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SUMMARY

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Federal Habeas Corpus: An Abridged Sketch

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

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

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Introduction[1]

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

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

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

History

Colonial America was well acquainted with habeas corpus and with occasional suspensions of the writ. The drafters of the United States Constitution, after enumerating the powers of Congress, inserted the limitation that "[t]he [p]rivilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." The Act that created the federal court system empowered federal judges to issues writs of habeas corpus "and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions . . . . [a]nd . . . to grant writs of *habeas corpus* for the purpose of an inquiry into the cause of commitment." The power was limited, however, in that "writs of *habeas corpus* shall in no case extend to prisoners in gaol, unless where they are in custody, under or by colour of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify."

In 1867, Congress substantially increased the jurisdiction of federal courts to issue the writ by authorizing its issuance "in all cases," state or federal, "where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States." Originally, habeas corpus permitted collateral attack upon a prisoner's conviction only if the sentencing court lacked subject matter jurisdiction. Shortly after 1867, however, the Supreme Court began to recognize a growing number of circumstances where courts were said to have acted beyond their jurisdiction because some constitutional violation had extinguished or "voided" their jurisdiction.

[1] This report is an abridged version of CRS Report RL33391, *Federal Habeas Corpus: A Brief Legal Overview*, by Charles Doyle.

Early in the 1940s, the Court stopped requiring that an alleged constitutional violation void the jurisdiction of the trial court before federal habeas relief could be considered. Federal judges soon complained that federal prisoner abuses of habeas had become "legion." Congress responded by incorporating into the 1948 revision of the judicial code the first major revision of the federal habeas statute since 1867. State courts exerted little pressure for revision of the federal habeas statute in 1948. Although habeas relief had been available to state prisoners by statute since 1867 and subsequent decisions seemed to invite access, the hospitality that federal habeas extended to state convicts with due process and other federal constitutional claims had not yet become apparent.

This all changed over the next two decades. Some of the change was attributable to expansive Supreme Court interpretations of the procedural guarantees of the Bill of Rights and of the extent to which those guarantees were binding upon the states through the Due Process Clause of the Fourteenth Amendment. By the early 1970s, the Supreme Court had begun to announce a series of decisions grounded in the values of respect for the work of state courts and finality in the process of trial and review. Thus, state prisoners who fail to afford state courts an opportunity to correct constitutional defects were barred from raising them for the first time in federal habeas in the absence of a justification. Nor might they scatter their habeas claims in a series of successive petitions. Those who plead guilty and thereby waived, as a matter of state law, any constitutional claims, might not use federal habeas to revive them. And with narrow exception, state prisoners might not employ federal habeas as a means to assert, or retroactively claim the benefits of, a previously unrecognized interpretation of constitutional law (i.e., a "new rule").

Contemporary Exercise of Habeas Jurisdiction

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

Deference to State Courts. Before passage of the AEDPA, state court interpretations or applications of federal law were not binding in subsequent federal habeas proceedings. The debate that led to passage was marked by complaints of delay and wasted judicial resources countered by the contention that federal judges should decide federal law. Out of deference to state courts and to eliminate unnecessary delay, the AEDPA, in 28 U.S.C. § 2254, barred federal habeas relief on a claim already passed upon by a state court "unless the adjudication of the claim—(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." The Court observed that "This means that a state court's ruling must be 'so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.'" Section 2254(d)'s contrary-to-or unreasonable-application threshold applies even when the *Brecht v. Abrahamson* standard (which requires a state prisoner seeking to challenge his conviction in collateral federal proceedings to show that trial error had a substantial and injurious effect or influence on the outcome of the trial) is in play. Section 2254(e) limits new evidence that might be used to undermine a prior factual determination to previously undiscoverable evidence or evidence made available by the retroactive application of a Supreme Court "new rule" of constitutional interpretation. Even if all of § 2254(e)'s conditions are met, admission of the new evidence is a matter of the court's discretion.

Exhaustion: The deference extended to state courts reaches not only their decisions but the opportunity to render decisions arising within the cases before them. State prisoners had long been required to exhaust the opportunities for state remedial action before federal habeas relief could be granted. The AEDPA preserves this exhaustion requirement, and reinforces it with an explicit demand that a state's waiver of the requirement must be explicit. On the other hand, Congress appears to have been persuaded that while as a general rule constitutional questions may be resolved more quickly if state prisoners initially bring their claims to state courts, in some cases where a state prisoner has mistakenly first sought relief in federal court, operation of the exhaustion doctrine may contribute to further delay. Hence, the provisions of 28 U.S.C. § 2254(b)(2) authorize dismissal on the merits of mixed habeas petitions filed by state prisoners.

Successive petitions: The AEDPA also bars repetitious habeas petitions by state and federal prisoners under 28 U.S.C. § 2244 which with limited exceptions gives habeas petitioners "one and only one bite of the apple," no more continuing parade of habeas petitions from a single prisoner. Under earlier law, state prisoners could not petition for habeas relief on a claim they had included or could have included in earlier federal habeas petitions unless they could show "cause and prejudice" or a miscarriage of justice. Cause could be found in the ineffective assistance of counsel; the subsequent development of some constitutional theory which would have been so novel at the time it should have been asserted as to be considered unavailable; or the discovery of new evidence not previously readily discoverable. A prisoner unable to show cause and prejudice might nevertheless be entitled to federal habeas relief upon a showing of a "fundamental miscarriage of justice," that is, that "the constitutional error 'probably' resulted in the conviction of one who was actually innocent." "To establish the requisite probability, the petitioner must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." The Supreme Court's pre-AEDPA tolerance for second or successive habeas petitions from state prisoners was limited; the tolerance of the AEDPA is, if anything, more limited. "If the prisoner asserts a claim that he has already presented in a previous federal habeas petition, the claim must be dismissed in all cases." A claim not mentioned in an earlier petition must be dismissed unless it falls within one of two narrow exceptions: (A) it relies on a newly announced constitutional interpretation made retroactively applicable; or (B) it is predicated upon on newly discovered evidence, not previously available through the exercise of due diligence, which together with other relevant evidence establishes by clear and convincing evidence that but for the belatedly claimed constitutional error "no reasonable factfinder would have found the applicant guilty." Moreover, the exceptions are only available if a three-judge panel of the federal appellate court authorizes the district court to consider the second or successive petition because the panel concludes that the petitioner has made a prima facie case that his claim falls within one of the exceptions. And the section purports to place the panel's decision beyond the en banc jurisdiction of the circuit and the certiorari jurisdiction of the Supreme Court. The Supreme Court, in *Felker v. Turpin*, held that because it retained its jurisdiction to entertain original habeas petitions neither the gatekeeper provisions of 28 U.S.C. § 2244(b)(3) (which requires prior appellate approval) nor the limitations on second or successive petitions found in § 2244(b)(1) and (2) deprive the Court of appellate jurisdiction in violation of Article III, § 2 of the Constitution. At the same time, it held that the restrictions came well within Congress' constitutional authority and did not "amount to a 'suspension' of the writ contrary to Article I, § 9." In *Castro v. United States*, the Court held that § 2244(b)(3)(E) constraint upon its certiorari jurisdiction is limited to instances where the lower appellate court has acted on a request to file a successive petition, and does not apply to instances where the lower appellate court has reviewed a trial court's successive petition determination.

Statute of Limitations: The AEDPA establishes a one-year deadline, codified at 28 U.S.C. § 2244(d), within which state and federal prisoners must file their federal habeas petitions. The

period is tolled during the pendency of state collateral review, that is, "during the interval between (1) the time a lower state court reaches an adverse decision, and (2) the day the prisoner timely files an appeal." Amendments, submitted after the expiration of a year, to a petition filed within the one-year period limitation, that assert claims unrelated in time and type to those found in the original petition do not relate back and are time barred. A state may waive the statute of limitations defense, but its intent to do so must be clear and not simply the product of a mathematical miscalculation.

The 1-year statute of limitations provisions are subject to a miscarriage of justice exception under which a "petitioner 'must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence.'" The same 1-year provisions initially presented a novel problem for district courts faced with petitions presenting containing claims over which opportunities for state relief had exhausted and unexhausted claims. "As a result of the interplay between AEDPA's 1-year statute of limitations and *Lundy's* dismissal requirement, petitioners who come to federal court with 'mixed' petitions run the risk of forever losing their opportunity for any federal review of their unexhausted claims. If a petitioner file[d] a timely but mixed petition in federal district court, and the district court dismisse[d] it under *Lundy* after the limitations period has expired, this will likely mean the termination of any federal review." Nevertheless, the district court was under no obligation to warn pro se petitions of the perils of mixed petitions. Although cautioning against abuse if too frequently employed, the Supreme Court endorsed a "stay and abeyance" solution suggested by several of the lower courts, under which the portion of a state prisoner's mixed petition related to exhausted habeas claims are stayed and held in abeyance until he can return to state court and exhaust his unexhausted claims.

Appeals: Appeals are only possible upon the issuance of certification of appealability (COA), based on a substantial showing of a constitutional right. A petitioner satisfies the requirement when he can show that "'reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong.'" This does not require the petitioner show a likelihood of success on the merits; it is enough that reasonable jurists would find that the claim warrants closer examination. Should the district have dismissed the habeas petition on procedural grounds, a COA may be issued only upon the assessment that reasonable jurists would consider both the merits of the claim and the procedural grounds for dismissal debatable.

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

In some cases, a prisoner's attorney may fail to satisfy the requirements designed to ensure finality and comity, through negligence or by choice, and the prisoner asserts that the failure is due to constitutionally defective assistance of counsel. The Sixth Amendment guarantees the criminally accused the right to the assistance of counsel. The right is binding against the states through the Fourteenth Amendment. The right "is the right to effective counsel." The want of efficient counsel may lead to reversal of a conviction or vacatur of a sentence. To prove deficient performance of counsel, a defendant must show first that counsel's performance was not reasonably "within the range of competence demanded of attorneys in criminal cases . . . under prevailing professional norms." Second, "the defendant must show that the deficient performance

prejudiced the defense," that is, that counsel's errors were so serious as to deprive the defendant of a fair trial."

In *Wainwright v. Sykes* and the cases which followed its lead, the Supreme Court declared that state prisoners who fail to raise claims in state proceedings are barred from doing so in federal habeas proceedings unless they can establish both "cause and prejudice." The Court later explained that the same standard should be used when state prisoners abused the writ with successive petitions asserting claims not previously raised, and when they sought to establish a claim by developing facts which they had opted not to establish during previous proceedings. Of the two elements, prejudice requires an actual, substantial disadvantage to the prisoner.

What constitutes cause is not easily stated, and the cases reflect the Supreme Court's reluctance to second-guess counsel. Cause does not include tactical decisions, ignorance, inadvertence or mistake of counsel, or the assumption that the state courts would be unsympathetic to the claim. Cause may include the ineffective assistance of counsel; some forms of prosecutorial misconduct; the subsequent development of some constitutional theory which would have been so novel at the time it should have been asserted as to be considered unavailable; or the discovery of new evidence not previously readily discoverable. The Constitution does not guarantee the right to the effective assistance of counsel in post-conviction litigation after the direct appeal stage. Consequently, ineffective assistance there cannot supply cause to excuse default, unless the default is the product of state law.

Federal courts may entertain a habeas petition, notwithstanding default and the failure to establish cause, in any case where failure to grant relief, based on an error of constitutional dimensions, would result in a miscarriage of justice due to the apparent conviction of the innocent. To meet this "actually innocent" standard, the prisoner must show that "it is more likely than not that no reasonable juror would convict him." When the petitioner challenges his capital sentence rather than his conviction, he must show "by clear and convincing evidence that, but for the constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty." This miscarriage of justice exception, whether addressed to the petitioner's guilt or sentence, is a matter that can be taken up only as a last resort after all non-defaulted claims for relief and the grounds for cause excusing default on other claims have been examined.

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

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

In re Davis afforded the Court the opportunity to consider anew the issue it put aside in *Herrera* and *House*—may habeas relief be granted on the basis of a freestanding claim of innocence, and if so, what level of persuasion is required before such relief may be granted? The Supreme Court transferred Davis' habeas petition to the U.S. District Court for the Southern District of Georgia to receive evidence and make findings concerning Davis' innocence. Justice Scalia, joined by Justice Thomas, characterized the transfer as a "fool's errand," since in their view the lower court

may not grant habeas relief regardless of its findings. Justice Stevens, in a concurrence joined by Justices Ginsburg and Breyer, disagreed. The lower federal courts subsequently denied relief and the Supreme Court denied certiorari.

Harmless Error: The mere presence of constitutional error by itself does not present sufficient grounds for issuance of the writ unless the error is also harmful (i.e., "unless the error had a substantial and injurious effect or influence in determining the jury's verdict.") The writ will issue, however, where the court has grave doubt as to whether the error was harmless.

New Rules and Retroactivity: A line of cases beginning with the Supreme Court's 1989 decision in *Teague* v. *Lane* drastically limited use of federal habeas to raise novel legal issues by restricting for habeas purposes the retroactive application of the Supreme Court's decisions. The Court's 2021 decision in *Edwards v. Vannoy* limited availability even further. In *Edwards*, the Court repudiated the "watershed rules of criminal procedure" exception and summarized the surviving rule as follows:

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

Opting In: The most controversial of the proposals that preceded enactment of the AEDPA involved habeas in state capital cases. The AEDPA offered procedural advantages to the states to ensure the continued availability of qualified defense counsel in death penalty cases. When it became apparent that the states could not or would not opt in, Congress changed the procedure under which states are deemed to have qualified. Under amendments in the USA PATRIOT Improvement and Reauthorization Act of 2005, the Attorney General rather than the courts determines whether a state has taken the steps necessary to opt in. States that elect to opt in must still provide a "mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in state postconviction proceedings." References to competence standards for appointed counsel were removed. The Attorney General's certification that a state has taken the necessary steps to opt in is subject to de novo review in the United States Court of Appeals for the District of Columbia, an appeal which in turn is subject to certiorari review in the Supreme Court. The Attorney General promulgated implementing regulations in late 2008.

For states that opt in, the AEDPA establishes a one-time automatic stay of execution for state death row inmates carrying through until completion of the federal habeas process. Previously, the federal habeas statute authorized federal courts to stay the execution of a final state court judgment during the pendency of a state prisoner's federal habeas proceedings and related appeals. Federal appellate courts could consider motions for a stay, pending review of the district court's decision or at the same time they considered the merits of the appeal. This regime encouraged unnecessary litigation over whether a stay was or was not in order and often resulted in state death row inmates waiting until the last hour before simultaneously filing a motion for a stay and an appeal from the district court's denial of the writ. The AEDPA creates a 180-day statute of limitations for filing federal habeas petitions after the close of state proceedings with the possibility of one 30-day extension upon a good cause showing for states that opt in.

When a state opts in, federal habeas review of a claim filed by a state death row inmate is limited to issues raised and decided on the merits in state court unless the state unlawfully prevented the claim from being raised in state court, or the claim is based on a newly recognized, retroactively

applicable constitutional interpretation or on newly unearthed, previously undiscoverable evidence. In cases where the federal habeas application has been filed by a prisoner under sentence of death under the federal law or the laws of a state that has opted in, the government has a right, enforceable through mandamus, to a determination by the district court within 450 days of the filing of an application and by the federal court of appeals within 120 days of the filing of the parties' final briefs. The implementing regulations are still in force, but Arizona appears to be the only state to have opted in.

Habeas for Federal Convicts: The Section 2255 Substitute

Federal prisoners who claim that they are being held by virtue of a conviction or sentence rendered contrary to the Constitution or laws of the United States must ordinarily repair to § 2255 of title 28 of the United States Code for collateral review. Congress added § 2255 when it revised title 28 in 1948 to expedite review. The section "replaced traditional habeas corpus for federal prisoners . . . . The purpose and effect of the statute was not to restrict access to the writ but to make postconviction proceedings more efficient." The section "was intended to mirror § 2254 in operative effect," although there are occasionally differences between the two. When the AEDPA amended the provisions governing access to habeas by state prisoners, in some instances it made comparable changes in § 2255. Thus, both the state inmate's habeas petition and federal convict's § 2255 motion must be filed within a year after their direct appeals become final. "An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus." As for procedural default, "[w]here the petitioner—whether a state or federal prisoner—failed property to raise his claim on direct review, the writ is available only if the petitioner establishes cause for the waiver and shows actual prejudice resulting from the alleged violation."

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

Congressional Authority to Bar or Restrict Access to the Writ

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

The Original Writ: The question as to the scope of Congress' control over Court's appellate jurisdiction in habeas cases surfaced again when a prisoner challenged the AEDPA's habeas limitations in *Felker v. Turpin.* In particular, Felker argued that the provisions of 28 U.S.C. § 2244(b)(3)(E), which declared the appellate court determination of whether to authorize a second or successive habeas petition, was neither appealable nor "subject to a petition for rehearing or for a writ of certiorari." The Supreme Court took no offense to the limitation of habeas appellate jurisdiction. Since the AEDPA "does not repeal [the Court's] authority to entertain a petition for habeas corpus, there can be no plausible argument that the Act has deprived this Court of appellate jurisdiction in violation of Article III, §2." Review remained possible under the "original" writ of habeas corpus.

Suspension of the Privilege of the Writ: *Felker* dispelled any contention that the AEDPA's provisions violated the Suspension Clause. Shortly after *Felker*, however, the Court narrowly construed congressional efforts to restrict review of various immigration decisions and recognized that the courts retained jurisdiction to review habeas petitions, with the observation that otherwise serious Suspension Clause issues would arise. The Court was compelled to face the issue of Congress' constitutional authority to absolutely bar access to the writ, which the Court avoided in *Felker*, in *Boumediene v. Bush*. Boumediene was among the foreign nationals detained at the U.S. Naval Station at Guantanamo Bay, Cuba. While the detainees' subsequent habeas petitions were pending, Congress passed the Detainee Treatment Act, providing combatant status review tribunal procedures and stating that "no court, justice, or judge shall have jurisdiction to hear or consider" a habeas petition filed on behalf of a foreign national detained in Guantanamo." After the Supreme Court held that the Detainee Treatment Act provision did not apply to cases pending prior to its enactment, Congress passed the Military Commissions Act, which made the provision applicable to pending cases. At this point, the constitutional issue could not be avoided. The government argued in *Boumediene* "that noncitizens designated as enemy combatants and detained in territory located outside our Nation's borders have no constitutional rights and no privilege to habeas corpus." The detainees disputed both claims. They argued that the legislation violated the Suspension Clause which declares that "[t]he privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."

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

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

The Court identified, in context of *Boumediene*, the essential features of habeas corpus and any adequate substitute. First, it noted that "the privilege of habeas corpus entitles the prisoner to a

meaningful opportunity to demonstrate that he is being held pursuant to 'the erroneous application or interpretation' of relevant law." Second, "the necessary scope of habeas review in part depends upon the rigor of any earlier proceedings." Thus, "[w]here a person is detained by executive order, rather than, say, after being tried and convicted in a court, the need for collateral review is more pressing." Third, "[f]or the writ of habeas corpus, or its substitute, to function as an effective and proper remedy in this context, the court that conducts the habeas proceeding must have the means to correct errors that occur during [prior] proceedings." Fourth, it must have "some authority to assess the sufficiency of the Government's evidence against the detainee. It also must have the authority to admit and consider relevant exculpatory evidence that was not introduced during the earlier proceeding."

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

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

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