SECTION 2262(C) OF THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996: TOWARDS THE PRECIPICE OF UNCONSTITUTIONALITY?

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I. INTRODUCTION

With the passage of the Antiterrorism & Effective Death Penalty Act of 1996 ("the Act"),[1] Congress has taken aggressive steps toward restricting the availability of habeas corpus review[2] for defendants convicted of capital crimes.[3] One of the main congressional point-men for the Act, Senator Orrin Hatch[4] emphasized that "[t]he habeas bill is one of the all-time most important

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*This Comment is dedicated to my family. I would also like to thank Professor John Kip Cornwell, Professor Edward A. Hartnett, and Professor Michael J. Zimmer for all of their help and comments concerning previous drafts of the article.

[1]Pub. L. No. 104-193, 110 Stat. 1214 (1996).

[2]BLACK'S LAW DICTIONARY defines habeas corpus in part as follows:

> [t]he name given to a variety of writs having for their object to bring a party before a court or judge. . . . . A form of collateral attack. An independent proceeding instituted to determine whether a defendant is being unlawfully deprived of his or her liberty. . . . . Initially, the writ only permitted a prisoner to challenge a state conviction on constitutional grounds that related to the jurisdiction of the state court. But the scope of the inquiry was gradually expanded . . . [so] that the writ now extends to all constitutional challenges.

BLACK'S LAW DICTIONARY 709 (6th ed. 1990).

[3]A capital offense is defined as "[o]ne in or for which [the] death penalty may, but need not necessarily, be imposed." BLACK'S LAW DICTIONARY 209 (6th ed. 1990).

[4]Senator Hatch is a distinguished Republican Senator from Utah and Chairman of the Senate Judiciary Committee.

reinstitutions of criminal law . . . . It [is] about time we put a stop to the endless, frivolous appeals of justly imposed sentences."[5] Many conservatives have applauded the new bill as streamlining a system of justice run amuck.[6]

Conversely, opponents of the bill insist that this "streamlining" will inevitably lead to the death of innocent individuals.[7] Directly on point is the case of Lloyd Schlup, a Missouri death row inmate since 1984.[8] Schlup was convicted and sentenced to death for participating in the murder of a fellow inmate.[9] Throughout the appeals process, Schlup consistently maintained his innocence as pertaining to the murder of the fellow inmate, but to no avail.[10] As part of his second habeas petition, Schlup again argued that he was innocent of murder and that his execution be cruel and unusual punishment in violation of the Eighth Amendment, as well as a violation of due process under the Fourteenth Amendment.[11] After the United States Court of Appeals for the Eighth Circuit

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[5]Naftali Bendavid, *The Hangman Cometh*, NEW JERSEY LAW JOURNAL, Dec. 30, 1996, at 6 [hereinafter Bendavid].

[6]*Id.* As Paul Kamenar, the executive legal director of the nonprofit Washington Legal Foundation declared, "[t]he American people were terribly frustrated with the administration of the criminal justice system. It is terribly unresponsive to the victim and is skewed extremely on the side of the criminal and the defendant. This is a step in the right direction." *Id.*

[7]Bendavid, *supra* note 5, at 6. "Criminal trials . . . are often horribly botched, especially if the defendant is poor. State judges, sensitive to the political winds, often do not correct matters, . . . so federal habeas is crucial." *Id.* Without delving into the quagmire that is the death penalty debate, the crux of the argument powering this Comment is that application of the death penalty requires substantial judicial diligence and as many procedural protections as are necessary in order to minimize, to the greatest degree possible, the chances of unjustly executing an innocent individual.

[8]*Id.*

[9]Schlup v. Delo, 115 S. Ct. 851 (1995).

[10]*Id.* at 856. Schlup's original habeas petition averred *inter alia* ineffective counsel for failing to examine witnesses who might substantiate Schlup's claim of innocence. The Court of Appeals affirmed the District Court's ruling that Schlup's "ineffectiveness claim was procedurally barred . . . and [the Supreme Court] denied a petition for certiorari." *Id.* at 857.

[11]*Id.* In terms of the capital defendant, the Eighth Amendment of the United States Constitution states in pertinent part that no "cruel or unusual punishment [shall be] inflicted." U.S. CONST. amend. VII. In addition, the Fourteenth Amendment provides protection to the state capital defendant by providing that no "[s]tate [shall] deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1. The core of Schlup's argument was that, as an innocent individual, his execution would be cruel and unusual punishment in violation of the Eighth Amendment. In addition, failing to

affirmed the denial of Schlup's second petition and vacated the stay of his execution, the Supreme Court granted certiorari.[12] Upon review, the Court vacated the judgment of the court of appeals and remanded the case to the United States District Court for the Eastern District of Missouri for further consideration.[13] Following a hearing, the district court ordered that Schlup receive a new trial in order to once again attempt to prove his innocence.[14]

Lloyd Schlup was given a second chance to prove his innocence because of the United States Supreme Court's ability, by way of the habeas process, to hear and rule on a substantial constitutional issue; that is whether Schlup was wrongfully convicted of murder. In overruling the court of appeals, the Supreme Court performed its duty as the final vanguard of constitutional rights

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afford him an opportunity to relitigate the issue of his innocence in light of exculpatory evidence would violate the Due Process Clause of the Fourteenth Amendment.

[12]*Schlup*, 115 S. Ct. at 857-61. Schlup averred that ineffective counsel and the withholding of pertinent evidence by the prosecution "denied him the full panoply of protections afforded to criminal defendant's by the Constitution." *Id.* at 860.

[13]*Id.* at 869. The Court concluded that "[b]ecause both the Court of Appeals and the District Court evaluated the record under an improper standard, further proceedings are necessary." *Id.* On remand, the district court ordered a hearing to consider Schlup's habeas petition. Schlup v. Delo, 912 F.Supp. 448, 455 (E.D. Mo. 1995). Chief Judge Hamilton of the United States District Court for the Eastern District of Missouri declared:

> [a]fter consideration of all of the materials presented to the Court on the actual innocence issue, the Court concludes that 'it is more likely than not that no reasonable juror would have convicted [Petitioner] in light of the new evidence.' Accordingly, the Court may reach the merits of Petitioner's claims. The Court, however, will address such claims following a hearing . . . .

Id.

[14]Tim Bryant, *Death Row Inmate to Get New Trial*, ST. LOUIS POST-DISPATCH, May 4, 1996, at A1. In ordering the new trial, Judge Hamilton stated that:

> [a]lthough determining whether trial counsel's failure to interview eyewitnesses prejudiced the defendant presents a close question in this case, considering the totality of the evidence presented at trial and the lack of physical evidence connecting (Schlup) to the crime, the court concludes that there is reasonable probability that, but for the trial counsel's failure to interview eyewitnesses, the result of the proceeding would have been different.

Id.

and in the process potentially saved an innocent man's life.[15] Had the habeas reforms of the Antiterrorism and Effective Death Penalty Act of 1996 been in effect during Schlup's case, Schlup's appeal would not have been allowed and Schlup would have been put to death.[16]

The Antiterrorism & Effective Death Penalty Act of 1996 is a substantial piece of legislation which contains various provisions possessing potential constitutional ramifications.[17] Most importantly section 2262(c) of the Act curtails the ability of federal courts to enter a stay of execution for capital defendants. Section 2262(c) reads, in pertinent part, as follows:

> (c) If one of the conditions in subsection(b) has occurred, no Federal court thereafter shall have the authority to enter a stay of execution in the case, unless the court of appeals approves the filing of a second or successive application . . . .[18]

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[15]As of the time this Comment went to publication, Lloyd Schlup's innocence as to the murder of the fellow inmate had not been determined via a new trial.

[16]Bendavid, *supra* note 5, at 6. *See The Supreme Court's 'Unseemly Haste'*, ST. LOUIS POST-DISPATCH, May 7, 1996, at 10B. The editorial opined that:

> [u]nder the anti-terrorism law, Schlup could not have appealed to the Supreme Court because that law prohibits persons filing second habeas petitions from appealing to the high court. Herein lies a constitutional issue that goes far beyond the capital case: Can Congress deny Supreme Court appeal in a whole category of cases? The power of Congress to strip the Supreme Court of jurisdiction is one of the most important unresolved issues of constitutional law.

Id.

[17]A complete constitutional analysis of the Act is beyond the scope of this Comment. Instead the focus of this piece will be on section 2262(c) of the Act and how that particular provision might work to unconstitutionally deprive the Supreme Court of an ability to review constitutional issues brought by a state capital defendant.

[18]Pub. L. No.104-132, 110 Stat. 1214, 1222 (1996) (28 U.S.C.A. § 2262(c)). The entirety of Title 28 U.S.C.A. § 2262 reads as follows:

> § 2262. Mandatory stay of execution; duration; limits on stays of execution; successive petitions
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> (a) Upon the entry in the appropriate State court of record of an order under section 2261(c), a warrant or order setting an execution date for a State pris-

One commentator has posed the following hypothetical in criticism of the Act:

> Suppose a district court grants habeas relief to a prisoner . . . but the court of appeals reverses, 2-1. Section 2262(c) seems to suggest that even were the Supreme Court to grant certiorari [or habeas], neither it nor any other federal court could stay the execution to permit the Court to consider the case.[19]

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oner shall be stayed upon application to any court that would have jurisdiction over any proceedings filed under section 2254. The application shall recite that the State has invoked the post-conviction review procedures of this chapter and that the scheduled execution is subject to stay.

(b) A stay of execution granted pursuant to subsection (a) shall expire if—

(1) a State prisoner fails to file a habeas corpus application under section 2254 within the time required in section 2263;

(2) before a court of competent jurisdiction, in the presence of counsel, unless the prisoner has competently and knowingly waived such counsel, and after having been advised of the consequences, a State prisoner under capital sentence waives the right to pursue habeas corpus review under section 2254; or

(3) a State prisoner files a habeas corpus petition under section 2254 within the time required by section 2263 and fails to make a substantial showing of the denial of a Federal right or is denied relief in the district court or at any subsequent stage of review.

(c) If one of the conditions in subsection (b) has occurred, no Federal court thereafter shall have the authority to enter a stay of execution in the case, unless the court of appeals approves the filing of a second or successive application under section 2244(b).

110 Stat. 1214, 1222 (1996)

[19]HART & WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 65 n.15 (Richard H. Fallon et al. eds., 4th ed. Supp. 1996). It is significant to recognize the importance of the Supreme Court granting certiorari or habeas in a given case. Because the acceptance of the writ of certiorari or habeas by the Court is discretionary in nature, the Court's decision to entertain a certiorari or habeas petition should be afforded due import. The core of the Comment's argument is that section 2262(c) should not work to prohibit the Court

An argument can be made under this hypothetical that Congress has impermissibly infringed upon the province of the Supreme Court and in doing so violated a state defendant's constitutional right to due process under the Fourteenth Amendment. Notwithstanding this argument, this Comment concludes that an individual's constitutional rights might be impermissibly infringed upon when the Supreme Court's ability to review a state defendant's conviction via a writ of habeas corpus [or certiorari] is suspended because of the Court's inability to reinstate a stay of execution.[20]

After a brief discussion of the history of habeas corpus and the Antiterrorism and Effective Death Penalty Act of 1996, the Comment turns to discuss the constitutional challenges facing section 2262(c). Initially, the Comment analyzes section 2262(c) in terms of the Suspension Clause of the United States Constitution,[21] arguing that it prevents the Court from entertaining a capital

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from entertaining the issues presented in the writs.

[20]The constitutionality determination of section 2262(c) depends on the time frame applicable to a given case. Only in a situation where the execution of a state capital defendant is imminent would section 2262(c) work to unconstitutionally deprive the defendant of Supreme Court review of his claim because of the Court's inability to re-instate the defendant's stay of execution.

[21]The Suspension Clause provides 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." U.S. CONST. art. I, § 9, cl. 2. In A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES, Bernard Schwartz attempted to define the intent of the Framers with regards to the Suspension Clause, stating:

> The Habeas-Corpus Clause of Article I, section 9, which is the only provision in the organic instrument in which the Great Writ is mentioned, is, in terms, not a grant of the right of the writ, but only a prohibition against suspension of "The Privilege of the Writ." Yet it cannot be doubted that the Framers took for granted the existence of the same right to habeas corpus as existed in English law and a competence of the courts of the United States to issue the writ comparable to that exercised by the judges at Westminster. Thus, though the Constitution nowhere defines habeas corpus, the Framers understood that the writ, the suspension of which in ordinary circumstances they forbade, was the writ with its full common-law scope. The very first Judiciary Act, in providing the "means by which this great constitutional privilege should receive life and activity," confirms this view, for it intimates that the issuance of habeas corpus is to be "agreeable to the principles and usages of law"-the common law, presumably. Hence, as the Supreme Court expressed it in 1963, "it would appear that the Constitution invites, if it does not compel . . . a generous construction of the power of the federal courts to dispense the writ conformably with common law practice."

1 BERNARD SCHWARTZ, A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES,

defendant's original habeas petition. Secondly, the Comment analyzes section 2262(c) in terms of the Due Process Clause of the Fourteenth Amendment,[22] arguing that where the Supreme Court wishes to review a constitutional claim addressed in the lower courts, due process mandates that such review not be denied, especially to capital defendants.

The success of each of these two arguments ultimately depends upon the role that the reader ascribes to the Supreme Court under Article III of the Constitution.[23] This Comment maintains that the essential function of the Supreme Court is to exercise its proper role as the final arbiter of constitutional issues, which includes clarifying issues in situations where a district court and court of appeals differ as to a constitutional interpretation. In conclusion, this Comment asserts that the constitutionality of section 2262(c) depends entirely on two issues: 1) how that provision is applied in a given case, and 2) the proper role of the Supreme Court. If the appropriate role of the Supreme Court is to be the final arbiter of constitutional issues and if the application of section 2262(c) is construed to prevent review by the Supreme Court, there exists a powerful argument that section 2262(c) violates a defendant's constitutional rights under the Suspension and Due Process Clauses.

PART III RIGHTS OF THE PERSON 23-24 (1968) (citations omitted).

[22]*See supra* note 11.

[23]Article III of the United States Constitution states in relevant part:

> Section 1. The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.
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> Section 2. [1] The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their authority . . . . [2] In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the Supreme Court shall have original Jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

U.S. CONST. art. III, § 1 and § 2, cls. 1-2.

II. HISTORY OF THE WRIT OF HABEAS CORPUS[24]

The writ of habeas corpus has its genesis in the common law of England.[25] In tracing the history of the writ, one commentator dates its origin to the early thirteenth century.[26] The ascendants to the writ, as it is known today, were used more as glorified arrest warrants as opposed to the present instruments now used to substantiate an individual's detention.[27] It was not until 1341 that the writ began to evolve "not only . . . as a means of producing the body, but to secure as well a statement of the cause of detention."[28] Thus, the writ of *habeas corpus cum causa*, as it came to be known, reinforced the notion that an individual's detention must be justified.[29]

In 1627, "the most famous habeas corpus case" was decided.[30] In *Darnell's Case*,[31] the incarceration (or "executive detention" as it is referred to today) of the five knights by the King promulgated a swift response by the House of Commons which modified the King's decision through a Petition of Right.[32] It appears that Parliament's response to the King's actions via the

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[24]For an interesting and readable account of the evolution of habeas corpus, see generally BADSHAH K. MIAN, AMERICAN HABEAS CORPUS: LAW, HISTORY, AND POLITICS (1984); IRA P. ROBBINS, HABEAS CORPUS CHECKLISTS (1995); RONALD P. SOKOL, FEDERAL HABEAS CORPUS (2nd ed. 1969).

[25]SOKOL, *supra* note 24, at 3.

[26]MIAN, *supra* note 24, at 3.

[27]SOKOL, *supra* note 24, at 4 (explaining that "[t]he early function of the writ, say from 1150, was simply to get an unwilling party into court . . .").

[28]*Id.* at 6.

[29]*Id.*

[30]SOKOL, *supra* note 24, at 9. Darnell's Case involved the incarceration of five knights who refused to loan the Crown money in violation of a royal directive demanding the funds. The question presented was "can a man be lawfully incarcerated by the mere order of the King?" *Id.*

[31]3 Cobbett's St. Tr. 1 (1627).

[32]SOKOL, *supra* note 24, at 11. The petition established that:

> "Divers subjects have been imprisoned without any cause shown," and when they were brought by writs of *habeas corpus* before the justices . . . no cause was

Petition of Right was meant as a reprimand for an improper exercise of executive authority.[33] Parliament's response to the outcome of *Darnell's Case* laid the foundation for both the Act of 1641[34] and the Habeas Act of 1679.[35] While the Act of 1641 basically applied to procedural aspects of the writ, the object of the Habeas Act of 1679 was to elucidate the application of the writ as well as make it a more efficient remedy.[36]

It was through English common law that the writ was introduced into Colonial America.[37] The colonists' application of the writ centered on attacking the validity of detentions in the Colonies which had been mandated by the Crown.[38] Following the American Revolution and the Constitutional Convention, the writ was solidified as a part of American jurisprudence through the

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> certified by the keepers except that "they were detained by your Majesties Special Command . . . and, were in consequence remanded to prison without being further charged with anything against which they might make answer according to law . . . . They do therefore humbly pray your Most Excellent Majesty . . . that no free man in any such manner as is before mentioned be imprisoned or detained."

Id. at 11-12 (quoting Cohen, *Habeas Corpus Cum Causa-The Emergence of the Modern Writ-I*, 18 CANADIAN BAR. REV. 39-40 (1940)).

[33]SOKOL, *supra* note 24, at 11.

[34]SOKOL, *supra* note 24, at 12 (citing 16 Car. I, ch. 10 (1641)). The Act of 1641 provided various procedures for the application of the writ of habeas corpus, including specifying that "the writ should issue from the courts of King's Bench or Common Pleas." SOKOL, *supra* note 24, at 12. In addition, "the sheriff or jailer, had to certify the cause of detention and within three days thereafter the court 'shall proceed to examine and determine whether the cause of such commitment be just or legal.'" *Id.* Finally, the Act held that "the judge could be held liable to the one offended for treble damages if he did anything contrary to 'the true meaning' of the act." *Id.* at 12-13.

[35]SOKOL, *supra* note 24, at 14 (citing 31 Car. II, ch. 7, 8 Stat. 432-39 (1679)). The Habeas Act of 1679 was passed in order to address various problems which had arisen since the 1641 Act. SOKOL, *supra* note 24, at 13-14.

[36]SOKOL, *supra* note 24, at 14 (quoting DANIEL J. MEADOR, HABEAS CORPUS AND MAGNA CARTA: DUALISM OF POWER AND LIBERTY, 26-27 (1966)). Sir James Stephen described the Habeas Act of 1679 "as ill drawn as it is celebrated." SOKOL, *supra* note 24, at 14 (quoting 1 STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND 243 (1883)).

[37]SOKOL, *supra* note 24, at 15.

[38]MIAN, *supra* note 24, at 39. According to Badshah Mian, "the colonists used the writ to obtain their freedom against the arbitrariness of the executive, and they generally relied upon the English precedents to support their claim over being freeborn British subjects." *Id.*

"Suspension Clause" of the United States Constitution.[39] Subsequently, a large majority of the states incorporated the writ in their individual state constitutions.[40]

On the federal level, the Judiciary Act of 1789[41] limited the availability of the writ to federal prisoners.[42] The Habeas Corpus Act of 1867[43] extended habeas protection by "making the writ available to state prisoners allegedly held in violation of federal law."[44] One view of the 1867 Act is that, as an outgrowth of the Reconstruction Era, it was intended to protect the constitutional rights of all defendants, state or federal.[45] Once the writ was extended to persons in state custody, the application of the writ slowly evolved until the Supreme Court's decision in *Brown v. Allen*[46] when the writ of habeas corpus be-

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[39]See *supra* note 21.

[40]SOKOL, *supra* note 24, at 16.

[41]1 Stat. 73, 81-82.

[42]*See* ROBBINS, *supra* note 24, at 5-2. The Court in *Ex parte Dorr*, 44 U.S. (3 How.) 103 (1844) reaffirmed this application of the writ to only federal prisoners when it stated that "[n]either this nor any other court of the United States, or judge thereof, can issue a habeas corpus to bring up a prisoner, who is in custody under a sentence or execution of a state court, for any other purpose than to be used as a witness." *Id.* at 105.

[43]14 Stat. 385.

[44]ROBBINS, *supra* note 24, at 5-2. Professor Jordan Steiker stated that:

> [t]he most significant statutory expansion of the writ occurred in the Judiciary Act of 1867. The Act extends the writ to "all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States." More than a century later, the 1867 Act, with some important modifications, still provides the basic framework for the current regime of federal habeas review of state convictions. This regime permits, with some recent exceptions, state prisoners to relitigate properly preserved federal issues in federal court after such issues are fully exhausted in the state system.

Jordan Steiker, *Incorporating the Suspension Clause: Is There a Constitutional Right to Federal Habeas Corpus for State Prisoners?*, 92 MICH. L. REV. 862, 883 (1994).

[45]SOKOL, *supra* note 24, at 18-19. According to Robert Sokol, "[t]he 1867 act arose out of the Reconstruction era and reached persons held in custody in violation of the Constitution." *Id.*

[46]344 U.S. 443 (1953). For one version of the historical evolution of the writ of habeas corpus from an instrument to challenge a court's jurisdiction to a mechanism by which to

came an instrument whereby a state defendant could collaterally attack a conviction under state criminal law on the ground that it was inconsistent with a right guaranteed by the Federal Constitution.[47]

The importance of the writ in American jurisprudence cannot be denied.[48] In *Lonchar v. Thomas*,[49] the Supreme Court declared that the writ is "aptly described as the 'highest safeguard of liberty'" which deserves the utmost protection from incursion of any kind.[50] Accordingly, it is clear that such an important safeguard should not be obstructed.

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collaterally attack state court judgments, *see generally* Paul Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisons*, 76 HARV. L. REV. 441 (1963).

[47]SOKOL, *supra* note 24, at 38-39. This avenue of collateral attack has been codified under the current law of 28 U.S.C. § 2254(a). Section 2254(a)states that:

> The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

28 U.S.C. § 2254(a) (1988).

[48]*See* SCHWARTZ, *supra* note3921, at 22. "[I]t is certainly correct to see in the Great Writ the fundamental basis of the Sanctity of the Person. In Lincoln's words, '[T]he benefit of the writ of habeas corpus is the great means through which the guaranties of personal liberty are conserved, and made available in the last resort.'" *Id.*

[49]116 S. Ct. 1293 (1996).

[50]*Id.* at 1298 (quoting Smith v. Bennett, 365 U.S. 708, 712 (1961)). In the brief to the Court in Felker v. Turpin, 116 S. Ct. 2333, the petitioner eloquently summarized that:

> [t]hrough habeas, this Court has for more than a century played an important role in protecting against unconstitutional deprivations of life and liberty. Any argument that the Act strips the Court entirely of its authority to examine in any way the claim of persons that they are being held in custody under rules, rulings, or practices that violate our fundamental law calls for the rejection of the Court's historic traditions. "[T]here is no higher duty than to maintain the [the writ of habeas corpus] unimpaired."

1996 WL 272389 (U.S. Pet. Brief) at 13 (quoting Bowen v. Johnston, 306 U.S. 19, 26 (1939)).

III. THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996.

In the spring of 1996, the 104th Congress passed the Antiterrorism and Effective Death Penalty Act of 1996.[51] Title I of the Act dealt specifically with habeas corpus reform; section 106 placed limits on second or successive applications, while section 107 enacted special habeas corpus procedures in capital cases.[52] In *Felker v. Turpin*,[53] the first case challenging the Act, the Court rejected the petitioner's[54] claim that section 106 of the Act[55] was unconstitutional; the plaintiff argued that section 106 of the Act was unconstitutional in limiting second or successive petitions for habeas relief. In rejecting this claim, the Court found that the Act did not deprive the Court of its "jurisdiction to entertain original habeas petitions" because section 106 dealt only with second or successive petitions.[56] The Court held that application of the Act in that case did not amount to an unconstitutional suspension of the writ of habeas corpus.[57]

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[51]110 Stat. 1214 (1996).

[52]*Id.* at 1220-27.

[53]116 S. Ct. 2333 (1996).

[54]Petitioner in this case had been convicted of capital murder, rape, aggravated sodomy, and false imprisonment; the conviction was affirmed on appeal. *See id.*

[55]*Id.* at 2337. The Court determined that section 106(b)(3)(E) specifies that "[t]he 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.'" *Id.*

[56]*Id.*

[57]*Id.* at 2340. Chief Justice Rehnquist stated that:

> [t]he new restrictions on successive petitions constitute a modified res judicata rule, a restraint on what is called in habeas corpus practice 'abuse of the writ.' In *McCleskey v. Zant*, we said that 'the doctrine of abuse of the writ refers to a complex and evolving body of equitable principles informed and controlled by historical usage, statutory developments, and judicial decisions.' The added restrictions which the Act places on second habeas petitions are well within the compass of this evolutionary process, and we hold that they do not amount to a 'suspension' of the writ contrary to Article I, § 9.

Id. (citations omitted).

One of the underlying thrusts of the Court's opinion in *Felker* appeared to be the desire to define the constraints which section 106 placed on the Court. Writing for a unanimous Court, Chief Justice Rehnquist distinguished between matters filed as original habeas petitions and those filed as second or successive petitions, emphasizing that the Supreme Court retained jurisdiction over the former.[58] In concurrence, Justice Souter expanded the caveat concerning the Court's jurisdiction over original habeas petitions, opining:

> [t]he statute's text does not necessarily foreclose all of our appellate jurisdiction . . . nor has Congress repealed our authority to entertain original petitions for writs of habeas corpus . . . . I have no difficulty with the conclusion that the statute is not on its face, or as applied here unconstitutional.[59]

One inference which may be drawn from the opinions of the two Justices is that if a section of the Act should work to limit the Court's "authority to hear habeas petitions filed as original matters,"[60] the Court might not find that section of the Act constitutional.

A. SECTION 2262 (C) OF THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996

The special care with which the Court delineated its jurisdiction over original petitions of habeas corpus takes on particular significance in light of the impact section 2262(c) might have on a capital defendant's case in the future. To reiterate, section 2262(c) states that "*no* Federal court . . . shall have the authority to enter a stay of execution in the case, unless the court of appeals approves the filing of a second or successive application . . ."[61] The most plausible scenario under which section 2262(c) might come into play is where a capital defendant is "denied relief in the district court or at any subsequent

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[58]*Id.* at 2338-39. Chief Justice Rehnquist cautioned that "[a]lthough § 106(b)(3)(E) precludes us from reviewing, by appeal or petition for certiorari, a judgment on an application for leave to file a second habeas petition in district court, it makes no mention of our authority to hear habeas petitions filed as original matters in this Court." *Id.*

[59]*Id.* at 2341-42 (Souter, J. concurring).

[60]*Id.* at 2338-39. As discussed more fully in footnote 64, the comment discusses "original" in terms of first or initial in time.

[61]Pub. L. No. 104-132, 110 Stat. 1214, 1223 (1996) (emphasis added).

stage of review"[62] and the stay of execution is thereby lifted.

Assume a hypothetical in which the Supreme Court wished to review the constitutional question raised by the defendant, but the defendant was executed before the Court was able to hear the case. Because the Court could not issue a stay, the case would be moot and the Court foreclosed from deciding that issue and possibly saving the defendant's life. The Court's inability to reinstate the stay of execution would work a serious and perhaps unconstitutional impediment to its ability to review the constitutional issues raised by the state defendant. While the Court could certainly address the particular issue in another case, this unfortunately would not aid the original defendant. Like Lloyd Schlup, the state defendant could have a life-saving constitutional claim, but section 2262(c) would forestall that claim from ever receiving Supreme Court review. Assuming that the matter at hand was the capital defendant's original habeas petition and further assuming that section 2262(c) inhibited the Court from reviewing the defendant's constitutional claim, it could be argued that section 2262(c) suspended the writ in violation of the Constitution.

IV. CONSTITUTIONAL CHALLENGES TO SECTION 2262(C)

Three grounds exist which could prove section 2262(c) of the Act to be unconstitutional. First, the section could violate the Suspension Clause of the Constitution. Second, section 2262(c) could deprive a defendant of its due process rights under the Fourteenth Amendment. Finally, Congress's passage of section 2262(c) may usurp the Supreme Court of its essential functions as the final arbiter of conflict between the courts and guardian of constitutional rights.

A. SUSPENSION CLAUSE

Whether section 2262(c) could work to unconstitutionally prevent the Supreme Court from reviewing an original habeas petition and thereby suspend the writ[63] hinges on the definitions of two key words: "suspension"[64] and

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[62] *Id.* (quoting from section 2262(b)(3)).

[63] The hypothetical used to show how section 2262(c) might be unconstitutional relies on the presumption that a state capital defendant would be attempting to file an "original" petition as opposed to a "second or successive petition" which the court addressed in *Felker* under section 106. As Justice Souter pointed out in his concurring opinion in *Felker*, "such a petition is commonly understood to be 'original' in the sense of being filed in the first instance in this Court, but nonetheless for constitutional purposes an exercise of this Court's appellate (rather than original) jurisdiction." Felker v. Turpin, 116 S. Ct. 2333, 2342 n.1 (1996) (Souter, J. concurring). According to Professor Sokol, "[a]s a practical matter an original petition in either the Supreme Court or a court of appeals is not a viable use of the

"original."[65] If section 2262(c) works to "suspend" the Court's ability to review an "original" petition of habeas corpus, then section 2262(c) would be unconstitutional per se under Article I, section 9 of the United States Constitution.

In order to appreciate this constitutional problem, one must focus on the scenario introduced earlier[66] in which a district court's decision to grant a capital defendant relief is overruled by the court of appeals, thereby lifting the defendant's stay of execution. What if the Supreme Court were to want to review the constitutional issue at hand? A literal reading of section 2262(c) suggests that the Supreme Court would be unable to reinstate the stay of execution

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writ in contemporary habeas corpus practice." SOKOL, *supra* note 24, at 91. The general practice for "a petitioner in state custody pursuant to the judgment of a state court [is to file] his petition in either (1) the court for the district within which the court issuing the state judgment was held, or (2) the court of the district within which he is in custody." SOKOL, *supra* note 24, at 84-85.

It is not common practice then for a state capital defendant to make his original petition to the Supreme Court. Imagine a case where a state capital defendant wins relief and a stay of execution through his original petition to the district court. That decision would then be appealed to the court of appeals which might then reverse (thus lifting the stay). In that situation, any attempt by the Supreme Court to review the court of appeals would be pursuant to the Supreme Court's original (initial) review of the constitutional claim.

[64]According to Professor Sokol, "surprisingly little scholarly attention has been given to this aspect of the writ." SOKOL, *supra* note 24, at 196. Professor Sokol's own discussion focuses primarily upon historical instances of "suspension" whereby the President or Congress suspended the writ in times of crises. *See* SOKOL, *supra* note 24, at 196-204 (recapping the historical instances when the writ was suspended). In terms of the argument at hand, "the Suspension Clause of the Constitution refers to the writ as it exists today, rather than as it existed in 1789." Felker v. Turpin, 116 S. Ct. 2333, 2340 (1996). In terms of a Suspension Clause argument, the Court in *Felker* held that "the added restrictions which the Act [section 106 in particular] places on second habeas petitions are well within the compass of [the] evolutionary process [of habeas corpus], and we hold that they do not amount to a "suspension" of the writ contrary to Article I, § 9." *Id.* at 2340.

The problem is that the Court failed to define what would amount to a suspension in violation of the constitution in terms of the way the writ is employed today. The Court's decision in *Felker* not to find a "suspension" must be viewed in light of the opinion as a whole. The decision was based in light of second habeas petitions, not original petitions which the Court went to great lengths to distinguish. If a situation would arise in which the Court's ability to hear an original petition was precluded, the Court might be more apt to find that a "suspension" has occurred.

[65]See the discussion of "original" petitions of habeas corpus in note 63.

[66]*See* text accompanying note 19.

which would have been lifted under section 2262(b)(3) once the court of appeals reversed. The question in this scenario is, therefore, one of timing.[67] Presuming the Court wished to review a constitutional claim brought by a state capital defendant, section 2262(c) could preclude review of the constitutional issue. Therefore, the constitutionality of section 2262(c) would depend on whether the statute "suspended" the Courts "authority to hear habeas petitions filed as original matters."[68]

Commentators troubled by Congress's curtailing the availability of the writ of habeas corpus have argued that the writ is an independent constitutional guarantee which is not subject to Congress's ability to curtail the appellate jurisdiction of the Supreme Court.[69] Other commentators suggest that the Suspension Clause should be read along with the Fourteenth Amendment in con-

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[67]*See* Beverly Brian Swallows, *Stays of Execution: Equal Justice for All*, 45 BAYLOR L. REV. 911, 912 (1993). "Because litigation usually arises in emergency situations with claims pursued in the face of an impending execution date, the decision to grant certiorari [or habeas] is more often than not accompanied by a stay of execution." *Id.*

[68]*Felker*, 116 S. Ct. at 2339. Chief Justice Rehnquist went on to posit that such an infringement into the Court's ability to entertain an original petition might be viewed as depriving the "[c]ourt of appellate jurisdiction in violation of Article III, § 2." *Id.* This question as to whether section 2262(c) might work as an unconstitutional infringement upon the Court's appellate jurisdiction is addressed in Part IV of the Comment concerning the debate over the "essential function" of the Court.

[69]SCHWARTZ, *supra* note 39, at 25. Bernard Schwartz takes a more stringent view of Congress' ability to curtail habeas review. He states that:

> [T]he Habeas Corpus Clause . . . is in substance, a recognition of the constitutional right of the individual to the protection of the Great Writ. It is difficult to see how a Congressional restriction of the proper scope of habeas corpus can be treated as other than an infringement upon such basic right. From this point of view, the protection of the writ is not subject to abrogation through exercise of the conceded Congressional authority over the jurisdiction of the federal courts . . . . [S]uch Congressional power may not be employed so as to destroy rights guaranteed by the Constitution itself. So far as the subject under discussion is concerned, this means that, as stated by Justice Brewer over half a century ago, "notwithstanding the legislation of Congress, the courts may and must, when properly called upon by petition in habeas corpus, examine and determine the right of any individual restrained of his personal liberty to be discharged from such restraint." For the Congress to refuse to permit the federal courts to accord the Great Writ its full common-law scope would be for it to attempt a *pro tanto* suspension in violation of the Habeas-Corpus Clause.

Id.

cluding that state prisoners must be allowed federal review of their federal claims.[70] If application of section 2262(c) worked to prohibit the Court's ability to review constitutional issues raised by a state defendant in a habeas proceeding, the constitutionality of the section would have to be closely scrutinized in order to prevent an unconstitutional "suspension" of the writ.

B. PROCEDURAL DUE PROCESS

In enacting section 2262(c), it was Congress's intention to curtail "abuses" of the writ of habeas corpus by prohibiting courts which sought to review lower court decisions from re-instating stays of executions.[71] However, "such legislative control may not be pushed so far as to negate rights guaranteed by the Constitution."[72]

Another individual right protected by the Constitution is that of due process.[73] Of concern for a capital defendant, in light of section 2262(c), is

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[70]Steiker, *supra* note 44, at 868. Professor Steiker argues that "the Suspension Clause and the Fourteenth Amendment together are best read to mandate federal habeas review of the convictions of state prisoners." *Id.* Professor Steiker goes on to argue that this premise "rests on the importance of federal review of constitutional questions to the supremacy and enforcement of federal law," noting that "[e]ven before the Civil War, the federal writ of habeas corpus had become an essential means of assuring full vindication of federal interests." *Id.* In support for his claim, Professor Steiker looks to the early history of the writ and concludes that the nexus between federal habeas and supremacy of federal law in early American judicial history supports the position that the writ as it was used then is substantially the same as it is being used today. *Id.* at 869. While conceding that the text of the Constitution "supports only the limited proposition that the Fourteenth Amendment constitutionalizes some aspect of the habeas right protected by the Suspension Clause," Professor Steiker argues "that historical considerations, as well as contemporary habeas practices and prevailing constitutional doctrine, suggest that the Fourteenth Amendment habeas right requires Congress to afford some meaningful, nondiscretionary jurisdictional vehicle for federal review of federal constitutional claims raised by state prisoners." *Id.* at 869-70.

[71]See the discussion of section 2262 in text accompanying notes 61-62.

[72]SCHWARTZ, *supra* note 39, at 27.

[73]The Due Process Clause is defined as the "two clauses [which] are found in the U.S. Constitution, one in the Fifth Amendment pertaining to the federal government, the other in the Fourteenth Amendment which protects persons from state actions. There are two aspects: procedural, in which a person is guaranteed fair procedures and substantive which protects a person's property from unfair governmental interference or taking." BLACK'S LAW DICTIONARY 500 (6th ed. 1990). In terms of the defining the needs for due process:

> one fundamental moral justification for requiring due process is that due process minimizes the number of unjust treatments; it is not simply a just or humane way

whether the section could potentially violate the procedural aspect of the Due Process Clause.[74] More specifically, the question is whether section 2262(c) could operate in a way that deprives an individual of his constitutional guarantee of due process by preventing the Supreme Court from hearing and ruling on a constitutional issue developed by a capital defendant in the federal court.[75]

The argument can be made that the Supreme Court is and should be the final arbiter and ultimate vanguard of constitutional rights and issues.[76] Support

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> of depriving persons of life, liberty or property. To the extent that due process requires an accurate judicial process, it fulfills two morally valuable functions: in terms of subjective probabilities, it maximizes correct outcomes and minimizes errors. The fact that intentional harmful treatments are the outcomes of a procedure that accords with due process gives us both an assurance that the number of unjust treatments will be as few as possible and warrants confidence that those who are harmed actually deserve to be.

David Resnick, *Due Process and Procedural Justice in* DUE PROCESS 217 (J. Roland Pennock & John W. Chapman eds. 1977).

[74]BLACKS LAW DICTIONARY defines Procedural due process as:

> [t]he guarantee of procedural fairness which flows from both the Fifth and Fourteenth Amendments due process clauses . . . For the guarantees of procedural due process to apply, it must first be shown that a deprivation of a significant life, liberty, or property interest has occurred . . . Minimal procedural due process is that parties whose rights are to be affected are entitled to be heard and, in order that they may enjoy that right, they must be notified. Procedures which due process requires beyond that minimum must be determined by a balancing analysis based on the specific factual context [as established in Mathews v. Eldridge].

BLACK'S LAW DICTIONARY 1203 (6th ed. 1990).

[75]As discussed in THE CONSTITUTIONAL LAW DICTIONARY:

> [t]he fact that the Supreme Court can review on both substantive and procedural due process grounds under the Fifth and Fourteenth Amendments gives the Supreme Court unparalleled power in the modern democratic governments. Although due process, in Daniel Webster's words, fundamentally may only provide that a court 'hear before it condemns,' it has in American practice been elaborated to provide a series of checkpoints for the courts to assure the preservation of a distinctly American tradition, that it is better for the guilty to go free than for one innocent person to be deprived of life . . .

1 THE CONSTITUTIONAL LAW DICTIONARY 205-206 (Ralph C. Chandler et al. eds., 1985).

[76]According to Bernard Schwartz, the Supreme Court as "the nation's highest Court, [is] the ultimate enforcer of all procedural rights guaranteed in the Federal Constitu-

for this position can be found in the due process framework established by the Supreme Court.[77]

Procedural due process attempts to afford protection against arbitrary action by the state against an individual's life, liberty, or property interests. Assuming there is a life, liberty, or property interest at stake,[78] the question becomes the extent of process which must be afforded to the individual in a given circumstance. In *Mathews v. Eldridge*,[79] the Supreme Court formulated a three-

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tion . . . [and] [w]here the decision of a state court [or lower federal court] involves a federal question, it must be subject to review by the Supreme Court." SCHWARTZ, *supra* note 39, at 12-13. Professor Schwartz argues that there is a "fundamental principal" of constitutional law concerning the hierarchy of Supreme Court review of lower court decisions concerning constitutional issues. *Id.* at 13. In terms of the lower federal courts, Professor Schwartz argues that "the Supreme Court's supervisory power is not limited to the enforcement of constitutional guaranties. The Court must also ensure the fairness of the procedures followed and the soundness of the decisions reached themselves. This is particularly true in the aspect of the high bench's appellate work [in criminal cases]." *Id.* Professor Schwartz continues to posit that "[t]he very first Congress, in 1789, gave the Supreme Court power to review decisions of the state courts on constitutional grounds [and] [w]hile this jurisdiction has often been challenged, it has never been taken away or basically altered." *Id.* The argument presented is that the Supreme Court is and should be the final arbiter of constitutional issues. That is the Court's "essential function" and should the Court decide to hear a capital defendant's constitutional issue, section 2262(c) should not be able to prevent the high Court from doing so.

[77]As Professor Tribe states, "deciding what kind of participation the Constitution demands requires analysis not only of the efficacy of alternative processes, but also of the character and importance of the interest at stake-its role in the life of the individual as an individual." Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories in* CONSTITUTIONAL LAW AND ITS INTERPRETATIONS 371 (Jules L. Coleman & Anthony Sebok eds. 1994).

[78]In terms of the capital defendant, the interest at stake is obviously life. This comment argues that life is logically the most vital interest which an individual can have at risk.

[79]424 U.S. 319 (1976). The facts of *Mathews* are as follows:

> Eldridge had received disability benefits since 1968. After considering Eldridge's response to a questionnaire about his condition, reports from Eldridge's physician and a psychiatric consultant, and Eldridge's files, the relevant state agency made a tentative determination that Eldridge's disability had ceased. Eldridge was so informed, given a statement of reasons, and offered an opportunity to submit a written response. He did so, disputing the agency's decision, but benefits were nonetheless terminated. Eldridge claimed that this procedure violated the due process clause. The Court agreed.

Geoffrey R. Stone et al, CONSTITUTIONAL LAW 1059 (3d. ed. 1996).

part "balancing" framework in which to address the amount of due process that an individual should be afforded. The *Mathews* test attempts to balance an individual's private interest at stake along with the possibility and severity of an incorrect decision, against the state's interest whatever it may be.[80] Essentially, the *Mathews* test provides that the greater the interest at stake, the greater the procedural protection that must be afforded to the individual in order to insure that the government does not act in an arbitrary manner.

It has been argued in support of section 2262(c)'s constitutionality under a due process analysis that capital defendants received full due process protection in the courts below.[81] In contrast, it is also argued that if the Supreme Court identifies a constitutional issue worthy of review, the capital defendant deserves the opportunity to have the issue addressed during his lifetime.[82]

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[80]The *Mathews* framework examines the following considerations:

> First, the private interest that will be affected by the official action; second, the risk of erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews, 424 U.S. at 335. In Medina v. California, 505 U.S. 437 (1992), the Supreme Court distinguished the *Mathews* framework in terms of criminal proceedings. According to Professor John Kip Cornwell, "[in *Medina*] the Court held that where state rules of criminal procedure are at issue, the constitutional analysis is framed not by the *Mathews* test, but in terms of whether such rules "'offend some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" John Kip Cornwell, *Confining Mentally Disordered "Super Criminals": A Realignment of Rights in the Nineties*, 33 HOUS. L. REV. 651, 690 n.201 (1996); *see also* Mark A. Sblendorio, Note, 27 SETON HALL L. REV. 735 (discussing the proper burden of proof required by due process on defendant in a criminal incompetency proceeding). A question could be raised as to whether the *Mathews* framework is appropriate in terms of a habeas proceeding given the intrinsic nexus between the habeas petition and the fairness of the individual's trial. This Comment argues that because the habeas petition is a civil action, the *Mathews* framework applies in order to determine whether the individual should be afforded an opportunity to be heard by a court of law.

[81]*See* Nancy Levit, *Expediting Death: Repressive Tolerance and Post-Conviction Due Process Jurisprudence in Capital Cases*, 59 UMKC L. REV. 55, 102 (1990) (discussing the present trend of the Supreme Court limiting the individual rights of capital defendants).

[82]*See* note 75 (discussing one of the underlying theories of American criminal jurisprudence that it is better to protect against the innocent being punished then protecting against the guilty going free).

Should section 2262(c) prohibit the Supreme Court from reviewing and adjudicating a constitutional issue, section 2262(c) would work to unconstitutionally deny a capital defendant the due process which should be afforded given the absolute nature of the punishment involved.

Clearly, in relation to a capital defendant, section 2262(c) affects the most important liberty interest - a person's life. The Supreme Court has recognized the inherent importance of this interest, noting that "[w]hen a defendant's life is at stake, the Court has been particularly sensitive to insure that every safeguard is observed."[83] Commentators have expanded upon this notion, arguing that the finality of capital punishment necessitates an increase in procedural protections.[84]

Under the *Mathews* framework,[85] a court determining the amount of due process that should be afforded an individual a court must first examine the

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[83]Gregg v. Georgia, 428 U.S. 153, 187 (1976).

[84]Professor Nancy Levit argues that:

> [f]oremost, of course, is the ultimate interest in life. Because of the finality of the punishment, the Court has long recognized the need for heightened reliability in the imposition of a death sentence. Additional constitutional concerns are implicated by the expedition of habeas petitions. The Court has long exhibited particular sensitivity to litigants' rights of access to the courts. The right of access assumes special significance in post-conviction litigation since habeas actions are original civil proceedings, which "frequently raise heretofore unlitigated issues."

Levit, *supra* note 81, at 101 (1990).

In support of her position that "the habeas process operates as a significant procedural safeguard against the unconstitutional deprivation of life," Professor Levit argues that:

> there is overwhelming evidence that the habeas process prevents erroneous impositions of death sentences. As Justice Marshall noted in his dissent in *Barefoot*, "[o]f the 34 capital cases decided on the merits by the Courts of Appeals since 1976 in which a prisoner appealed from the denial of habeas relief, the prisoner has prevailed in no fewer than 23 cases, or approximately 70% of the time." The documentation of this pattern of error discovery has continued through 1986. Professor Mello observed that "[t]he success rate in capital habeas [litigation was] . . . 60-75% as of 1982, 70% as of 1983, and 60% as of 1986."

Id. at 103.

[85]*See* text accompanying note 80.

private interest to be affected. In the case of a capital defendant, life represents the most fundamental and important right to be protected by due process.[86]

The second element of the due process equation that must be considered is the risk of error associated with the interest at stake. The risk associated with a capital case is that any error by the state will unconstitutionally deprive a defendant of his life.[87] This risk is particularly severe in light of the time frame involved.[88] Because of the last minute nature of many capital defendants' petitions, section 2262(c) will prevent review by the Supreme Court, simply because it is unable to reinstate a capital defendant's stay of execution.[89]

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[86]While this appears to be a logical assumption, Professor Levit notes that the Court "has diminished the individual interest" at stake by looking to the amount of process that has been afforded to the defendant at previous stages of litigation. Levit, *supra* note 81, at 102. Professor Levit attacks this trend by the Court by arguing that:

> [b]y conflating the nature of the individual interest with the amount of prehabeas process that has transpired, the Court engages in a shell game. The habeas petitioner's argument is that the nature of his interest must play a part in determining the amount of habeas process he is due. The Court's rejoinder is to keep all eyes focused entirely on the amount of process that already has been afforded, thus eliminating the habeas petitioner's interest in life as a factor in the due process equation.

Levit, *supra* note 84, at 102.

[87]*See* Levit, *supra* note 81, at 64-65. Professor Levit not only discusses the research that has been done in an attempt to calculate the number of innocent individuals that have been put to death, but also the counter arguments which state that the percentage of those innocent individuals is "an acceptable level of risk." *Id.* at 65. According to Professor Levit, the research done by Professors Hugo Bedau and Michael Radelet suggests that from 1900 to 1986, "350 defendants were erroneously convicted of crimes that were potentially capital offenses. 'In 40 percent of the cases, an innocent person was sentenced to death . . . . In twenty-three of these cases, the execution was carried out.'" *Id.* at 64 (quoting Hugo Bedau and Michael Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21 (1987)). According to Professor Levit, the research done by Professors Bedau and Radelet has been updated and "[i]n 1987, 1988, and the first seven months of 1989 alone, at least a dozen more men who had received death sentences have been released as innocent." *Id.* at 65 (quoting Ronald Tabak and J. Mark Lane, *The Execution of Injustice: A Cost and Lack-of-Benefit Analysis of the Death Penalty*, 23 LOY. L.A. L. REV. 59, 102 (1989)).

[88]*See* text accompanying note 81.

[89]*See* text accompanying note 84 (discussing the Court's recognition as to the importance of habeas review in ensuring proper results.)

The third element of the *Mathews* balancing framework is to factor in the government's interests at stake.[90] This argument posits that the primary (if not sole) interest the state has in capital cases is to insure the reliability of the process.[91] Even if one were to argue that the state's interest in capital cases includes extraneous externalities such as cost or efficiency, there is no basis to argue that these interests outweigh the life of a human being.[92] Thus, in balancing the three elements, commentators have argued that "the value of the private interest at stake in any capital case is extraordinarily high; it is a matter of life and death. Even a small risk that procedural error will result in the unjustifiable taking of life is intolerable."[93]

As the interests of the capital defendant (and arguably society) clearly outweigh any possible state interests, the argument remains that capital defendants should be afforded every conceivable safeguard available in a given circumstance.[94]

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[90]*See* text accompanying note 80.

[91]Levit, *supra* note 81, at 104. Professor Levit argues that:

> [i]n *Barefoot*, the Court declared that the state has an interest in killing capital habeas petitioners and that there is no way the state's interest can be effectuated other than by killing them quickly. The *Barefoot* Court not only inflated the state's interest and gave it priority, the Court also misinterpreted that interest. First, with respect to expedited procedures, the state's only real interest is in the *acceleration* of the process, not the ultimate outcome. Second. and more important, the government's true interest should be in the reliability of the process, not its speed.

Id.

[92]Professor Swallows opines that "the basic premise behind habeas relief [is] that finality must take a back seat to justice." Swallows, *supra* note 67, at 930.

[93]Robert McAuliffe, *A Procedural Due Process Argument for Proportionality Review in Capital Sentencing*, 21 COLUM. J.L. & SOC. PROBS. 385, 411 (1988).

[94]At the most basic level, this comment argues that if a constitutional issue arises in a capital case and the Supreme Court wishes to review it, section 2262(c) should not be allowed to operate in a way which would preclude the Court from reviewing the constitutional issue. There may be those who believe that section 2262(c) is needed to hasten an already ridiculously slow execution of a just sentence. However, in light of the situation, allowing the Court to issue a stay in this scenario really can not be seen as overly burdensome. As Professor Swallows states:

> [a] stay [is] . . . temporary in scope. Finality will be delayed, at a minimum,

If the Supreme Court wished to review the constitutionality of an issue, section 2262(c) should not be construed to prevent the United States Supreme Court from doing so. To prevent review of the constitutional issue in question would violate a capital defendant's right to due process under the law.[95]

C. THE "ESSENTIAL FUNCTION" OF THE SUPREME COURT

For some, a slight uneasiness accompanies a situation in which the Supreme Court is precluded from reviewing constitutional issues. After all, "[t]he judicial Power of the United States, shall be vested in one supreme Court . . . .

> during the pendency of the petition to the Supreme Court for a writ of certiorari [or habeas]. At most, execution will be postponed for the duration of the appeal already under consideration by the Supreme Court. This delay is a price that must be paid when new constitutional standards may be forthcoming and the potential for irreversible error so great.

Swallows, *supra* note 67, at 930.

Diane Wells might have put it best when she posited that:

> while it may be conceded that the Constitution does not require a perfect trial for a capital defendant, clearly a system that places the utmost value on individual life must afford him the best procedural protections that can be provided. This standard of protection is obviously not being met when the Court allows imposition of potentially unjust death sentences due to procedural formulations.

Diane Wells, *Federal Habeas Corpus and the Death Penalty: A Need for a Return to the Principles of* Furman, 80 J. CRIM. L. & CRIMINOLOGY 427, 483 (1989).

[95]Support for this statement comes from a combination of two premises proffered by Professor Leonard G. Ratner. The first premise is that "when you are talking about *constitutional* claims, the due process clause requires that there remain a tribunal available in which you may be heard. Thus, the due process clause is a limitation on congressional power over judicial jurisdiction." Symposium Proceedings, 27 VILL. L. REV. 1042, 1046 (1982). Professor Ratner's second premise is that one of the Supreme Court's essential functions is "to provide a tribunal for the ultimate resolution of inconsistent or conflicting interpretations of federal law by state and federal courts . . ." Leonard Ratner, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157, 161 (1960). While Professor Ratner's "essential function" argument is discussed in more depth infra in Part IV, at this juncture it will suffice to recognize that if the Supreme Court is seen as the final arbiter of constitutional issues and the ultimate tribunal in which to resolve constitutional conflicts, then section 2262(c) can not operate in such a manner as would deprive the Court of its ability to make a constitutional ruling if the Court wished to review the issue. To do so would be an unconstitutional deprivation of the state defendant's individual right of due process.

[and] [t]he Judicial Power shall extend to all Cases in Law and Equity arising under [the] Constitution."[96] One can only imagine the frustration of knowing that the Supreme Court might wish to hear the issue but was unable to do so simply because of a procedural bar under which a defendant will die before the case is heard. With the death of the defendant comes the death of the claim; the constitutional issue would be mooted by the defendant's expiration.[97]

In *Hamilton v. Texas*,[98] Justice Marshall warned against "continu[ing] the distressing rollback of the legal safeguards traditionally afforded [in capital cases]."[99] The Supreme Court's role is that of final arbiter of constitutional issues. Thus section 2262(c) should not operate in a way that prevents an individual from presenting a constitutional issue to the Supreme Court, especially where the High Court wishes to make such a ruling.[100]

The debate over the role of the Supreme Court inevitably centers upon an Article III[101] debate concerning the ability of Congress to define the limits of

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[96]U.S. CONST. art. III, §§ 1-2, cl.1.

[97]In order to prevent cases from being mooted, the Supreme Court has developed the so-called "Rule of Four." *See* Hamilton v. Texas, 498 U.S. 908 (1990) (Justice Marshall outlining the operation of the established practice of the so-called "Rule of Four"). If four justices would grant certiorari, a fifth vote is cast in order to grant a stay and insure that the case can be heard by the Court. This procedural safeguard is not always followed. In *Hamilton*, the Court was unable to secure the fifth vote needed to issue a stay, resulting in the execution of one James Edward Smith. *Id.* at 911. In a concurring opinion, Justice Stevens wrote that:

> Smith's execution obviously mooted this case. The Court has therefore properly denied the petition for a writ of certiorari. This denial, however, does not evidence any lack of merit in the petition; instead the reason for the denial emphasizes the importance of confronting on the merits the substantial questions that were raised in this case.

Id. (Stevens, J. concurring). *Hamilton* involved the constitutionality of executing someone whose competency to direct his appeal was in question. *Id.*

[98]498 U.S. 908 (1990).

[99]*Id.* at 909.

[100]The granting of both habeas and certiorari by the Supreme Court is a discretionary function and as such should not be taken lightly.

[101]See *supra* note 23.

the Supreme Court's appellate jurisdiction.[102] The suspension and due process

[102]The Article III debate is a favorite battleground for constitutional scholars. *See generally*, RAOUL BERGER, CONGRESS V. THE SUPREME COURT 285-96 (1969); WILLIAM W. CROSSKEY, POLITICS AND THE CONSTITUTION 616-20 (1953); JULIUS GOEBEL, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801, 196-412 (1971); MARTIN H. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER 7-34 (1980); CHARLES E. RICE, CONGRESS AND SUPREME COURT JURISDICTION (1980); Henry J. Abraham, *Limiting Federal Court Jurisdiction: A "Self-Inflicted Wound?"*, 65 JUDICATURE 179 (1981); Carl A. Auerbach, *The Unconstitutionality of Congressional Proposals to Limit the Jurisdiction of Federal Courts*, 47 MO. L. REV. 47 (1982); Paul M. Bator, *Congressional Power over the Jurisdiction of the Federal Courts*, 27 VILL. L. REV. 1030 (1982); Max Baucus & Kenneth R. Kay, *The Court Stripping Bills: Their Impact on the Constitution, the Courts, and Congress*, 27 VILL. L. REV. 988 (1982); Raoul Berger, *Insulation of Judicial Usurption: A Comment on Lawrence Sager's "Court-Stripping" Polemic*, 44 OHIO ST. L.J. 611 (1983); Scott H. Bice, *An Essay Review of Congress v. The Supreme Court*, 44 S. CAL. L. REV. 499 (1971); Irving Brant, *Appellate Jurisdiction: Congressional Abuse of the Exceptions Clause*, 53 OR. L. REV. 3 (1973); Theodore Eisenberg, *Congressional Authority to Restrict Lower Federal Court Jurisdiction*, 83 YALE L.J. 498 (1974); Morris D. Forkosch, *The Exceptions and Regulations Clause of Article III and a Person's Constitutional Rights: Can the Latter be Limited by Congressional Power Under the Former?*, 72 W. VA. L. REV. 238 (1970); Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953); Kenneth R. Kay, *Limiting Federal Court Jurisdiction: The Unforeseen Impact on Courts and Congress*, 65 JUDICATURE 185 (1981); Henry J. Merry, *Scope of the Supreme Court's Appellate Jurisdiction: Historical Basis*, 47 MINN. L. REV. 53 (1962); Leanord G. Ratner, *Majoritarian Constraints on Judicial Review: Congressional Control of Supreme Court Jurisdiction*, 27 VILL. L. REV. 929 (1982) [hereinafter Ratner, *Congressional Control*]; Leanord G. Ratner, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157 (1960) [hereinafter Ratner, *Congressional Power*]; Martin H. Redish, *Congressional Power to Regulate Supreme Court Appellate Jurisdiction Under the Exceptions Clause: An Internal and External Examination*, 27 VILL. L. REV. 900 (1982) [hereinafter Redish, *Congressional Power*]; Martin H. Redish, *Constitutional Limitations on Congressional Power to Control Federal Jurisdiction: A Reaction to Professor Sager*, 77 NW. U.L. REV. 143 (1982) [hereinafter Redish, *Constitutional Limitations*]; Martin H. Redish & Curtis E. Woods, *Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis*, 124 U. PA. L. REV. 45 (1975); Charles E. Rice, *Congress and the Supreme Courts Jurisdiction*, 27 VILL. L. REV. 959 (1982) [hereinafter Rice, *Congress and the Supreme Court*]; Charles E. Rice, *Limiting Federal Court Jurisdiction: The Constitutional Basis for the Proposals in Congress Today*, 65 JUDICATURE 190 (1981) [hereinafter Rice, *Limiting Federal Court Jurisdiction*]; Lawrence G. Sager, *The Supreme Court, 1980 Term-Forward: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17 (1981); Dolores K. Sloviter, *Introduction: Legislative Proposals to Restrict the Jurisdiction of the Federal Courts: Are They Wise? Are They Constitutional?*, 27 VILL. L. REV. 895 (1982); Telford Taylor, *Limiting Federal Court Jurisdiction: The Unconstitutionality of Current Legislative Proposals*, 65 JUDICATURE 199 (1981); Laurence H. Tribe, *Jurisdictional Gerrymandering: Zoning Disfavored Rights Out of the Federal Courts*, 16 HARV. C.R.-C.L. L. REV. 129 (1981); William W. Van Alstyne, *A Critical Guide to* Ex Parte McCardle, 15 ARIZ. L. REV. 229 (1973); Herbert Wechsler, *The Courts and the Constitution*, 65 COLUM.

arguments discussed above only succeed if one agrees that the Constitution mandates that the Supreme Court be able to review all constitutional issues that the Court deems worthy of address. Thus, the third argument against section 2262(c) is that depriving the Court of its discretionary review of constitutional issues would prevent the High Court from exercising its "essential function" in the constitutional scheme.

While it is largely held that Congress has absolute control over the jurisdiction of the lower federal courts,[103] congressional control over the appellate jurisdiction of the Supreme Court is arguably limited.[104] Article III, section 2, clause 2 of the United States Constitution provides that the appellate jurisdiction of the Supreme Court is subject to Congressional "exceptions."[105] Ac-

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L. REV. 1001 (1965);

[103]Article III, section 1 of the Constitution grants Congress the discretion to create the lower federal courts. *See supra* note 101. As Professor Ratner concedes, "[c]onstitutional authority to create and abolish inferior federal courts gives Congress plenary control over their jurisdiction." Ratner, *Congressional Control*, *supra* note 102, at 158; *see* Redish, *Constitutional Limitations*, *supra* note 102, at 145; *but see* Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U.L. REV. 205 (1985) (arguing that federal jurisdiction, if vested must be completely vested).

[104]*See* note 102. There appear to be two separate schools of thought concerning congressional control of the Supreme Court's appellate jurisdiction. The traditional school led by men such as Professors Herbert Wechsler and Martin Redish, subscribe to the notion that "[u]ltimately . . . there exist no real internal limitations on Congress' power under the exceptions clause." Redish, *Congressional Power*, *supra* note 102, at 902. Professor Wechsler argues:

> that Congress has the power by enactment of a statute to strike at what it deems judicial excess by delimitations of the jurisdiction of the lower courts and of the Supreme Court's appellate jurisdiction. Under the *McCardle* case, even a pending case may be excepted from appellate jurisdiction. Judicial "duty," the Chief Justice said, "is not less fitly performed by declining ungranted jurisdiction than in exercising firmly that which the Constitution and the laws confer."

Wechsler, *supra* note 102, at 1005 (quoting Ex parte McCardle, 74 U.S. (7 Wall.) 506, 515 (1869)).

The more radical school, led by men like Professors Ratner and Clinton, argues that Congress may not curtail the appellate jurisdiction of the Supreme Court in a way that would obviate the high Court's "essential function."

[105]*See supra* note 101. According to Professor Charles E. Rice:

> [t]he clause was intended, according to Alexander Hamilton, to give 'the national

cordingly, there has been much discussion in scholarly circles concerning the scope of Congress's ability to curtail the appellate jurisdiction of the federal judiciary.

One view espoused by constitutional scholars is that Article III grants Congress virtually unlimited power to abridge the appellate jurisdiction of the federal judiciary.[106] Scholars like Professor Martin H. Redish argue that while the Constitution provides for the existence of the Supreme Court "it is only the Court's relatively limited *original* jurisdiction that is unequivocally insulated from congressional regulation."[107] If this is the case, it could be argued that Congress could completely obviate the appellate jurisdiction of the Supreme Court.[108] To do so, however, would not be "in harmony with the spirit and intention of the Constitution"[109] as "[t]he protections of the Constitution will only be what 51 percent of the House and 51 percent of the Senate say they are."[110]

A contrary view was first espoused by Professor Henry M. Hart, Jr. In his now famous exercise in dialectic, Professor Hart stated that the apparent plenary power of Congress to control the appellate jurisdiction of the Supreme

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> legislature . . . ample authority to make such *exceptions*, and to prescribe such regulations as will be calculated to obviate or remove' the 'inconveniences' which might arise from the powers given in the Constitution to the federal judiciary. Much of the debate surrounding the adoption of the clause centered upon the Framers' concern that a supreme court would exercise appellate powers to reverse jury verdicts on issues of fact.

Rice, *supra* note 102, at 962-63. (quoting THE FEDERALIST NO. 80 at 559 (A. Hamiliton)).

[106]*See supra* note 104.

[107]Redish, *Congressional Power*, *supra* note 102, at 901 (emphasis added). Charles E. Rice summarizes that:

> the holdings of the Supreme Court and the statements of various individual justices compel the conclusion that Congress clearly has power under the Exceptions Clause to withdraw appellate jurisdiction from the Supreme Court in particular classes of cases.

Rice, *supra* note 102, at 194.

[108]*See generally* Symposium Proceedings, 27 VILL. L. REV. 1042 (1982).

[109]Kay, *supra* note 102, at 188 (quoting President Andrew Jackson).

[110]*Id.*

Court is in fact limited in "that the exceptions must not be such as will destroy the essential role of the Supreme Court in the constitutional plan."[111] Professor Leonard G. Ratner expanded on this view by defining the essential appellate functions of the Supreme Court under the Constitution as not only being the final arbiter of constitutional issues, but also in maintaining the supremacy of federal law when it directly conflicts with state law.[112]

In support of his "essential function" theory, Professor Ratner asserts that these essential functions: (1) are mandated by the Constitution;[113] (2) were contemplated by the Framers;[114] and (3) have been recognized by the Supreme Court.[115]

1. THE COURT'S FUNCTION AS THE FINAL ARBITER IS MANDATED BY THE CONSTITUTION

The Supremacy Clause of the United States Constitution[116] supports the

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[111]Hart, *supra* note 102, at 1365.

[112]According to Professor Ratner, the Court's "essential function" is:

> (1) to provide a tribunal for the ultimate resolution of inconsistent or conflicting interpretations of federal law by state and federal courts, and (2) to provide a tribunal for maintaining the supremacy of federal law when it conflicts with state law or is challenged by state authority.

Ratner, *Congressional Power*, *supra* note 102, at 161.

Professor Ratner's position, like most any other scholarly stance, has neither been universally accepted nor left uncriticized. *See* Redish, *Congressional Power*, *supra* note 102, at 906-13. ("Both Professors Hart and Ratner have read into seemingly unambiguous constitutional language a principle that undeniably does not appear anywhere on the face of the document . . . Thus, while I might well agree, as a policy matter, that Congress should not possess the power to tamper with performance of the Supreme Court's role, if I can find no constitutional basis for erecting such a limitation, I am powerless to alter the situation."). *Id.* at 906-07.

[113]*See* Ratner, *Congressional Power*, *supra* note 102, at 160-161. At the heart of Professor Ratner's argument that the Constitution supports an "essential function" hypothesis, Professor Ratner looks to the supremacy clause. *Id.*

[114]*Id.* at 161-65.

[115]*See* Ratner, *Congressional Power*, *supra* note 102, at 166-67.

[116]U.S. CONST. art. VI, cl. 2. The Supremacy Clause provides:

position that the Constitution embodies an essential function theory. The "constitutional mandate" of the Supremacy Clause "requires (a) that there shall be one supreme federal law throughout the land and (b) that in the event of conflict between that law and the law or authority of any state, the federal law shall prevail."[117] The argument continues that "[t]he [S]upremacy [C]lause standing alone . . . is no more than an exhortation. A tribunal with nationwide authority is needed to interpret and apply the supreme law . . . . [The Supreme Court] is thus the constitutional instrument for implementing the [S]upremacy [C]lause."[118] Thus the Supremacy Clause mandates that there be an ultimate arbiter for constitutional issues.

2. THE FRAMER'S INTENTION THAT THE SUPREME COURT BE THE FINAL ARBITER OF CONFLICT WITHIN THE COURTS

In addition to the Supremacy Clause, it has been argued that "[t]he nature of these essential Supreme Court functions is confirmed by the proceedings of the Constitutional Convention."[119] Specifically, the proceedings of the Constitutional Convention developed the "explicit [and unchallenged] assumption that the Supreme Court would exercise appellate jurisdiction over state court judgments."[120] The conclusion drawn from this argument is that "[a]s the sole tribunal established by the Constitution, [the Supreme Court] provid[es] the only certain instrumentality for securing 'national rights & uniformity of [Judgments].'"[121]

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every state shall be bound thereby, any Thing in the Constitution or Laws of any state to the contrary notwithstanding.

Id.

[117]Ratner, *Congressional Power*, *supra* note 102, at 160.

[118]*Id.* at 160-61.

[119]*Id.* at 161.

[120]*Id.* at 162.

[121]*Id.* (quoting Mr. Rutledge, the Constitutional Convention delegate from the state of South Carolina.) Mr. Rutledge argued that "the State Tribunals might and ought to be left in all cases to decide in the first instance the right of appeal to the supreme national tribunal being sufficient to secure the national rights & uniformity of Judgmts." *Id.* Professor Henry J. Merry suggests that:

Other commentators have also looked to the intent of the framers in an attempt to define the appropriate role of the Supreme Court.[122] At the core of these arguments is that the framers established the Supreme Court and allocated to Congress the right to create lower federal courts as it deemed necessary.[123] Implicit in this argument is that the Constitution allocates to the Supreme Court the vast majority of appellate jurisdiction; reserving to Congress the right to obviate that jurisdiction only to a limited degree.[124]

Accordingly, the framers intended a much narrower view of Congress's ability to curtail the appellate jurisdiction of the Supreme Court. This intent lends credence to the theory that the Court has the essential function as final arbiter of constitutional issues.

> [t]he constitutional grant of authority to Congress over the appellate jurisdiction of the Supreme Court appears to have originated because of a particularly limited problem-the extent to which the Supreme Court should have jurisdiction to review fact issues in those cases in which practice differed among the states . . . If the intent of the Constitutional Convention is deemed to be controlling, then there would seem to be substantial grounds for saying that the authority of Congress to make exceptions and regulations with respect to the appellate jurisdiction of the Supreme Court is limited to the treatment of fact issues.

Merry, *supra* note 102, at 68.

[122]Professor Robert N. Clinton looks to the intent of the framers in establishing the appropriate role of the Supreme Court. Professor Clinton concludes:

> that the framers, by providing that '[t]he judicial Power of the United States, shall be vested in one supreme court and in such inferior Courts as the Congress may from time to time ordain and establish,' intended to mandate that Congress allocate to the federal judiciary as a whole each and every type of case or controversy defined as part of the judicial power of the United States by section 2, clause 1 of article III, excluding, possibly, only those cases that Congress deemed to be so trivial that they would pose an unnecessary burden on both the federal judiciary and on the parties forced to litigate in federal court . . . . The powers over the federal judiciary that articles I and III gave to Congress thus involved authority over the distribution, organization, and implementation of the judicial power of the United States, not a license to curtail its exercise.

Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 U. PA. L. REV. 741, 749-50 (1984).

[123]*See supra* note 122.

[124]*See supra* note 122.

3. JUDICIAL INTEREPRETATION SUPPORTS THE SUPREME COURT'S FUNCTION

Finally, it has been argued that "[f]rom an early date the Supreme Court itself has explicitly recognized that its indispensable functions under the Constitution are to resolve conflicting interpretations of the federal law and to maintain the supremacy of that law when it conflicts with state law or is challenged by state authority."[125] In support of this assertion, the Supreme Court decisions in *Martin v. Hunter's Lessee,*[126] *Cohen's v. Virginia,*[127] and *Ableman v. Booth*[128] have been interpreted as constitutionally mandating Supreme Court review of state court decisions.[129]

V. CONCLUSION

Section 2262(c) operates in an unconstitutional manner by depriving the Supreme Court of its essential function as the ultimate interpreter of constitutional issues and vanguard of constitutional rights. Because the role of the Supreme Court is to be the final arbiter of constitutional conflicts as well as the ultimate protector of an individual's constitutional rights, section 2262(c) is unconstitutional because it denies Supreme Court review. In a scenario in which the Supreme Court is unable to hear a state capital defendant's constitutional issue because the state defendant's stay of execution was lifted by the court of appeals overruling a district court's decision to grant a state defendant

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[125]Ratner, *Congressional Power, supra* note 102, at 166.

[126]14 U.S. (1 Wheat.) 304 (1806).

[127]19 U.S. (6 Wheat.) 264 (1821).

[128]62 U.S. (21 How.) 506 (1858).

[129]Ratner, *Congressional Power, supra* note 102, at 167. According to Professor Ratner:

> *Martin v. Hunter's Lessee, Cohens v. Virginia,* and *Ableman v. Booth* upheld the Court's jurisdiction to review state court decisions under section 25 of the Judiciary Act not only because that jurisdiction was authorized by the Constitution, but also because it was required by the Constitution. The implication of these decisions is that Congress could not constitutionally deny such jurisdiction to the Court.

Id. (citations omitted).

relief, section 2262(c) becomes unconstitutional on two fronts.[130] Initially it impermissibly infringes upon the Supreme Court's jurisdiction under Article III. Section 2262(c) is also unconstitutional because it violates the due process rights of an individual state defendant.

On February 3, 1997, the American Bar Association's (ABA) House of Delegates voted 280-119 to call for an immediate moratorium on executions in the United States.[131] In the report which accompanied the resolution, the ABA argued that "[e]fforts to forge a fair capital punishment jurisprudence have failed" and that the moratorium should remain "unless and until greater fairness and due process prevail."[132] In what was described as the American Bar Association's "strongest statement ever on capital punishment,"[133] the ABA announced that it was "calling upon each and every jurisdiction that has the death penalty to clean up its act."[134]

The ABA resolution highlights the argument that there are still inherent deficiencies in the application of the death penalty in the United States. This is not to say that the death penalty is unconstitutional and should be completely abandoned.[135] Due to the irreversible nature of capital punishment, however,

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[130]The scenario would also be unconstitutional in terms of the Suspension Clause if it dealt with the defendant's original petition for habeas corpus.

[131]Pete Williams, *Lawyers Want Changes in Death Penalty*, (Feb. 4, 1997) <http://www.msnbc.com/news/54127.asp>. One of those opposing the resolution was Lee Cooper, the current American Bar Association president, who said "people would misinterpret [the resolution]." *Id.* According to Mr. Cooper, "[t]he Department of Justice does not think it is a problem. The White House does not think it is a problem. And I agree with the Department of Justice and the White House." *Id.* However, the MSNBC report noted that the "[b]ackers of the moratorium obtained the support of 20 of the 24 living former ABA presidents, and no organized opposition surfaced within the association." *Id.*

[132]*Id.*

[133]*Id.*

[134]*Id.* Accordingly, the ABA's recommendation:

> [I]nvokes previously adopted ABA policies that 'minimize the risk' of executing innocent people. Those include efforts to end racial discrimination in death sentencing and to make readily available federal court review of state prosecutions. That review has been curtailed by the new laws.

Id.

[135]As stated in the Introduction, the death penalty debate is fierce and much too elaborate for the scope of this piece.

procedural due process mandates that the protections afforded to a state capital defendant be as expansive as possible. In terms of section 2262(c) of the Antiterrorism and Effective Death Penalty Act of 1996, this means that the Supreme Court cannot constitutionally be precluded from reviewing a state capital defendant's constitutional claims. Because the Supreme Court is the ultimate protector of an individual's constitutional rights, Congress can not and should not be allowed to destroy the Court's role through the passage of legislation designed to promote an efficient, as opposed to a just, result. John Jay once said, "[j]ustice is indiscriminately due to all, without regard to numbers, wealth, or rank."[136] This statement becomes no less true when applied to capital defendants.

[136]Georgia v. Brailsford, 3 U.S. (3 Dall.) 1, 4 (1794). John Jay was the first Chief Justice of the United States Supreme Court.