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RESPONSE

THE SUPREME COURT, ORIGINAL HABEAS, AND THE PARADOXICAL VIRTUE OF OBSCURITY

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IN “Original Habeas Redux,”¹ Professor Lee Kovarsky reminds us of the important—if elusive—role that the Supreme Court’s jurisdiction to issue “original” writs of habeas corpus can play in providing one last avenue of judicial review to those challenging their federal or state imprisonment. As Kovarsky notes, this is hardly a new idea: ever since Chief Justice Chase’s indirect allusion to such authority in *Ex parte McCardle*,² the Court itself has recognized its original habeas jurisdiction as just this kind of backstop—an unorthodox but sometimes necessary means of exercising review in situations where other avenues for relief are either practically or formally unavailable.³ To that end, even though the Court has not issued an original writ in eighty-six years, continuing judicial invocations of the

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¹ Lee Kovarsky, *Original Habeas Redux*, 97 Va. L. Rev. 61 (2011).

² See *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 515 (1868) (“Counsel seem to have supposed, if effect be given to the repealing act in question, that the whole appellate power of the court, in cases of *habeas corpus*, is denied. But this is an error. The act of 1868 does not except from that jurisdiction any cases but appeals from Circuit Courts under the act of 1867. It does not affect the jurisdiction which was previously exercised.”). The “jurisdiction which was previously exercised” was the Court’s power to issue “original” writs under section 14 of the Judiciary Act of 1789, as recognized in *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 105–06 (1807). See, e.g., *Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 97–98 (1868).

³ See, e.g., *Felker v. Turpin*, 518 U.S. 651, 661–62 (1996).

possibility of such relief⁴ are perhaps the most oft-recurring manifestation of the “time-honored tradition for the Supreme Court . . . to find that Congress did not intend to preclude altogether judicial review of constitutional claims in light of the serious due process concerns that such preclusion would raise.”⁵

Thus, just as was true in the Guantánamo litigation—where original habeas was invoked on several occasions when the jurisdiction of the lower federal courts was in doubt⁶—Professor Kovarsky sees in original habeas the potential for increasing judicial consideration of certain arguments that, for a host of reasons, have been increasingly difficult to raise in the lower federal courts, especially claims based on “crime innocence” and “death ineligibility.”⁷ Marshaling an impressive set of data concerning the Court’s original habeas docket, Kovarsky suggests that circumstances have conspired to place an increasing amount of pressure on the Court’s original habeas jurisdiction over the past fifteen years—pressure that may eventually compel the Court to act. Moreover, as he notes, if we are to read anything from the tea leaves in the Troy Davis case, at least some of the Justices appear to agree.⁸ As Kovarsky concludes, “after almost a century-long period of virtual dormancy, the Supreme Court’s original habeas power may be on a revival’s precipice.”⁹

I have no quarrel whatsoever with Professor Kovarsky’s descriptive account or with his impressive construction of—and conclusions arising out of—the original habeas dataset at the heart of his article. Indeed, I do not think it is an exaggeration to suggest that his work is the most important account of “original habeas” in almost a half-century, since Dallin Oaks’s classic article on the subject in the

⁴ See, e.g., *Padilla v. Hanft*, 547 U.S. 1062, 1064 (2006) (Kennedy, J., concurring in the denial of certiorari).

⁵ *Bartlett v. Bowen*, 816 F.2d 695, 699 (D.C. Cir. 1987).

⁶ For example, in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), the Petitioner also sought original habeas relief just in case the Detainee Treatment Act of 2005 (“DTA”) were held (as the government argued) to foreclose the Court’s certiorari jurisdiction. After the Court concluded that the relevant provisions of the DTA did not apply to Hamdan’s case, *id.* at 572–84, the Court denied Hamdan’s request for original relief. *In re Hamdan*, 548 U.S. 924 (2006) (mem.).

⁷ See Kovarsky, *supra* note 1, at 98–112.

⁸ See *In re Davis*, 130 S. Ct. 1, 1–2 (2009) (Stevens, J., concurring). But see *Davis v. Humphrey*, No. 10-949, 2011 WL 220685 (U.S. Mar. 28, 2011) (mem.) (denying certiorari—and original habeas—after the proceedings on remand in the *Davis* case).

⁹ Kovarsky, *supra* note 1, at 123.

1962 *Supreme Court Review*.¹⁰ Instead, in the short response that follows, I offer two reflections on Kovarsky's prescriptive thesis—that is, that the increasing pressure on the Court's original habeas docket will eventually impel the Justices to act. First, using the post-World War II war crimes cases as an example, I suggest that the existence of atypical (and increasing) pressure on the Court to use its original habeas jurisdiction in no way ensures that the Court *will* so act—or at least it may not do so without some underlying consensus as to both the merits of the petitioners' claims and the unavailability of alternative forums. Contrary to Kovarsky's suggestions, the Supreme Court's response to the upsurge in war related original habeas cases in the late 1940s was to punt the issue, and rather categorically, at that.

Second, even if the Court *is* eventually motivated to wield its exotic power under section 14 of the Judiciary Act of 1789, one might wonder whether, in the long term, such normalization of the original habeas "safety valve" could (paradoxically) undermine its utility, at least to the extent that such a result might precipitate legislation more directly circumscribing the Court's authority. To be sure, any such statute could well raise serious constitutional questions, the answers to which are hardly obvious. But even then, increasing reliance on original habeas would thereby provoke fundamental constitutional questions that the Court has historically done everything within its power to avoid asking, let alone answering.¹¹ Ultimately, the most useful feature of original habeas as a safety valve may be its *obscurity*, a status that would very much be jeopardized if Professor Kovarsky's prediction comes true. In other words, original habeas is—and has been—more about protecting the Supreme Court's role in the abstract than it has ever been about protecting individual litigants on the merits.

¹⁰ Dallin H. Oaks, The "Original" Writ of Habeas Corpus in the Supreme Court, 1962 Sup. Ct. Rev. 153.

¹¹ See, e.g., *INS v. St. Cyr*, 533 U.S. 289, 301 n.13 (2001) ("The fact that this Court would be required to answer the difficult question of what the Suspension Clause protects is in and of itself a reason to avoid answering the constitutional questions that would be raised by concluding that review was barred entirely.").

I. ORIGINAL HABEAS AND THE WAR CRIMES CASES

As Kovarsky explains, the Court's power to issue "original" writs of habeas corpus under 28 U.S.C. § 2241(a), the descendant of section 14 of the Judiciary Act of 1789, is typically most salient when two factors are present: (1) the unavailability of relief to prisoners in alternative forums, including state courts and lower federal courts; and (2) at least some sense that the unavailability of relief is thereby precluding access to a judicial forum for resolution of colorable constitutional claims. One of the sharpest examples of the intersection of these two considerations came in the aftermath of World War II when, at the same time, hundreds of U.S. and Axis servicemembers convicted by overseas war crimes tribunals sought relief in the U.S. civilian courts—and, initially, in the Supreme Court directly.¹² For the most part, the petitioners pursued original relief because it appeared that the lower courts lacked statutory jurisdiction.¹³ And in cases where the defendants had been convicted by U.S. military commissions, there was a substantial argument that the petitioners were effectively seeking review of an inferior U.S. court, thereby satisfying *Ex parte Bollman's* requirement that the Supreme Court's jurisdiction be functionally "appellate."¹⁴

Nevertheless, the Court repeatedly and steadfastly rebuffed attempts to invoke its original habeas jurisdiction, denying leave to file in nearly every case, albeit summarily and usually by a 4-4 vote (owing to Justice Jackson's recusals). Indeed, the Court refused to even set the jurisdictional question for argument, let alone hear argument on any question going to the underlying merits of the petitions. Such avoidance continued apace even when, as in the Dachau case, the petition

allege[ed] a total lack of jurisdiction of the tribunal sentencing the prisoners and charge[d] that the convictions were the product of confessions obtained by "mock trials" and that the trials them-

¹² See Kovarsky, *supra* note 1, at 74–79; see also Stephen I. Vladeck, Deconstructing *Hirota*: Habeas Corpus, Citizenship, and Article III, 95 Geo. L.J. 1497, 1505–25 (2007) (describing the post-World War II original habeas cases in detail).

¹³ See *Ahrens v. Clark*, 335 U.S. 188 (1948) (holding that the federal habeas statute only authorized a district court to entertain cases in which the petitioner was detained within that court's territorial jurisdiction).

¹⁴ See *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 100–01 (1807).

selves were conducted in such way as to deprive the prisoners and their counsel of any possible chance adequately to set up their defenses.¹⁵

Even when Justice Jackson finally broke the logjam and the Court heard argument on its jurisdiction in *Hirota v. MacArthur*,¹⁶ the resulting per curiam opinion deliberately obfuscated the basis on which jurisdiction was ultimately held to be lacking: whether the defect went to the Court's original jurisdiction (on the theory that the jurisdiction was not functionally "appellate" if exercised to review an international tribunal) or to the jurisdiction of the federal courts in general over habeas petitions brought by individuals convicted by foreign or international tribunals.¹⁷ Thus, the Court not only refused to exercise its original jurisdiction, but it also willfully refused to establish whether or not it *could*.

What is most telling for present purposes about the war crimes cases is not just the Court's passivity, but the role that the Justices' views of the merits undoubtedly played in shaping the Court's approach. Thus, in cases brought by U.S. citizens, where some claim to relief might well arise, the denial of jurisdiction to consider an application for original habeas relief was usually "without prejudice to it being filed in the appropriate District Court,"¹⁸ even though it was hardly clear that such courts had jurisdiction. In cases brought by noncitizens, where the potential grounds for relief were far less

¹⁵ Memorandum for the Conference at 1 (May 17, 1948) (on file with the Library of Congress, Manuscript Division, Papers of Hugo L. Black, Container No. 292, *Everett v. Truman* Case File), quoted in Vladeck, supra note 12, at 1510–11.

¹⁶ 338 U.S. 197 (1948) (per curiam).

¹⁷ See Vladeck, supra note 12, at 1518 & n.107; see also *Munaf v. Geren*, 553 U.S. 674, 687–88 & n.3 (2008) (summarizing the various facts on which *Hirota* may have rested). Thus, I do not think it is quite right to conclude that *Hirota* is "premised expressly on habeas limits common to all federal courts." Kovarsky, supra note 1, at 78. Only because of the D.C. Circuit's subsequent decision in *Flick v. Johnson*, 174 F.2d 983 (D.C. Cir. 1949), is it clear that *Hirota* applied in the lower courts as well. See Vladeck, supra note 12, at 1525–27.

¹⁸ See, e.g., *Ex parte Betz*, 329 U.S. 672, 672 (1946) (mem.); see also *In re Bush*, 336 U.S. 971, 971 (1949) (mem.). The Court would eventually endorse the extra-statutory jurisdiction of the lower federal courts to entertain habeas cases brought by U.S. citizens detained overseas, albeit *sub silentio*, in *Burns v. Wilson*, 346 U.S. 137, 139–44 (1953). See Paul M. Bator et al., *Hart and Wechsler's The Federal Courts and the Federal System* 359 n.52 (2d ed. 1973); see also *Rasul v. Bush*, 542 U.S. 466, 497 (2004) (Scalia, J., dissenting); *Ex parte Hayes*, 414 U.S. 1327, 1328–29 (1973) (Douglas, J., in chambers).

clear,¹⁹ the denial of the petition included no similar notation. From the Court's perspective, at least, there seemed to be little point in using the safety valve if there was nothing in either category that needed saving.

To be sure, Professor Kovarsky's analysis rightly accounts for the historical utility of the war crimes cases and the opportunities lost in the Court's handling thereof. In my view, though, Kovarsky's account does not ascribe enough significance to the role that citizenship came to play in dictating how the Court responded. He therefore simultaneously gives short shrift to the significance of *both* factors—unavailability of other forums *and* at least some consensus as to whether the claims were colorable on the merits—in explaining when the Court would look to the safety valve. If this pattern is to hold for “crime innocence” and “death ineligibility” cases (and I see no reason why it would not), then we must ask two questions of each class of cases: are other avenues to relief truly unavailable, and is the Court sufficiently persuaded that colorable claims would otherwise be left unredressable?

With “death ineligibility” cases, these questions seem easy to answer, especially given the Court's unhesitating trend toward clear, bright-line rules concerning who may be executed constitutionally and for which offenses.²⁰ The harder category, I suspect, will be “crime innocence” cases because of both (1) the well-documented divisions on the current Court over whether “actual innocence” arguments are cognizable;²¹ and (2) the recent development that causes of action under 42 U.S.C. § 1983 will be available for at least *some* DNA-based “crime innocence” suits.²² In short, although I agree entirely with Professor Kovarsky's descriptive account, I wonder if, where “crime innocence” is concerned, the Court will truly feel compelled to exercise its original jurisdiction in light of the unsettled na-

¹⁹ See, e.g., *Johnson v. Eisentrager*, 339 U.S. 763, 777–81 (1950) (holding that noncitizens held outside the territorial United States who had been properly convicted by a duly-convened military commission had no right to pursue habeas corpus relief in the United States).

²⁰ See, e.g., *Kennedy v. Louisiana*, 554 U.S. 407, 421 (2008). See generally Lee Kovarsky, *Death Ineligibility and Habeas Corpus*, 95 *Cornell L. Rev.* 329 (2010).

²¹ See, e.g., Sarah A. Mourer, *Gateway to Justice: Constitutional Claims to Actual Innocence*, 64 *U. Miami L. Rev.* 1279, 1298–99 (2010).

²² See *Skinner v. Switzer*, 131 S. Ct. 1289, 1296–300 (2011) (holding that a convicted state prisoner may seek DNA testing of crime-scene evidence in a § 1983 action).

ture of the underlying substantive law and the potential avenues for relief that *Skinner v. Switzer* may yet provide. And if the war crimes cases are any indication, the Court will be incredibly reluctant to invoke the safety valve that original habeas provides until and unless the need is truly manifest.

II. THE PARADOXICAL SAFETY OF OBSCURITY

Even if the Supreme Court does reach some consensus on the need to utilize the original habeas “safety valve,” such reliance upon a previously obscure avenue of relief might paradoxically undermine its value. It is no coincidence, after all, that Chief Justice Chase referred only obliquely to the Court’s jurisdiction to issue original habeas relief in *McCardle*;²³ given Congress’s efforts to prevent the Court from passing upon the constitutionality of the Military Reconstruction Act, an explicit discussion of *Bollman* and section 14 simply might have provoked legislation to repeal that source of authority as well.²⁴ Thus, whether deliberately or not, Chief Justice Chase simultaneously invoked the “safety valve” and reinforced its obscurity.

Whereas we can only speculate about Chief Justice Chase’s motives in *McCardle*, a similar phenomenon can be observed in the relationship between Congress and the courts in immigration cases over the past fifteen years. Congress in 1996 attempted to curtail judicial review dramatically in large classes of immigration cases, cutting off direct review of removal orders in the Courts of Appeals and purporting to circumscribe habeas as well. The judicial response was to hold that Congress had not been sufficiently clear in foreclosing habeas review and to use habeas to effectuate the same review collaterally that, before 1996, had been available directly.²⁵ Congress eventually responded in the REAL ID Act of 2005, expressly cutting off habeas and funneling all judicial review back into direct petitions for review of administrative action. To drive the point home, the habeas-stripping provision of the REAL ID Act expressly provides that petitions for review shall be exclusive,

²³ See supra note 2.

²⁴ See generally Charles Fairman, 6 *History of the Supreme Court of the United States: Reconstruction and Reunion, 1864-88*, at 244-45 (1971); William W. Van Alstyne, A Critical Guide to *Ex Parte McCardle*, 15 *Ariz. L. Rev.* 229, 230-31 (1973).

²⁵ See, e.g., *INS v. St. Cyr*, 533 U.S. 289, 298-99, 308-14 (2001).

“[n]otwithstanding any other provision of law (statutory or non-statutory), including section 2241 of Title 28, or any other habeas corpus provision.”²⁶ Notwithstanding *St. Cyr*’s “clear statement” requirement, one would be hard-pressed to argue that the reference to “section 2241 of Title 28” does not encompass the Supreme Court’s original habeas jurisdiction.

The upshot of this back-and-forth in immigration cases is that increasing judicial reliance on the “safety valve” provided by habeas only provoked legislative efforts to shut it off, creating constitutional consequences that remain unresolved today—largely because the courts *never* conclusively settled whether there were classes of cases in which immigrants facing removal have a constitutional right to at least some judicial review.²⁷ Given that the pressures Kovarsky identifies with regard to “crime innocence” and “death ineligibility” cases have largely been created *by* Congress, and given Congress’s increasingly active role as of late *vis-à-vis* the habeas jurisdiction of the federal courts, it does not seem beyond the pale that Congress might respond to increasing use of the backdoor provided by original habeas in a comparable manner.

Of course, that Congress might more directly seek to circumscribe the Supreme Court’s original habeas jurisdiction does not mean that Congress *can* completely divest the Court of such power. Since Henry Hart’s famous dialectic,²⁸ if not before, there has been strong support for Justice Souter’s suggestion in *Felker* that “if it should later turn out that statutory avenues other than certiorari for reviewing [lower court habeas decisions] were closed, the question whether the statute exceeded Congress’s Exceptions Clause power would be open.”²⁹ And even if the Exceptions Clause does not meaningfully constrain Congress’s power over the Supreme Court’s power to issue original writs of habeas corpus as a function of its appellate ju-

²⁶ 8 U.S.C. § 1252(a)(5) (2006).

²⁷ See Gerald L. Neuman, On the Adequacy of Direct Review After the REAL ID Act of 2005, 51 N.Y.L. Sch. L. Rev. 133 (2006–2007) (summarizing the potential constitutional issues that REAL ID raises); see also Jennifer Norako, Comment, Accuracy or Fairness?: The Meaning of Habeas Corpus After *Boumediene v. Bush* and Its Implications on Alien Removal Orders, 58 Am. U. L. Rev. 1611, 1640–47 (2009) (considering the adequacy of direct review under REAL ID after *Boumediene*).

²⁸ Henry M. Hart, Jr., The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic, 66 Harv. L. Rev. 1362, 1364–65 (1953).

²⁹ *Felker v. Turpin*, 518 U.S. 651, 667 & n.2 (1996) (Souter, J., concurring).

risdiction, *Boumediene v. Bush* establishes that the Suspension Clause mandates the availability of at least *some* judicial forum for consideration of those detention claims protected by the “Great Writ.”³⁰ In habeas cases, at least, the Suspension Clause might thereby protect the Supreme Court’s jurisdiction in ways that the Exceptions Clause does not.

But whether statutes directly attacking the Supreme Court’s original habeas jurisdiction withstand judicial scrutiny or fail it, the damage would be done, for it should go without saying that the utility of original habeas as a safety valve would be undermined dramatically. It might seem paradoxical that a remedy is only as useful as it is obscure, but the historical utility of original habeas has not been in allowing the Court to provide relief in individual cases as much as in allowing the Court to sidestep some of the thorniest questions about Congress’s power over the jurisdiction of the federal courts. The more that its emergence from near desuetude would draw attention to it as a relevant factor when devising new legislative or judicial remedies or constraints, the more that its use might only *provoke* the very questions it has historically allowed the courts to sidestep.

* * *

It is more than understandable that, notwithstanding the anticlimactic outcome, the Supreme Court’s odd maneuvering in the Troy Davis case has prompted scholars to reconsider whether the Court might be on the cusp of reinvigorating the most “exotic” form of its appellate jurisdiction. And we would all do well to take Professor Kovarsky’s analysis of the potential utility of original habeas to heart. But if original habeas becomes the standard remedy in “crime innocence” and “death ineligibility” cases, it will thereby become just another remedy, subject to the same shortcomings that have been well documented for the other judicial remedies available to those who would challenge their detention. More than just mitigating its interest as a source of academic study, such use would subvert the important structural purpose that, through careful administration, original habeas has historically come to play—not so much

³⁰ See *Boumediene v. Bush*, 553 U.S. 723, 766–71 (2008).

as a means of protecting detainees but as a way for the Supreme Court to protect its own authority.