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AN APPEAL BY ANY OTHER NAME: CONGRESS'S EMPTY VICTORY OVER HABEAS RIGHTS—*Felker v. Turpin*, 116 S. Ct. 2333 (1996)

I. Introduction: Jurisdiction Stripping, Past and Present

At two different moments in American history, Congress acted to limit the capacity of society's most hated criminals to waste time and public resources arguing for their rights in the federal courts. In 1867, the hated criminals were traitorous Confederates who had shed the blood of Union soldiers and the Congress consisted of a veto-proof majority of Radical Republicans representing the victorious Union side.¹ By stripping the Supreme Court's jurisdiction to hear appeals of circuit court habeas denials, Congress circumscribed the Confederates' rights to challenge their convictions via the writ of habeas corpus.²

In April, Congress passed Title I of the Antiterrorism and Effective Death Penalty Act of 1996,³ ("the Act"), which limited most convicts to one federal habeas petition⁴ and eliminated the Supreme Court's jurisdiction to review federal circuit court denials of second habeas petitions.⁵ In the words of President Clinton, the law sought to ensure that "[f]rom now on criminals sentenced to death for their vicious crimes will no longer be able to use endless appeals to delay their sentences."⁶ In 1996, the hated criminals whose rights the politicians refuse to countenance are the violent murderers, terrorists, and drug dealers who inspire fear and hatred in suburban voters whose status as "swing voters" in the modern electoral calculus⁷ invites tough-on-crime posturing from both political

¹ See, e.g., ALLAN NEVINS ET AL., A POCKET HISTORY OF THE UNITED STATES 246–55 (9th ed. 1992). Nevins notes that "after the secession of the southern states there was no longer any effective opposition in the halls of Congress" to the Republican party, *id.* at 246, which had among its goals "rewarding those who had been loyal and punishing those who had been disloyal," *id.* at 252.

² The Court discussed, interpreted, and ruled on the constitutionality of these congressional actions in a series of cases during the late Reconstruction period. See *Ex parte McCordle*, 74 U.S. 506 (1869) (upholding repeal of Court's authority to review circuit court habeas denials); *Ex parte Yerger*, 75 U.S. (8 Wall.) 85 (1868) (holding that Congress could not eliminate Court authority to entertain original habeas petitions). See generally *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872) (addressing appellate jurisdiction in a presidential pardon case).

³ Pub. L. 104-132, 110 Stat. 1214, 1217–26 (codified in scattered sections of 28 U.S.C. and 21 U.S.C.) (1996).

⁴ See 28 U.S.C. § 2244(a)–(b) (1996).

⁵ See *id.* § 2244(b)(3).

⁶ Remarks by the President at Signing of Antiterrorism Bill, M2 Presswire, Apr. 29, 1996, available in 1996 WL 7897846 [hereinafter Remarks].

⁷ See, e.g., Harry A. Chernoff et al., *The Politics of Crime*, 33 HARV. J. ON LEGIS. 527, 537 (1996) (noting that campaign attacks against heinous crimes, such as the Bush campaign's infamous 1988 Willie Horton advertisement, "relayed powerfully the suburban swing-voter's worst nightmare").

parties.⁸ As one House of Representatives aide explained, "The Democrats in the center are trying to prove they're as tough on crime as the Republicans. People think that we need to start frying people."⁹

Between 1867 and 1996, legal scholars built a small cottage industry studying the interesting constitutional quirk that the Reconstruction-era jurisdiction-stripping cases illuminated: one critical function of the federal judiciary is to protect individual rights against legislative infringement; but the Constitution's Exceptions Clause grants a congressional majority the power to deny the Supreme Court jurisdiction to hear a case.¹⁰ How can the Court protect the minority's voice against the same government whose legislature, by majority vote, can silence it? The key

⁸ For Democratic posturing, see, for example, *Remarks, supra* note 6. For Republican posturing, see, for example, Orrin G. Hatch, *Rule of Law: Is Clinton Tough on Crime? Just Look at His Judges*, WALL ST. J., May 1, 1996, at A15, arguing that Clinton-appointed judges "have sympathized with criminal defendants . . . [while] the Republicans . . . have worked hard literally for decades to end the abuse of the writ of habeas corpus by death row murderers."

⁹ Jane Hunter, *United States: Legislation Targets Death Row, Mideast Groups*, INT'L PRESS SERV., Apr. 25, 1996, available in 1996 WL 9810224 (quoting an anonymous House aide).

For criticism of this bipartisan hostility toward convicts' appeals, see, for example, Jeffrey Rosen, *Shell Game*, NEW REPUBLIC, May 13, 1996, at 6, claiming that the Clinton-Hatch Bill can be seen as "radically restricting federal courts' ability to review violations of federal constitutional law"; Charles Levendosky, *Reforming Away a Fundamental Right*, SAN DIEGO UNION-TRIB., Apr. 24, 1996, at B7, asserting that "[t]he Great Writ has been a weapon against unfair trials [and that] Congress ignores that in its panic to appear tough on crime"; *So Long, Civil Liberties*, PROGRESSIVE, May 1, 1996, at 8, stating that "President Clinton is trying to fuel his reelection campaign by setting fire to the Bill of Rights."

¹⁰ In addition to its original jurisdiction, "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, § 2, cl. 2 (emphasis added). For arguments that Congress's Exceptions Clause power is plenary, see, for example, Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895 (1984); 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).

For a variety of arguments that Congress's Exceptions Clause power is limited in some way, see, for example, Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205 (1985); Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817 (1994); William S. Dodge, *Note, Congressional Control of Supreme Court Appellate Jurisdiction: Why the Original Jurisdiction Clause Suggests an "Essential Role"*, 100 YALE L.J. 1013 (1991); Gunther, *supra*; 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); Leonard G. Ratner, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157 (1960); Redish, *supra*; Lawrence Gene Sager, *Supreme Court, 1980 Term—Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of Federal Courts*, 95 HARV. L. REV. 17 (1981); Laurence H. Tribe, *Jurisdictional Gerrymandering: Zoning Disfavored Rights Out of the Federal Courts*, 16 HARV. C.R.-C.L. L. REV. 129 (1981).

For an elaboration of the various proposed limits on Congress's Exceptions Clause power, see, *infra* Parts IV.B. and V.

question the theorists addressed was the extent of Congress's Exceptions Clause power to circumscribe the Court's appellate jurisdiction. Is that power plenary or limited? If it is limited, what is it that Congress cannot do?

Politically motivated jurisdiction-stripping proposals "have surfaced in virtually every period of controversial federal court decisions."¹¹ "It is an old story: the courts get in the way and make the politicians angry."¹² Since the Civil War, though, the only two such proposals that have become law were the 1867 and 1996 repeals of Supreme Court jurisdiction over appeals from lower court denials of habeas petitions. The fact that these two proposals became law may, in part, be due to the fact that they did not concern "areas where a lot of powerful people were arrayed on both sides," but instead "target[ed] immigrants, prisoners, and the poor—people who don't vote or can't vote."¹³

Because the vast majority of jurisdiction-stripping efforts has failed, the case law on the subject, while containing intriguing dicta, is sparse.¹⁴ In many fields of law, the theorists have not had to struggle to generate new ideas to reflect the latest case law. But in jurisdiction-stripping, the small band of theorists, like the mysterious family in the Luigi Pirandello

¹¹ Gunther, *supra* note 10, at 896. Over the past two decades, Congress has most frequently seen jurisdiction-stripping proposals after the failure of proposed constitutional amendments to repeal the substance of Supreme Court decisions. From 1981 to 1982 alone, thirty jurisdiction-stripping bills were introduced in Congress, most issuing due to dissatisfaction with Court decisions on the controversial "social issues" of school prayer, abortion, and busing. *Id.* at 895–96.

In 1984, Senator Jesse Helms responded to the failure of a school prayer amendment by suggesting a repeal of federal court jurisdiction over prayer cases as a "way for Congress to provide a check on arrogant Supreme Court Justices who routinely distort the Constitution to suit their own notions of public policy." *Id.* at 922 n.1 (quoting 130 CONG. REC. S.2901 (daily ed. Mar. 20, 1984)) (statement of Senator Helms).

In the 1990s, Patrick Buchanan has consistently called for jurisdiction repeals based on the Congress's Exceptions Clause power as "an easier method of redress than amending the Constitution" when the "renegade third branch" makes a decision as bad as *Texas v. Johnson*, 491 U.S. 397 (1989), which recognized flag burning as protected expressive speech. Patrick J. Buchanan, *Flag Amendment is Our Rebellion*, HOUSTON CHRON., June 16, 1990, available in 1996 WL 28224823. Buchanan, especially in his 1996 presidential campaign, has since advocated a variety of other curbs on Court power through aggressive use of Congress's Exceptions Clause power. "In their eternal wisdom, the founding fathers left us a large club with which to smack down an arrogant Supreme Court." Patrick J. Buchanan, *Smack Down the Court* . . . , SAN DIEGO UNION-TRIB., June 24, 1989, at B10.

¹² Linda Greenhouse, *How Congress Curtailed the Courts' Jurisdiction*, N.Y. TIMES, Oct. 27, 1996, at A5.

¹³ *Id.*

¹⁴ Bits of dicta in several cases hint that, if directly pressed with the question, the Court would find limits on Congress's Exceptions Clause power. *See, e.g.*, Webster v. Doe, 486 U.S. 592 (1988) ("We emphasized . . . that where Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear.") (citation omitted) (citing *Johnson v. Robison*, 415 U.S. 361, 373–74 (1974)); *Glidden Co. v. Zdanok*, 370 U.S. 530, 606 (1962) (Douglas, J., dissenting) ("There is a serious question whether the *McCardle* case could command a majority view today.").

play *Six Characters in Search of an Author*,¹⁵ had a long and frustrating wait for a stage to give their ideas life.

Felker v. Turpin,¹⁶ the challenge to the 1996 Act's habeas restrictions, provided just such a high-drama stage. The Court, after its spring term had ended, stayed the execution of a violent repeat criminal to hold a special June hearing on the constitutional challenges to the two-month-old Act that had led to a denial of review of Felker's second federal habeas petition, which had been filed from death row and had been denied by the Eleventh Circuit Court of Appeals.¹⁷ Scholars were intrigued because *Felker* promised the first major Exceptions Clause ruling since Reconstruction.

The *Felker* opinion found the Act and its jurisdiction-stripping constitutional. This decision seems to strike a blow against the notion of an independent federal judiciary that preserves individual rights from infringement by the criminal justice system or the whims of temporary legislative majorities.¹⁸ Yet the Court gave the jurisdiction repeal a narrow construction, preserving the Court's power to review, by different procedures, any habeas claims the circuit courts deny.¹⁹ This jurisdictional "loophole" falls squarely in line not only with the Reconstruction-era Court's resolution of similar issues,²⁰ but also with the arguments of those theorists who argue that Congress's Exceptions Clause power is limited in that Congress cannot strip so much of the Court's jurisdiction as to impair its essential role of using appellate review to ensure the uniformity and supremacy of federal law.²¹

Thus, contrary to first appearances, the *Felker* opinion signaled that the Supreme Court will not easily acquiesce in congressional attempts to slash the Court's jurisdiction for political ends, even when the Court agrees with the end in question. If *Felker*'s narrow interpretation of the Act seems anticlimactic,²² it remains noteworthy precisely because it declined to reach the climax some anticipated: a finding of unrestricted plenary congressional power to circumscribe Supreme Court jurisdiction.²³

¹⁵ Luigi Pirandello, *Six Characters in Search of an Author*, in EIGHT MODERN PLAYS 210 (Anthony Caputi ed. & trans., 2d ed. 1991).

¹⁶ 116 S. Ct. 2333 (1996).

¹⁷ See *Felker v. Turpin*, 116 S. Ct. 1588 (1996) (mem.).

¹⁸ See *Felker v. Turpin*, 116 S. Ct. 2333 (1996).

¹⁹ See *id.*

²⁰ See cases cited *supra* note 2.

²¹ See Ratner, *supra* note 10, at 158.

²² See, e.g., Robert Marquand, *Court Tackles New U.S. Law Curbing Death-Row Appeals; Case May Redefine Balance of Powers Between Congress and Courts*, CHRISTIAN SCI. MONITOR, June 3, 1996, at 3, (asserting, before the *Felker* decision, that "[i]f the Court does not touch any part of Congress's death-penalty act, the *Felker* case could well be a landmark, ceding to Congress federal powers the Court has held since *habeas corpus* was enshrined in law in 1867").

²³ *Id.*

This Recent Development begins by sketching the *Felker* case's history and outcome, and then delineates the major theoretical schools on jurisdiction-stripping. The piece ultimately concludes that *Felker*'s outcome comports closely with the leading essential role theory—that Congress cannot restrict the Court's appellate jurisdiction so much as to impair its ability to use its powers of review to ensure the uniformity and supremacy of federal law. The Court's adherence to this theory maintains the uniformity of federal rights and protects the institution of judicial review against politicians' constant attempts to circumvent the Court for temporary political gains.

II. Facts and Procedural History

On April 24, 1996, Congress passed, and the President signed, the Antiterrorism and Effective Death Penalty Act of 1996. Section 106 of the Act restricts second or successive habeas petitions both substantively and procedurally. Substantively, subsections 106(b)(1) and 106(b)(2) mandate dismissal of claims already made in the first petition and only permit new claims when:

106(b)(2)(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

106(b)(2)(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.²⁴

Procedurally, subsection 106(b)(3) creates an unappealable gatekeeper for second or successive habeas petitions.²⁵ Any such petition filed with a district court is immediately transferred to a three-judge panel of the relevant court of appeals.²⁶ The appellate panel serves the gatekeeping function of deciding whether, under the new Section 106(b) criteria, the petition makes a sufficient preliminary showing to warrant return to the

²⁴ Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, 110 Stat. 1214, 1220-21 § 106 (b)(2) (1996).

²⁵ *Id.* § 106(b)(3), 110 Stat. at 1221.

²⁶ *See id.* § 106(b)(3)(B), 110 Stat. at 1221.

district court for full consideration.²⁷ If the appellate panel decides that the petition fails the 106(b) criteria, its decision to deny the petition outright is final. Under subsection 106(b)(3)(E), the appellate panel's decision to deny the petition "shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari."²⁸ It did not take long for a test case challenging the constitutionality of these subsections to percolate up from the state of Georgia.

Shortly after finishing four years in prison on a rape conviction, Ellis Wayne Felker was charged with aggravated sodomy and murder. A jury convicted Felker of murder, rape, aggravated sodomy, and false imprisonment, sentencing him to death for the murder.²⁹ The Georgia Supreme Court affirmed Felker's conviction and death sentence.³⁰ A state trial court denied his petition for collateral relief.³¹ Felker's first federal petition for a writ of habeas corpus fared no better, with the United States District Court for the Middle District of Georgia denying the petition, the Court of Appeals for the Eleventh Circuit affirming,³² and the Supreme Court denying certiorari.³³

On May 2, 1996, the beginning of the week during which Felker was to be executed, the Georgia Supreme Court denied his second state petition for collateral relief. That same day, Felker filed his second federal habeas petition with the Eleventh Circuit pursuant to the new gatekeeper procedure³⁴ in a pleading that also challenged the constitutionality of the Act.³⁵ Handing down its opinion later that day, the Eleventh Circuit denied Felker's habeas petition, finding that his two new claims did not satisfy the 106(b) standards,³⁶ as they neither relied on a "new rule of constitutional law,"³⁷ nor had a basis in facts that would disprove Felker's guilt and "could not have been discovered previously through the exercise of due diligence."³⁸ The Eleventh Circuit declined to rule on the constitutionality of the Act, finding that Felker "would not be entitled to any relief

²⁷ See *id.* § 106(b)(3)(C), 110 Stat. at 1221.

²⁸ *Id.* § 106(b)(3)(E), 110 Stat. at 1221.

²⁹ *Felker*, 116 S. Ct. at 2336.

³⁰ *Felker v. State*, 314 S.E.2d 621 (Ga. 1984).

³¹ *Felker*, 116 S. Ct. at 2336.

³² *Felker v. Turpin*, 52 F.3d 907, *extended on denial of petition for reh'g*, 62 F.3d 342 (11th Cir. 1995).

³³ *Felker*, 116 S. Ct. 956 (1996).

³⁴ *Felker v. Turpin*, 83 F.3d 1303, 1305 (11th Cir. 1996); see *supra* notes 24-27 and accompanying text.

³⁵ *Id.* at 1307.

³⁶ *Id.* at 1306-08 (stating that Felker challenged the reasonable doubt jury instruction at his trial and offered new evidence that called the testimony of a state expert witness into question).

³⁷ See Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, 110 Stat. 1214, 1221 § 106(b)(2)(B), (1996).

³⁸ *Id.*

even under pre-Act law,"³⁹ so "the Act's restrictions can have no unconstitutional effect on him."⁴⁰ Felker appealed to the Supreme Court in a pleading that again challenged the constitutionality of the Act's habeas restrictions and petitioned for a writ of habeas corpus.

III. The Supreme Court Decisions

A. *The Grant of Certiorari*

On May 3, 1996, the Court granted Felker's petition for a writ of certiorari to address the Act's interpretation and constitutionality. It also granted Felker a stay of execution pending the resolution of those issues and consideration of his habeas petition. The Court scheduled oral argument for exactly one month later, June 3, on three questions: (1) whether the Act, "in particular Section 106(b)(3)(E) . . . , is an unconstitutional restriction of the jurisdiction of this Court;" (2) whether the new provisions "apply to petitions for habeas corpus filed as original matters with this Court;" and (3) whether "application of the Act in this case is a suspension of the writ of habeas corpus in violation of Art. I, § 9, clause 2 of the Constitution."⁴¹ Justice Stevens, joined by Justices Souter, Ginsburg, and Breyer, dissented from the "expedited briefing of the important questions raised by the petition of certiorari and application for a writ of habeas corpus," arguing that "consideration of them should be undertaken with the utmost deliberation, rather than unseemly haste."⁴²

B. *The Unanimous Rehnquist Opinion*

Handing down its final opinion on June 28, 1996, a unanimous Court upheld the constitutionality of the Act while declining to apply its new restrictions to habeas petitions filed directly with the Supreme Court rather than with a district court.⁴³ Writing for the Court, Chief Justice Rehnquist recognized the jurisdiction limitation as a legitimate exercise

³⁹ *Id.* at 1313; *see also infra* note 51 and accompanying text.

⁴⁰ *Id.* at 1307.

⁴¹ *Felker v. Turpin*, 116 S. Ct. 1588 (1996) (mem.).

⁴² *Felker v. Turpin*, 116 S. Ct. 1588 (1996) (mem.) (Stevens, J. dissenting).

⁴³ The Court's appellate jurisdiction encompasses two ways to review habeas petitions. First, the Court can hear appeals from circuit court denials of habeas petitions. Second, it can issue its own writs of habeas corpus based on petitions filed originally with the Court. "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" because any habeas petition is, at root, an appeal of a conviction. *Felker v. Turpin*, 116 S. Ct. 2333, 2342 (1996) (Souter, J., concurring) (citing *Dallin H. Oaks, The "Original" Writ of Habeas Corpus in the Supreme Court*, 1962 SUP. CT. REV. 153).

of Congress's Exceptions Clause power. Yet, he construed the jurisdiction-stripping measure narrowly, thereby mitigating its impact.

The Court held that "the Act has not repealed our authority to entertain original habeas petitions" because it did not do so explicitly.⁴⁴ It cited *Ex parte Yerger*,⁴⁵ addressing a similar 1868 statutory restriction of habeas rights, to support its narrow construction of this congressional effort to repeal Supreme Court habeas jurisdiction. According to *Yerger*, a repeal of Court authority to review circuit court habeas denials does not imply a repeal of Court authority to grant its own writs of habeas corpus, even in cases where a circuit court has denied an identical habeas petition filed earlier with the district court. "Repeals by implication are not favored . . . and the continued exercise of original habeas jurisdiction [is] not 'repugnant' to a prohibition on review by appeal of circuit court habeas judgments."⁴⁶

The Court proceeded to apply the *Yerger* Court logic to the case at hand, upholding the new restrictions on habeas petitions filed with district courts while refusing to extend these limits to habeas petitions filed originally with the Supreme Court. On the procedural level, the Court reasoned that because the statute's gatekeeper provisions refer only to applications filed in the district courts, the Supreme Court could still consider original habeas petitions without first forwarding them to an appellate three-judge panel.⁴⁷ The Court paralleled this procedural maneuver on the substantive level by sidestepping the question of whether its consideration of original habeas petitions must adhere to the Act's rules for denying second habeas petitions. The Court simply stated, "Whether or not we are bound by these restrictions, they certainly inform our consideration of original habeas petitions."⁴⁸

By limiting the scope of the Act's jurisdiction scale-back, this *Yerger*-based interpretation staves off the claim that the repeal exceeded Congress's power under the Exceptions Clause. The Court's retention of the power to issue its own habeas writs enabled it to declare that "there can be no plausible argument that the Act has deprived this Court of appellate jurisdiction in violation of Article III, § 2."⁴⁹ The Exceptions Clause clearly grants Congress at least some power to limit and regulate the Court's appellate jurisdiction,⁵⁰ the retention of alternate appellate

⁴⁴ *Felker*, 116 S. Ct. at 2338.

⁴⁵ 75 U.S. (8 Wall.) 85 (1868).

⁴⁶ *Felker*, 116 S. Ct. at 2338 (citing *Yerger*, 75 U.S. at 105).

⁴⁷ See *Felker*, 116 S. Ct. at 2339 (quoting Pub. L. 104-132, § 106(b)(3)(A), 110 Stat. at 1221.)

⁴⁸ *Id.* at 2339.

⁴⁹ *Id.*

⁵⁰ See *id.* (citing *Durousseau v. United States*, 6 U.S. (1 Cranch) 307, 314 (1810), *United States v. More*, 3 U.S. (1 Cranch) 159, 172-73 (1805)).

avenues seems to ensure that Congress has not exceeded the scope of that power.

The Court also held that the restrictions on second or successive habeas petitions did not constitute an unconstitutional suspension of the writ of habeas corpus. Rather, in light of similar preexisting habeas limitations,⁵¹ the new measures are mere "added restrictions" to a "modified res judicata rule, a restraint on what is called in habeas corpus practice 'abuse of the writ.'"⁵² Habeas rights have evolved over time, both broadening in scope (covering state prisoners, for example) and narrowing in depth (denying most second petitions). According to the Court, the new restrictions are "well within the compass of this evolutionary process."⁵³

Finally, having reserved its power to do so, the Court considered *Felker*'s direct application for a writ of habeas corpus. It denied the application without discussing its merits, noting that it failed to satisfy the high hurdle that the Court sets for such applications: "To justify the granting of a writ of habeas corpus, the petitioner must show exceptional circumstances warranting the exercise of the Court's discretionary powers and must show that adequate relief cannot be obtained in any other form or from any other court. These writs are rarely granted."⁵⁴

C. The Stevens and Souter Concurrences

Justices Stevens, Souter, and Breyer, while joining the unanimous Rehnquist opinion, also joined the two concurrences penned by Justices Stevens and Souter. Both concurrences stressed that while the Court could not review the gatekeeping decisions, through a variety of alternative appellate paths, it could still review the same cases and even the standards the circuit courts used in their gatekeeping decisions. Indeed, the two concurrences differed only in emphasis, with Justice Souter more strongly suggesting that closure of those alternative paths might exceed Congress's Exceptions Clause power.⁵⁵

Justice Stevens noted that "[t]he Act does not purport to limit our jurisdiction," under other statutes, to review interlocutory orders and to take certified questions from circuit court gatekeeping decisions.⁵⁶ Nor does it purport to "limit our jurisdiction under the All Writs Act,"⁵⁷ which,

⁵¹ See *McCleskey v. Zant*, 499 U.S. 467, 494-95 (1991) (holding that a second or successive habeas petition, barring a rare showing of "fundamental miscarriage of justice . . . from a failure to entertain the claim," must include a new claim and prove both cause for not raising the claim earlier and actual prejudice from a denial of the present petition).

⁵² *Felker*, 116 S. Ct. at 2340.

⁵³ *Id.*

⁵⁴ *Felker*, 116 S. Ct. at 2340-41 (citing SUP. CT. REV. 20.4(a)).

⁵⁵ *Felker*, 116 S. Ct. at 2342 (Souter, J., concurring).

⁵⁶ *Felker*, 116 S. Ct. at 2341 (Stevens, J., concurring).

⁵⁷ *Id.*

as Justice Souter similarly explained, grants the Court "authority to issue appropriate writs in aid of another exercise of appellate jurisdiction."⁵⁸ Justice Stevens observed that in spite of the 1996 Act's explicit elimination of certiorari review of gatekeeping decisions, the retained All Writs authority ensures that those decisions actually "are not immune from direct review."⁵⁹ Moreover, given the Court's retention of authority over original habeas petitions, Stevens noted that "in the exercise of our habeas corpus jurisdiction, we may consider earlier gatekeeping orders entered by the court of appeals to inform our judgments and provide the parties with the functional equivalent of direct review."⁶⁰

Justice Souter went a bit further in stressing the importance of alternate avenues, musing that any congressional action to block them could exceed its Exceptions Clause power:

I write only to add that if it should later turn out that statutory avenues other than certiorari for reviewing a gatekeeping determination were closed, the question whether the statute exceeded Congress's Exceptions Clause power would be open. The question could arise if the Courts of Appeals adopted divergent interpretations of the gatekeeper standard.⁶¹

IV. Legal Setting: Views on the Scope of Congressional Power over Court Jurisdiction

A. Case Law

While the Court decided *Felker* against an unusually small body of precedent, the holding was fully consistent with the Reconstruction-era cases that were strongly on point. In 1867, Congress had granted the Supreme Court appellate jurisdiction over circuit court decisions denying habeas corpus. Congress retracted this grant the very next year, however, as it "fear[ed] the Court was about to invalidate the Reconstruction Acts" through this new power.⁶² Upholding Congress's repeal of jurisdiction, the *McCardle* Court, like the *Felker* Court, "carefully pointed out that the repeal did not affect its jurisdiction to issue writs of habeas corpus" filed originally with the Court.⁶³ The Court's decision to uphold was predicated on the preservation of original jurisdiction, an issue decided the year before in *Ex parte Yerger*.⁶⁴ The *Felker* Court stood firmly on *Yerger*,

⁵⁸ *Id.* at 2341 (Souter, J., concurring).

⁵⁹ *Id.* at 2341 (Stevens, J., concurring).

⁶⁰ *Id.*

⁶¹ *Felker*, 116 S. Ct. at 2342 (Souter, J., concurring).

⁶² Ratner, *supra* note 10, at 178-79.

⁶³ *Id.* at 179.

⁶⁴ 75 U.S. (8 Wall.) 85 (1869).

declaring "we declined to find a repeal . . . by implication then, [and] we decline to find a similar repeal . . . by implication now."⁶⁵

B. Theories

In contrast to the clear but dated case law, the theoretical debate on jurisdiction-stripping displays great divergence on the question of whether Congress possesses plenary or limited power to circumscribe the Court's appellate jurisdiction. As the most important Exceptions Clause power case since Reconstruction, *Felker* offers important insight into the Court's views on this question.

Prior to *Felker*, there were three major schools of thought regarding the Exceptions Clause. The first camp views Congress's authority as plenary, with no inherent limits on the constitutional grant of congressional power to determine appellate jurisdiction.⁶⁶ Because "there is simply no . . . limit on the face of the Exceptions Clause," plenary power theorists argue, any claim that jurisdiction-stripping destroys the traditional constitutional structure "confuses the familiar with the necessary, the desirable with the constitutionally mandated."⁶⁷

The second school of thought also views the Exceptions Clause as a categorical grant of plenary power, but only over Supreme Court appellate jurisdiction. In certain circumstances, these scholars conclude, some federal court must retain appellate jurisdiction. Congress, therefore, can strip Supreme Court appellate jurisdiction as long as it leaves some inferior federal court with jurisdiction to hear appeals that the Supreme Court cannot.⁶⁸

The third school of thought, maintaining that the Exceptions Clause cannot authorize exceptions that engulf the rule of judicial review, would impose a threshold limit on Congress's power. According to these *essential role* scholars, "the exceptions must not be such as will destroy the essential role of the Supreme Court in the constitutional plan."⁶⁹ Yet the scope of this essential role, and by extension the limits of congressional jurisdiction authority, is not self-evident.⁷⁰

⁶⁵ *Felker*, 116 S. Ct. at 2339.

⁶⁶ See, e.g., Redish, *supra* note 10, at 902-03.

⁶⁷ Gunther, *supra* note 10, at 903.

⁶⁸ See, e.g., Amar, *supra* note 10, at 255; Sager, *supra* note 10, at 61-68.

⁶⁹ Hart, *supra* note 10, at 1364-65; see also Ratner, *supra* note 10, at 160-61 (stating that the Court must retain sufficient appellate jurisdiction to fulfill its essential role of ensuring the uniformity and supremacy of federal law); Dodge, *supra* note 10, at 1074 (arguing that the Court must retain sufficient jurisdiction to preserve its essential role "as the most important court in the nation," which other constitutional language, such as the grant of the Court's original jurisdiction, implies).

⁷⁰ See Hart, *supra* note 10, at 1365 (advocating for the first time that the "essential role" limit on Congress's Exceptions Clause power could be "indeterminate").

While it would be difficult, and not particularly meaningful, to assess the exact level of support each theory has garnered, it is important to note that most of the recent debate has been between two particular camps. The first is the plenary power position that constitutes one extreme pole in the debate on the extent of Congress's Exceptions Clause power.⁷¹ The second appears to be Professor Leonard Ratner's specification of the essential role theory, as recognized by Ratner's critics and supporters alike.⁷²

V. Analysis: *Felker* and the Essential Role of Ensuring Federal Law Uniformity

The analysis of the *Felker* Court comports precisely with Ratner's version of essential role theory, which argues that the Court must retain sufficient jurisdiction to protect the uniformity and supremacy of federal law. The concurrences supported this notion even more explicitly, stressing that the Act is saved precisely via the Court's retained jurisdiction. Through these alternate avenues, the Court can protect the supremacy and uniformity of federal law.

According to Ratner, the main threat of congressional jurisdiction-stripping is that by eliminating decisive review of federal and constitutional law, "[i]t can reduce the supreme law of the land . . . to a hodgepodge of inconsistent decisions by making fifty state courts and eleven federal courts of appeals the final judges of the meaning and application of the Constitution, laws, and treaties of the United States."⁷³ Because of the lack of consistency across state and lower federal courts in decision making, the Supreme Court's essential appellate functions are the assurance of uniformity and the maintenance of supremacy of federal law. The court must be able to retain jurisdiction in order to secure uniformity through its resolution of inconsistent interpretations of federal law as well as to ensure supremacy by upholding the application of federal law when state laws or actions conflict with it.⁷⁴ Therefore, Ratner argues that "legislation denying the Court jurisdiction to review *any case* involving [that] subject would effectively obstruct those functions in th[e] proscribed area" and thereby exceed Congress's Exceptions Clause power.⁷⁵ He con-

⁷¹ See Gunther, *supra* note 10; Redish, *supra* note 10.

⁷² See, e.g., Caminker, *supra* note 10, at 835 (discussing Ratner's thesis with approval); Gunther, *supra* note 10, at 901-02 ("Far and away the most widely voiced modern argument for internal limitations is that the 'exceptions' power of Congress cannot be exercised in a way that would interfere with the 'essential' or 'core' functions of the Supreme Court The most insistent modern advocate of this type of limit is Leonard Ratner"); Tribe, *supra* note 10, at 135 (citing Ratner's definition of the essential role with approval).

⁷³ Ratner, *supra* note 10, at 158-59.

⁷⁴ See *id.* at 161.

⁷⁵ *Id.*

tinues by asserting, "some avenue must remain open to permit ultimate resolution by the Supreme Court of persistent conflicts" among courts interpreting federal law.⁷⁶ Evan Caminker expresses similar justifications of Supreme Court jurisdiction based on uniformity concerns. In Caminker's view, the Court must "have subject matter jurisdiction sufficiently broad to provide general leadership in defining federal law."⁷⁷

The construction *Yerger*, *McCardle*, and *Felker* limited congressional attempts to repeal Supreme Court habeas jurisdiction and fits well with the essential role notion that some avenue must remain open for the Court to ensure federal law supremacy and uniformity. Chief Justice Rehnquist's unanimous opinion stressed that the jurisdiction repeal did not exceed any possible limit on Congress's Exceptions Clause power because the Court retained authority to review original habeas petitions in the same cases where the Act had eliminated its capacity to review appellate court habeas denials.⁷⁸ Justice Stevens's concurrence noted still other appellate avenues that "provide the parties with the functional equivalent of direct review."⁷⁹ Justice Souter opined that the Court should employ these alternate avenues "if the Courts of Appeals adopted divergent interpretations of the gatekeeper standard."⁸⁰

In fact, the *Felker* concurrences may imply an even narrower interpretation of Congress's Exceptions Clause and regulations power and a broader sphere of essential Supreme Court jurisdiction than even the recent essential role advocates had envisioned. According to Ratner and Caminker, for example, the need for uniformity still permits Congress to exclude a class of cases from Court jurisdiction because the Court "need not rule in every case"⁸¹ so long as it retains "some avenue" to address "persistent conflicts."⁸² In contrast, Justice Souter's *Felker* concurrence saw a need to maintain "avenues . . . for reviewing a gatekeeping determination" in each particular case,⁸³ not just in a sufficient portion of cases to allow the Court the occasional chance to expound general principles.

In essence, under Justice Souter's view, Congress can pass *regulations* that restrict the "how" (through original habeas petitions, not review of circuit court habeas denials), but not *exceptions* that restrict the "whether" (no consideration at all of petitions the gatekeepers reject), of Supreme Court jurisdiction. By apparently interpreting exceptions to extend no further than regulations, all that the *Felker* and *McCardle* Courts permit-

⁷⁶ See *id.*

⁷⁷ Caminker, *supra* note 10, at 837.

⁷⁸ *Felker*, 116 S. Ct. at 2339.

⁷⁹ *Id.* at 2341 (Stevens, J., concurring).

⁸⁰ *Id.* at 2342 (Souter, J., concurring).

⁸¹ Caminker, *supra* note 10, at 835 n.73; see also Ratner, *supra* note 10, at 171 (regulations may "sometimes forbid a particular act").

⁸² Ratner, *supra* note 10, at 161.

⁸³ *Felker*, 116 S. Ct. at 2342 (Souter, J., concurring).

ted, in fact, were regulations, repeals that do not entirely remove any cases from Supreme Court jurisdiction. Justice Souter suggested that he would prohibit Congress from sealing off particular cases from all avenues of review. Chief Justice Rehnquist's implied possible agreement in explaining that the Act did not exceed the Exceptions Clause power because it left the Court jurisdiction to hear original habeas petitions. To the extent that the Court might have struck down a true habeas "exception," the Exceptions Clause power may be limited to neutral restrictions of jurisdiction that do not disfavor any particular right.

VI. Implications of *Felker*

In reserving its authority to hear habeas petitions as original matters, then, the Court was making more than a token defense against congressional encroachment on its turf. Indeed, the Respondent's Brief argues that such a narrow construction of the jurisdictional repeal as the one the Court in fact chose would actually "circumvent the new statutory scheme so as to nullify its provisions . . . by allowing petitioners to file original applications in this Court without first going through the authorization to file procedure."⁸⁴

Of course, while the Court found it important to preserve alternate avenues of review, those avenues have been traditionally employed only in exceptional circumstances. It is unclear whether the Court will use them more now that they are the sole means of review in certain cases. Justice Souter's allusion to divergent appellate standards hints that the Court might be most inclined to utilize an alternate avenue of habeas review where the uniformity of federal law, whether constitutional or statutory, is threatened. Yet the Supreme Court's reservation of these alternate avenues means that, regardless of how often it chooses to do so, it can review at will the same habeas petitions the Act purported to take out of its jurisdiction.

Nevertheless, even if it hears the occasional habeas appeal, the Court will not be circumventing the Act's entire habeas-restricting scheme. Both the new substantive limits on district court petitions and the mandatory gatekeeping panels serve Congress's intent to curb the number of successive writs of habeas corpus filed and help relieve overcrowded district court dockets. Indeed, the Court that has expressed outright hostility to repeat habeas petitions,⁸⁵ and arguably even general skepticism about all habeas petitions,⁸⁶ may be unlikely to use what had been exceptional

⁸⁴ Respondent's Brief at *20, *Felker* (No. 95-8836), available in 1996 WL 272387.

⁸⁵ See, e.g., *McClesky v. Zant*, 499 U.S. 467 (1991) (noting explicitly that the Court generally disfavors "endless repetitive petitions.").

⁸⁶ See, e.g., *Herrera v. Collins*, 506 U.S. 390, 439 (1993) (Blackmun, J., dissenting)

procedural devices to ensure habeas review whenever merited by an individual case. When Court reviews any successive habeas petitions, it has indicated in recent years that its motivations are likely to be systemic concerns such as federal law uniformity rather than concerns for individual justice.⁸⁷

VII. Conclusion: *Felker* as Futile Lesson in the Folly and Danger of Jurisdiction Tinkering

One clear legacy of *Felker* may be its illustration of the almost comic incoherence that results from jurisdiction-stripping efforts. Congress seized upon a constitutional loophole that apparently allowed a legislative majority to chisel away at judicial review. In response, the Court seized upon loopholes in Congress's repeal in order to prevent the erosion of judicial review. Congress reaps what it sows; loopholes beget loopholes.

While this gamesmanship among branches of the government does not inherently threaten the American legal regime, repeated and well-crafted attacks on judicial review potentially do. If Congress exercises its Exceptions Clause power to silence the Court by simple legislative majority, the Constitution ceases to restrain the political branches; its principles are then reduced from mandates to mere suggestions that politicians may ignore when a majority of them so desire. Of course, while legal scholars concerned with the constitutional implications of circumscribed judicial review will find this danger greatly disturbing, those individuals responsible for the mess will surely lose no sleep over the matter. Among the slumbering will be those politicians who are completely unconcerned with appellate jurisdiction except as a means to the end of striking a blow against the rights of those unpopular in the latest polls.

—Scott Moss*

("The only principle that would appear to reconcile [the majority's inconsistent positions] is the principle that habeas relief should be denied whenever possible.").

⁸⁷ See *McClesky v. Zant*, 499 U.S. 467 at 477 (recognizing the need for the Court to use its appellate jurisdiction to clarify the "confusion . . . on the standard for determining when a petitioner abuses the writ" with successive petitions).

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