

Washington University

Law Review Online

VOLUME 102

2024

WHAT'S LEFT OF THE SUSPENSION CLAUSE AFTER *JONES V. HENDRIX*?

I. INTRODUCTION

In 2000, Marcus DeAngelo Jones was convicted of two counts of unlawful possession of a firearm.¹ As a convicted felon, Jones was prohibited from possessing a firearm under federal law.² Yet Jones mistakenly believed that his felony convictions had been expunged and that he was able to purchase and possess a gun.³ He had cleared two background checks, one run by law enforcement.⁴ Nineteen years later, Jones was still incarcerated, serving his 327-month, or twenty-seven-year, sentence.⁵ That year the Supreme Court decided *Rehaif v. United States*, ruling that the statute Jones had been sentenced under had been widely misapplied.⁶ The fact that Jones had believed himself not to be a felon may, in fact, have made him entirely innocent. Jones now had a potentially meritorious claim that he was innocent. The catch? He had already filed a habeas petition challenging his sentence.⁷ Under 28 U.S.C. § 2255, incarcerated people can only bring second, or successive, habeas petitions in certain narrowly limited circumstances.⁸

1. Jones v. Hendrix, 599 U.S. 465, 470 (2023).

2. *Id.*

3. *FEDERAL STATUTES: 28 U.S.C. § 2255 – Collateral Review – Habeas Corpus – Jones v. Hendrix*, 137 HARV. L. REV. 370, 370–71 (2023) [hereinafter *Federal Statutes Article*].

4. *Id.* at 371.

5. *Id.*

6. 588 U.S. 225 (2019); see also *infra* Section II.C.

7. Jones v. Hendrix, 599 U.S. 465, 470 (2023); see also *infra* Section III.A.

8. 28 U.S.C. § 2255(h).

The upshot of the Court's holding in *Jones v. Hendrix* is ultimately quite simple: "federally incarcerated people who are . . . innocent . . . can be held in prison with no opportunity to petition the courts to be released."⁹ Jones will serve the remainder of his sentence for a crime he very well may not have committed. The case displays the Court's willingness to write off "the most favored class of criminal appellants: an innocent man in prison."¹⁰ It is also part of a pattern in which the Court cuts off avenues for collateral review of criminal sentences.¹¹ To cut down habeas relief, the Court has allowed the Suspension Clause to fade in significance. *Jones* completes a trend in which the Court has tied the Suspension Clause directly to its meaning at ratification, thereby robbing it of any present-day importance. *Jones* thus serves as a particularly significant example of the flaws in the Court's current approach to the Suspension Clause and habeas relief.

This case comment will proceed in four parts. In Part II, I examine the statutory, constitutional, and case law background of *Jones*. I begin with a survey of the Court's Suspension Clause jurisprudence,¹² provide an overview of the statutes at issue in *Jones*,¹³ and conclude with the Court's decision in *Rehaif*.¹⁴ In Part III, I cover Jones's case and the Court's eventual decision. In Part IV, I move to an analysis of *Jones* and the deficiencies in the Court's approach. Finally, Part V provides a conclusion to the piece.

II. BACKGROUND

A. Suspension Clause Jurisprudence

Article I, Section 9 of the Constitution of the United States mandates 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."¹⁵ This clause preserves the already existing common law writ of habeas. In

9. Press Release, ACLU, ACLU Comment on Supreme Court's Decision in *Jones v. Hendrix* (June 22, 2023, 5:00 PM), <https://www.aclu.org/press-releases/aclu-comment-on-supreme-courts-decision-in-jones-v-hendrix> [https://perma.cc/6RJ4-GF3H].

10. *Federal Statutes Article*, *supra* note 3, at 377.

11. See, e.g., *Shinn v. Martinez Ramirez*, 596 U.S. 366 (2022) (blocking habeas courts from conducting evidentiary hearings); *Herrera v. Collins*, 506 U.S. 390 (1993) (holding that claim of actual innocence based on new evidence is not sufficient ground for habeas relief); *Penry v. Lynaugh*, 492 U.S. 302, 313 (1989) (citing *Teague v. Lane*, 489 U.S. 288, 311–13 (1989)) (explaining that habeas courts should not apply or announce "new rules"), *abrogated on other grounds by Atkins v. Virginia*, 536 U.S. 304 (2002); *Harrington v. Richter*, 562 U.S. 86 (2011) (holding that AEDPA requires deferential review of state court application of federal law in habeas claims).

12. See *infra* Section II.A.

13. See *infra* Section II.B.

14. See *infra* Section II.C.

15. U.S. CONST. art. I, § 9, cl. 2.

the ensuing years, the scope and meaning of the writ expanded greatly.¹⁶ In previous cases the Court has struggled to determine the extent to which the Suspension Clause protects habeas as it has developed in the United States, or whether it merely protects the writ as it would have been understood and used when the Constitution was ratified. Over the past decades, the Court has continued to remain undecided, leaving the question for future review.

In *Felker v. Turpin*, decided in 1996, the Court dodged the question of whether the Suspension Clause protected uses of the writ pioneered after ratification.¹⁷ There, the Court was faced with a federal law “codif[ying] . . . pre-existing limits on successive petitions.”¹⁸ The Court assumed that “the Suspension Clause . . . refers to the writ as it exists today, rather than as it existed in 1789.”¹⁹ The Court then held that the challenged law constituted a permissible restraint on “abuse of the writ.”²⁰ Abuse of the writ is a “complex and evolving body of equitable principles” allowing a court to reject a habeas petition when the petitioner’s claims should have been raised in earlier proceedings.²¹ In upholding the challenged restrictions on habeas petitions, the *Felker* Court noted that the restrictions were “well within the compass of [the] evolutionary process” defining abuse of the writ.²² Thus the decision illustrated the principle that the Suspension Clause deals with habeas and restrictions on habeas as they have evolved since ratification.

In *INS v. St. Cyr*, the Court further honed its Suspension Clause analysis.²³ There the Court explicitly established that “at the absolute minimum, the Suspension Clause protects the writ ‘as it existed in 1789.’”²⁴ In *Boumediene v. Bush*, the Court took the same approach.²⁵ There, the Court noted that it had been “careful not to foreclose the possibility that the protections of the Suspension Clause have expanded along with post-1789 developments that define the present scope of the writ.”²⁶ The Court also cited *Felker*, alongside the older cases of *United States v. Hayman*²⁷ and *Swain v. Pressley*,²⁸ as supporting “the proposition that the Suspension

16. This section is concerned with the Court’s Suspension Clause jurisprudence. For more on the common law history of habeas and its American expansion, see *infra* Section IV.C.

17. 518 U.S. 651, 663–64 (1996).

18. *Id.* at 664.

19. *Id.*

20. *Id.*

21. *McCleskey v. Zant*, 499 U.S. 467, 489 (1991).

22. *Felker*, 518 U.S. at 664.

23. 533 U.S. 289 (2001).

24. *Id.* at 301 (quoting *Felker*, 518 U.S. at 663–64).

25. 553 U.S. 723, 746 (2008).

26. *Id.*

27. 342 U.S. 205 (1952).

28. 430 U.S. 372 (1977).

Clause does not resist innovation in the field of habeas corpus.”²⁹ Speaking specifically to the application of habeas to the military, the Court wrote that “accommodations can be made to reduce the burden habeas corpus proceedings will place on the military without impermissibly diluting the protections of the writ.”³⁰ Taken together, *Felker*, *St. Cyr*, and *Boumediene* establish the Court’s flexibility in dealing with the Suspension Clause. In these cases, the scope of the Suspension Clause was not tied directly to the meaning of habeas either now or in 1789. This flexibility allowed the Suspension Clause to incorporate the evolution of the writ and its restrictions.

B. Statutory Background

Jones v. Hendrix lies at the intersection of two statutory provisions. The first is 28 U.S.C. § 2241, which is known as the “general habeas corpus statute.”³¹ The statute provides “the Supreme Court, any justice thereof, the district courts and any circuit judge” the power to grant writs of habeas corpus.³² The statute has its roots in the First Judiciary Act, which initially allowed such courts to grant writs when prisoners were “in custody, under or by colour of the authority of the United States, or [were] committed for trial before some court of the same, or [were] necessary to be brought into court to testify.”³³ In 1867, the act was expanded to allow federal habeas relief in any cases in which a detention violated “the constitution, or . . . any treaty or law of the United States.”³⁴ This system of federal habeas relief created “serious administrative problems.”³⁵ Evidentiary issues arose as federal prisoners were often imprisoned far from the evidence necessary for habeas hearings.³⁶ While the evidence necessary for review would be stored with the sentencing court, the prisoners themselves were often incarcerated in prisons in other parts of the state or country. Additionally, the concentration of prisoners in certain areas left some federal courts with an inordinate number of habeas petitions.³⁷

While § 2241 continues to govern habeas relief, Congress has mandated that federal prisoners first seek postconviction relief through 28 U.S.C. § 2255.³⁸ The creation of § 2255 was an attempt to solve the administrative

29. *Boumediene*, 553 U.S. at 795.

30. *Id.*

31. *Jones v. Hendrix*, 599 U.S. 465, 469 (2023).

32. 28 U.S.C. § 2241.

33. First Judiciary Act, ch. 20, 1 Stat. 73, 82 (1789).

34. Act of Feb. 5, 1867, ch. 28, 14 Stat. 385 (1867).

35. *Jones*, 599 U.S. 465, 474 (quoting *United States v. Hayman*, 342 U.S. 205, 212 (1952)).

36. *Id.* (quoting *Hayman*, 342 U.S. at 212–13).

37. *Id.* (quoting *Hayman*, 342 U.S. at 213–14).

38. 28 U.S.C. § 2255(e).

problems inherent in § 2241.³⁹ § 2255 allows a prisoner to file a motion in the court that initially sentenced them.⁴⁰ The sentence can be challenged upon jurisdictional grounds, for being “in excess of the maximum authorized by law,” or “upon the ground that the sentence was imposed in violation of the Constitution or the laws of the United States.”⁴¹ § 2255 does include a savings clause, allowing one to file a § 2241 habeas motion if § 2255 is “inadequate or ineffective to test the legality of [the] detention.”⁴²

In 1996, Congress passed the Anti-Terrorism and Effective Death Penalty Act (AEDPA) and placed new limits on the use of § 2255.⁴³ The AEDPA bars a second or successive § 2255 motion unless a prisoner can satisfy one of two conditions. First, a motion can be filed if the movant can raise “newly discovered evidence that . . . would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty.”⁴⁴ Alternatively, a prisoner can file a new motion if their argument is based on “a new rule of constitutional law.”⁴⁵ A new interpretation of statutory law does not satisfy either requirement and therefore cannot be the basis of a second or successive § 2255 motion.⁴⁶ This raises the question of whether § 2255 is “inadequate or ineffective” for those seeking to bring a successive motion based on a new statutory interpretation. If so, one could then challenge their sentence under § 2241. If, however, § 2255 is still adequate or effective, one must then ask whether § 2255’s bar on secondary or successive motions in such cases constitutes a suspension of habeas.

C. *Rehaif v. United States*

In *Rehaif v. United States*, the Supreme Court overturned a longstanding statutory interpretation and provided thousands of people with potential claims of legal innocence.⁴⁷ The statutes at issue in *Rehaif* were 18 U.S.C. § 922 and 18 U.S.C. § 924. § 922(g) makes it a criminal offense for an

39. *Jones*, 599 U.S. at 474 (explaining that § 2241 created difficulties for prisoners incarcerated far from the “records of the sentencing court” and that § 2241 put the majority of habeas cases in a few federal courts).

40. 28 U.S.C. § 2255(a).

41. *Id.*

42. *Id.* § 2255(e).

43. *Jones*, 599 U.S. at 469; 28 U.S.C. § 2255(h).

44. 28 U.S.C. § 2255(h)(1).

45. *Id.* § 2255(h)(2).

46. *Jones*, 599 U.S. at 469–70.

47. 588 U.S. 225, 227 (2019). I use “legal innocence” to refer to appeals based on a claim that a statute has been misinterpreted or misapplied and “factual innocence” to refer to appeals based on claims that the factfinder erred in finding the defendant guilty.

individual in a covered category to possess a firearm.⁴⁸ To be subject to § 922(g), one must engage in the relevant conduct, possession of a firearm, and fall into the relevant status, being a member of one of the covered groups. Under § 924(a)(2), anyone who “knowingly violates” § 922(g) can be fined, imprisoned for no more than ten years, or both.

At issue in *Rehaif* was whether § 924(a)(2)’s requirement that a defendant “knowingly” violate § 922(g) applied to the conduct and status elements of § 922, or merely to the conduct element.⁴⁹ In other words, the question was whether one must know they have the relevant status before they can be sentenced under § 924(a)(2). Before *Rehaif*, “every single Court of Appeals to address [this] question” had held that the word “knowingly” only applied to the conduct element of § 922(g).⁵⁰

Appellant Hamid Rehaif had been sentenced under such an interpretation.⁵¹ On appeal, Rehaif sought to argue that he was not subject to §§ 922 and 924 because he did not know that he was in the United States unlawfully when he possessed a firearm.⁵² The Supreme Court agreed, holding that “knowingly” applied to both the conduct and status elements of § 922(g).⁵³ This holding gave people convicted in “thousands of cases” a new argument of legal innocence.⁵⁴

III. CASE SUMMARY

A. Facts and Procedural Posture

Marcus DeAngelo Jones is one of the thousands of people convicted under the pre-*Rehaif* interpretation of §§ 922(g) and 924(a)(2).⁵⁵ In 2000, Jones was convicted of two counts of unlawful possession of a firearm under § 922(g)(1) and sentenced to 327 months of imprisonment.⁵⁶ After an unsuccessful appeal in the Eighth Circuit,⁵⁷ Jones filed a § 2255 motion.⁵⁸ Jones successfully argued that he had received ineffective assistance of

48. The covered categories are felons, fugitives from justice, users of certain controlled substances, “mental defective[s],” undocumented immigrants, those who have been dishonorably discharged from the U.S. military, those who have renounced their U.S. citizenship, those subject to orders barring them from harassing intimate partners, and those who have been convicted of domestic violence misdemeanors. 18 U.S.C. § 922(g).

49. *Rehaif*, 588 U.S. at 227.

50. *Id.* at 238–39 (Alito, J., dissenting).

51. *Id.* at 228 (majority opinion).

52. *Id.*

53. *Id.* at 227.

54. *Id.* at 239 (Alito, J., dissenting).

55. *Jones v. Hendrix*, 599 U.S. 465, 470 (2023).

56. *Id.*

57. *United States v. Jones (Jones I)*, 266 F.3d 804 (8th Cir. 2001).

58. *Jones v. Hendrix*, 599 U.S. 465, 470 (2023).

counsel when his attorney failed to challenge the duplicative nature of Jones's indictment.⁵⁹ One of Jones's sentences was set aside, but, because his sentences had been concurrent, Jones was still required to serve the remainder of his 327-month sentence.⁶⁰

More than a decade later, Jones sought to use *Rehaif* to challenge his sentence.⁶¹ Because *Rehaif* was not new factual evidence or a new rule of constitutional law, Jones was unable to bring a second motion.⁶² Jones instead argued that § 2255 was inadequate in his case and that the savings clause therefore permitted a § 2241 habeas motion.⁶³ At this point, a majority of the federal circuits that have dealt with the issue considered § 2255 inadequate in cases where a prisoner was unable to bring a successive motion arguing legal innocence.⁶⁴ Those circuits thus allowed § 2241 motions in such situations. *Jones* was the first case to present this issue to the Eighth Circuit.⁶⁵ The Eighth Circuit sided with the Tenth and Eleventh Circuits by holding that § 2255 was not inadequate for Jones.⁶⁶ The court reasoned that § 2255 is not inadequate when “a petitioner had any opportunity to present his claim beforehand.”⁶⁷ Jones *could* have made a “*Rehaif*-type argument” earlier, on his direct appeal or initial § 2255 motion.⁶⁸ That “precedent was at that time against him” was irrelevant, as “the question is whether Jones could have raised the argument, not whether he would have succeeded.”⁶⁹ The court also reasoned that the savings clause only triggers when § 2255 is inadequate as a “remedial vehicle.”⁷⁰ Here, § 2255 was not inadequate—the law of the Eighth Circuit was.⁷¹ Finally, the court rejected Jones's argument because it would functionally remove the word “constitutional” from § 2255's provision allowing successive motions based on new *constitutional* law.⁷²

59. United States v. Jones (*Jones II*), 403 F.3d 604, 605 (8th Cir. 2005).

60. Jones v. Hendrix, 599 U.S. 465, 470 (2023); see United States v. Jones (*Jones III*), 185 F. App'x 541 (8th Cir. 2006) (rejecting Jones's request for resentencing on the remaining conviction).

61. Jones v. Hendrix, 599 U.S. 465, 470 (2023).

62. *Id.*

63. Jones v. Hendrix (*Jones IV*), 8 F.4th 683, 685 (8th Cir. 2021).

64. See, e.g., *Bourgeois v. Watson*, 977 F.3d 620, 637 (7th Cir. 2020); *Hueso v. Barnhart*, 948 F.3d 324, 332–33 (6th Cir. 2020); *Harrison v. Ollison*, 519 F.3d 952, 959 (9th Cir. 2008); *In re Smith*, 285 F.3d 6, 8 (D.C. Cir. 2002); *Jiminian v. Nash*, 245 F.3d 144, 147 (2d Cir. 2001); *Reyes-Requena v. United States*, 243 F.3d 893, 903–04 (5th Cir. 2001); *In re Jones*, 226 F.3d 328, 333–34 (4th Cir. 2000); *In re Dorsainvil*, 119 F.3d 245, 251 (3d Cir. 1997). But see *McCarthy v. Dir. of Goodwill Industries-Suncoast, Inc.*, 851 F.3d 1076, 1080 (11th Cir. 2017); *Prost v. Anderson*, 636 F.3d 578, 580 (10th Cir. 2011).

65. *Jones IV*, 8 F.4th 683, 687 (8th Cir. 2021).

66. *Id.*

67. *Id.* (quoting *Lee v. Sanders*, 943 F.3d 1145, 1147 (8th Cir. 2019)).

68. *Id.* at 687.

69. *Id.*

70. *Id.* at 688 (quoting *Prost v. Anderson*, 636 F.3d 578, 591 (10th Cir. 2011)).

71. *Id.*

72. *Id.*

Jones next argued that, by blocking him from petitioning for a writ of habeas corpus, § 2255 constituted an unconstitutional suspension of the writ.⁷³ The court reasoned that the suspension clause protects the writ “as it existed in 1789.”⁷⁴ The court then found that the “core purpose[]” of the writ was originally to “address Star Chamber shenanigans.”⁷⁵ These “shenanigans” were cases in which the English crown imprisoned people without a trial or any other judicial proceeding.⁷⁶ Thus, claims of legal innocence were not covered by the writ in 1789. As a result, the court found that § 2255 does not violate the suspension clause.⁷⁷

B. The Supreme Court’s Analysis

The Supreme Court agreed with the Eighth Circuit and held that § 2255 was not inadequate even though it blocked Jones from bringing a second motion based on a legal innocence argument.⁷⁸ In interpreting § 2255, the Court stated that “a page of history is worth a volume of logic.”⁷⁹ Because the purpose of § 2255 was to solve § 2241’s administrative difficulties, the Court found that § 2255 “was intended to afford federal prisoners a remedy identical in scope to federal habeas corpus.”⁸⁰ As a result, the savings clause is usually held to apply when it is “impossible or impracticable for a prisoner to seek relief from the sentencing court.”⁸¹ Such a situation occurs when the sentencing court is dissolved or the prisoner would be unable to be present at a hearing in the sentencing court.⁸²

The Court then turned to the AEDPA’s bar on second or successive § 2255 motions. The Court reasoned that, because § 2255 allows successive motions in limited circumstances, Congress intentionally blocked successive motions in other situations.⁸³ As one can bring a successive motion in light of a new constitutional rule, the Court found it especially easy to hold that Congress intentionally blocked successive motions based

73. *Id.* at 689.

74. *Id.*

75. *Id.* The Star Chamber was an English court active between the 15th and 17th centuries. Under the Stuarts, it became notorious for arbitrary proceedings culminating in harsh punishments for enemies of the Crown. It was ultimately abolished in 1640, just two years before the start of the English Civil War. For an examination of the mythology and reputation of the Star Chamber, see Thomas G. Barnes, *Star Chamber Mythology*, 5 AM. J. LEGAL HIST. 1 (1961).

76. See *Edwards v. Vannoy*, 593 U.S. 255, 282–95 (2021) (Gorsuch, J., concurring) (explaining the roots of habeas corpus relief).

77. *Jones IV*, 8 F.4th 683, 690 (8th Cir. 2021).

78. *Jones v. Hendrix*, 599 U.S. 465, 471 (2023).

79. *Id.* at 472 (quoting *N.Y. Tr. Co. v. Eisner*, 256 U.S. 345, 349 (1921)).

80. *Id.* at 473 (quoting *Davis v. United States*, 417 U.S. 333, 343 (1974)).

81. *Id.* at 474.

82. *Id.* at 474–75.

83. *Id.* at 477–78.

on a new statutory interpretation.⁸⁴ The goal of the statute, in essence, is to block prisoners from filing motions challenging their sentences. If the savings clause still allowed any such motions to be made through § 2241, Congress's intent would be foiled.

In its analysis, the Court rejected a series of alternative interpretations put forth by Jones.⁸⁵ Jones's first interpretation is that the § 2255 savings clause should always apply if the court applied the wrong substantive law.⁸⁶ Under such an interpretation, because the court that initially handled Jones's § 2255 motion inaccurately interpreted 18 U.S.C. § 924, Jones would be able to invoke the savings clause and proceed through § 2241. The Court rejected this interpretation because an inaccurate application of substantive law is not an inadequacy in "the § 2255 remedial vehicle" itself.⁸⁷ Next, Jones argued that the savings clause's use of the term "inadequate" should be interpreted in light of "the concept of 'inadequacy' as a term of art in traditional equity jurisprudence."⁸⁸ The Court found that this history was "irrelevant to the question presented" by the case.⁸⁹ Finally, Jones argued that § 2255 is inadequate "whenever a prisoner is presently unable to file a § 2255 motion."⁹⁰ Such an interpretation would make § 2241 available any time § 2255 blocked a second or successive motion. The Court rejected this interpretation, noting that it would foil Congress's goal of blocking such motions.⁹¹

Underlying all of Jones's statutory interpretations was the constitutional doubt canon.⁹² That canon suggests that, when faced with "competing plausible interpretations of a statutory text," the Court may "presume[e] that Congress did not intend [an] alternative which raises serious constitutional doubts."⁹³ In effect, the idea of the canon is that the Court should avoid constitutional questions when possible.⁹⁴ Here, Jones argued that the Court's interpretation of § 2255 "would violate the Suspension Clause" by "denying him any opportunity to seek postconviction relief based on *Rehaif*."⁹⁵

The Court rejected Jones's Suspension Clause argument because "it would extend the writ of habeas corpus far beyond its scope when 'the

84. *Id.* at 478.

85. The Court also rejected an alternative interpretation put forward by the Government. *See id.* at 488–90. As the Government's proposed interpretation would still have denied relief to Jones and did not raise Suspension Clause issues, it is beyond the scope of this comment.

86. *Id.* at 480.

87. *Id.* at 481 (quoting *Prost v. Anderson*, 636 F.3d 578, 590 (10th Cir. 2011)).

88. *Id.*

89. *Id.*

90. *Id.* at 482.

91. *Id.*

92. *Id.*

93. *Clark v. Martinez*, 543 U.S. 371, 381 (2005).

94. *Id.*

95. *Jones v. Hendrix*, 599 U.S. 465, 482 (2023).

Constitution was drafted and ratified.”⁹⁶ Looking to Chief Justice Marshall’s opinion in *Ex Parte Watkins*, the Court concluded that a Framing-era habeas court “had no power to ‘look beyond the judgment’ . . . for substantive errors of law – even ‘if . . . the [sentencing] court ha[d] misconstrued the law.’”⁹⁷ Habeas courts could only examine underlying facts in cases involving “commitments by justices of the peace.”⁹⁸ Such commitments were given less deference because justices lacked the general criminal jurisdiction possessed by courts of record.⁹⁹ Later in the 19th century, the Court allowed habeas courts to examine the constitutionality of the statute of conviction as an issue relating to jurisdiction, not the underlying facts.¹⁰⁰ Finally, the Court noted that it was not until 1974 that it held “for the first time that a substantive error of statutory law could be a cognizable ground for a” habeas petition.¹⁰¹

In effect, the Court framed a habeas court’s examination of substantive errors of law as a relatively recent development. Coupling this idea with the Court’s holding that the Suspension Clause protects habeas as understood at ratification, the Court was able to reject Jones’s Suspension Clause argument.

IV. ANALYSIS

A. *The Importance of Habeas*

The chief error in the Court’s decision in *Jones* lies in its unnecessary diminution of the Suspension Clause. As discussed below, habeas relief can play an integral role in protecting against unlawful or wrongful imprisonment. This was true of habeas both in the United States and in pre-revolutionary England. History is relevant both because of the Supreme Court’s focus on the historical meaning of habeas¹⁰² and because of what history can teach us about the connection, or lack thereof, between the writ and ideas of “fairness, due process, and humanitarianism.”¹⁰³ To begin with, this comment describes the function and significance of the writ in England. This comment will then cover the role played by the writ in the pre-revolutionary American colonies.

96. *Id.* at 482–83 (quoting *Dep’t of Homeland Sec. v. Thuraissigiam*, 591 U.S. 103, 107 (2020)).

97. *Id.* at 483 (quoting *Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 202, 209 (1830)).

98. *Id.*

99. *Id.* at 484.

100. *Id.* at 485 (citing *Ex parte Siebold*, 100 U.S. 371 (1880)).

101. *Id.* (citing *Davis v. United States*, 417 U.S. 333, 342–47 (1974)).

102. See *supra* Section II.A; Paul D. Halliday & G. Edward White, *The Suspension Clause: English Text, Imperial Contexts, and American Implications*, 94 VA. L. REV. 575, 580–82 (2008).

103. Halliday & White, *supra* note 102, at 581.

In England, the writ developed as a tool used by the King's Bench to supervise the detention of prisoners across the country.¹⁰⁴ As initially utilized, the King's Bench would issue the writ to a jailer or sheriff, ordering him to explain the cause of the detention.¹⁰⁵ By the seventeenth century, the King's Bench had developed the authority to require any other tribunal or court to provide "full legal accounts to justify the detention of prisoners."¹⁰⁶ This authority gave the Bench great power to determine the legality of detention. Such power was exercised according to equitable principles, turning the writ into an "embodiment of the King's mercy."¹⁰⁷ While the writ was not technically equitable, evidence suggests that it functioned in an equitable manner.¹⁰⁸

The equitable role of habeas relief underlines its significant use as a tool of justice. It was a tool for ensuring the "hidden righteousness" of the common law.¹⁰⁹ Habeas functioned akin to the writ of mandamus, described by Edward Coke as insuring that "no wrong or injury, either public or private, can be done but that it shall be (here) reformed or punished by due course of law."¹¹⁰ Habeas, a cousin to mandamus,¹¹¹ played a similar role, ensuring that the law was carried out in a just manner.¹¹² Both writs "embod[ied] the potency of a monarch whose judges employ the writ[s] to protect the liberties of the monarch's subjects."¹¹³ The writ thus protected against unlawful or illegitimate detentions ordered by actors throughout the English government.

In addition, though the writ derived at least in part from the power of the monarch, it also provided recourse against arbitrary or illegitimate detentions ordered by the monarch. The earliest attempt to use habeas in such a situation came in 1627, with *Darnel's Case*.¹¹⁴ In *Darnel's Case*,

104. See *id.* at 598–99. The Court of King's Bench, or simply the King's Bench, was an English court that primarily dealt with cases "concern[ing] the king's own interests." Frederick Bernays Wiener, *Tracing the Origins of the Court of King's Bench*, 59 ABA J. 753, 754 (1973). It grew to exercise significant "corrective and supervisory appeal" over courts in Ireland and Scotland, as well as the Court of Common Pleas. *Id.* at 756.

105. Halliday & White, *supra* note 102, at 598–99.

106. *Id.* at 599–600.

107. *Id.* at 608.

108. See *id.* at 610–11.

109. *Id.* at 609 (quoting EDWARD HAKE, *EPIEIKEIA: A DIALOGUE ON EQUITY IN THREE PARTS* 56 (D.E.C. Yale ed., Yale Univ. Press 1953)).

110. Halliday & White, *supra* note 102, at 609 (quoting *James Bagg's Case* (1615) 77 Eng. Rep. 1271, 1277–78).

111. Halliday & White, *supra* note 102, at 608 n.81 (noting that habeas and mandamus were both prerogative writs). Prerogative writs flowed from "those powers belonging uniquely to the king." *Id.* at 595.

112. *Id.* at 609.

113. *Id.* at 596.

114. Tor Ekeland, *Suspending Habeas Corpus: Article I, Section 9, Clause 2, of the United States Constitution and the War on Terror*, 74 FORDHAM L. REV. 1475, 1481 (2005).

habeas was used unsuccessfully to challenge Charles I's detention of subjects who had refused to help fund a war.¹¹⁵ Soon after, Parliament passed the Petition of Right, barring imprisonment absent the presence of express charges.¹¹⁶ The struggle over habeas continued into the 1840s, with the King ignoring habeas and Parliament passing the "ineffective" Habeas Corpus Act of 1640.¹¹⁷ Despite Parliament's failure to fully extend habeas relief as a tool against executive detention, its attempts to do so reveal a broad understanding of the significance of habeas relief as a tool against all forms of wrongful detention.

History thus reveals the significant role played by habeas relief in preventing abuses of the law. This role casts a negative light on the Supreme Court's narrowing of the Suspension Clause in cases like *Jones*. The Court is effectively making it easier for Congress (or the executive branch) to greatly diminish the scope and use of a writ that has helped protect the populace for hundreds of years. That such a decision is a mistake is further cemented by an examination of the history of colonial-era suspension of habeas relief.

The first of the habeas suspension acts was passed by Parliament in 1688.¹¹⁸ In the following century, Parliament passed a series of extremely similar suspension acts. Rather than suspending habeas relief, the acts actually expanded the power of the Privy Council to imprison those accused of treason.¹¹⁹ Each act lasted for a period between one month and one year, and provided that after the time period ran out those committed would once again have access to any laws touching on their liberty.¹²⁰ In effect, the statutes did not permanently suspend habeas for any given prisoner, as there was a clear point at which the suspension would come to an end. The suspensions were merely a "momentary diversion of law" through new channels.¹²¹

During the 1770s and 1780s, Parliament enacted suspensions of habeas targeting citizens of the American colonies.¹²² The six such acts each directly targeted Americans, allowing suspension on the grounds that it would be inconvenient to provide relief to those accused of treason in "certain of his Majesty's colonies and plantations in America."¹²³ Against this background, the Framers established the Suspension Clause in order to

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.* at 1482.

119. Halliday & White, *supra* note 102, at 618–19.

120. *Id.* at 622 (quoting 17 Geo. 2 c. 6. (Gr. Brit.)).

121. *Id.* at 623.

122. *Id.* at 644.

123. *Id.* at 645 (quoting 17 Geo. 3 c. 9. (Gr. Brit.)).

“protect what had come to be a powerful and important judicial writ from obliteration by governmental officials.”¹²⁴

Laws like AEDPA function in a radically different way than did the initial suspension acts. For a prisoner unable to file for a writ of habeas under § 2255, the denial is permanent. AEDPA will not cease to exist unless declared unconstitutional or actively overturned by Congress.¹²⁵ Already, the limitations placed by the Act have been in place for more than twenty-five years, decades longer than the restrictions in any of the original suspension acts.¹²⁶ Through a reading of the Suspension Clause supposedly tied to the extent of habeas relief in the Founding era, *Jones* actually allows habeas to be diminished to a degree unknown to the Founders. In essence, the Court’s narrow-minded historical analysis is allowing just what the evil the Suspension Clause was supposed to prevent.

B. Past Precedent

The Court’s decision here also elides its previous holdings on the Suspension Clause. Recall that the Court rejected *Jones*’s Suspension Clause argument because it would extend habeas beyond its scope at ratification.¹²⁷ In so doing, the Court cited two prior cases: *Thuraissigiam* and *Boumediene*.¹²⁸ However, in *Boumediene*, the Court explicitly refused to hold that the Suspension Clause only protected a ratification-era understanding of habeas.¹²⁹ This was, of course, the same approach the Court had taken in cases like *Felker*¹³⁰ and *St. Cyr*.¹³¹

Nor can *Thuraissigiam* justify the Court’s holding in *Jones*. It is true that *Thuraissigiam* rejected a Suspension Clause argument on the grounds that such an argument would extend the Suspension Clause beyond its 1789 meaning.¹³² But both parties had “agree[d] that ‘there [was] no reason’ to

124. *Id.* at 671.

125. See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 1214 (1996).

126. See Halliday & White, *supra* note 102, at 622 (explaining that the suspension acts lasted for, at the longest, one year).

127. See *supra* Section III.B.

128. *Jones v. Hendrix*, 599 U.S. 465, 482–83 (2023).

129. *Boumediene v. Bush*, 553 U.S. 723, 746 (2008) (“The Court has been careful not to foreclose the possibility that the protections of the Suspension Clause have expanded along with post-1789 developments that define the present scope of the writ [of habeas corpus].”); see also *supra* Section II.A.

130. *Felker v. Turpin*, 518 U.S. 651, 663–64 (1996) (“[W]e assume, for purposes of decision here, that the Suspension Clause . . . refers to the writ as it exists today, rather than as it existed in 1789.”)

131. *INS v. St. Cyr*, 533 U.S. 289, 301 (2001) (“[A]t the absolute minimum, the Suspension Clause protects the writ ‘as it existed in 1789.’” (quoting *Felker*, 518 U.S. at 663–64)).

132. *Dep’t of Homeland Sec. v. Thuraissigiam*, 591 U.S. 103, 116–17 (2020) (citing Brief for Respondent at 26 n.12, *Thuraissigiam*, 591 U.S. 103 (No. 19-161)). In *Thuraissigiam*, the petitioner argued that the writ of habeas corpus could be used “to obtain additional review of his asylum claim.” *Id.* at 107.

consider whether the clause extends any further.”¹³³ *Thuraissigiam* did not decide that the Suspension Clause only protected the ratification-era version of habeas; it instead allowed the parties to take that question out of contention. The Court’s ongoing rule that the Suspension Clause *definitely* protected habeas as practiced historically and *maybe* protected habeas as practiced now was not, or should not have been, disturbed by *Thuraissigiam*. As discussed in the preceding subsections, the Court’s focus here on a specific and historically grounded idea of what the Suspension Clause protects is deeply flawed. We can now see that the Court’s jurisprudence does not even require such a focus.

C. Another Path

Having discussed the issues with the Court’s approach to the Suspension Clause, the question remains: what should the Court have done in *Jones*? There are two chief paths the Court could have taken. The first would have been to avoid the issue altogether by adopting a broader reading of § 2255’s savings clause. If Jones could file for habeas relief under the savings clause, the threat of suspension would be avoided. The other alternative is to adopt the narrower reading of the savings clause but take a different stance on the constitutional issue. This approach would be the more radical, as it would lead to the Court striking down some portion of § 2255.

The simplest way for the Court to avoid narrowing the Suspension Clause would be to dodge the clause altogether. After all, the Suspension Clause only becomes relevant if petitioners like Jones have no recourse under either § 2255 or § 2241. That the Court’s interpretation of § 2255’s saving clause is the only reasonable interpretation is far from clear. As discussed above, prior to *Jones* a majority of the circuit courts had allowed recourse to § 2241 for those in Jones’s position.¹³⁴

To demonstrate such a reading of the savings clause I will examine the Seventh Circuit’s holding in *In re Davenport*.¹³⁵ There, the court considered the claim of Sherman Nichols, who had been convicted of the use of a firearm in the commission of a drug offense.¹³⁶ At the time of conviction, the Seventh Circuit defined use as covering “mere possession” of a firearm during the drug offense.¹³⁷ Nichols had previously filed an unsuccessful petition under § 2255, alleging that he had suffered from ineffective assistance of counsel.¹³⁸ After his petition was denied, the Supreme Court

133. *Id.* at 1689.

134. *See supra* note 64 and accompanying text.

135. 147 F.3d 605 (7th Cir. 1998), *abrogated by* Jones v. Hendrix, 599 U.S. 465 (2023).

136. *Id.* at 607.

137. *Id.* Nichols was convicted under 18 U.S.C. § 924(c).

138. *Davenport*, 147 F.3d at 607.

issued its opinion in *Bailey v. United States*, holding that the use of a firearm requires something more than mere possession.¹³⁹ The situation of Nichols was thus remarkably similar to that of Jones: both were convicted of firearm offenses, appealed unsuccessfully under § 2255, then were left to watch as the Court handed down incredibly favorable case law soon after.

The two ultimately met with entirely different outcomes. In Nichols's case, the Seventh Circuit found that § 2255 was inadequate, as Nichols had a claim that "he could at no time present in a motion under section 2255, nor earlier in his direct appeal."¹⁴⁰ The court adopted the view that § 2255 will be inadequate when "it is so configured as to deny a convicted defendant *any* opportunity for judicial rectification of so fundamental a defect in his conviction as having been imprisoned for a nonexistent offense."¹⁴¹ This holding provides a common-sense understanding of the word "inadequate." A proceeding under § 2255 is straightforwardly considered inadequate when it leaves a petitioner with "no way to compel *any* judge to listen to an argument later proved sound and . . . cognizable."¹⁴²

Justice Jackson's dissent in *Jones* raised another argument in favor of such a construction: the canon of constitutional avoidance.¹⁴³ As defined by the Court, this canon "is a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts."¹⁴⁴ In other words, when a statute can plausibly be interpreted in two different ways, the Court will choose the interpretation that does not raise a serious concern of unconstitutionality. The Court does not need to find that the disfavored interpretation would definitively *be* unconstitutional. In previous cases, the Court has invoked this canon "even when the question would have been answered by *rejecting* the constitutional claim."¹⁴⁵ In one instance, the Court invoked this canon to avoid a constitutional claim it had already rejected just six years prior.¹⁴⁶

Turning back to *Jones*, we can see that the canon of constitutional avoidance provides a strong backing to the alternative adopted in *Davenport*

139. 516 U.S. 137 (1995), *superseded by statute*, 18 U.S.C. § 924(c)(1), *as recognized in* *Welch v. United States*, 578 U.S. 120 (2016).

140. *Davenport*, 147 F.3d at 610.

141. *Id.* at 611.

142. *Id.*

143. *Jones v. Hendrix*, 599 U.S. 465, 527 (2023) (Jackson, J., dissenting).

144. *Clark v. Martinez*, 543 U.S. 371, 381 (2005).

145. Adrian Vermeule, *Saving Constructions*, 85 GEO. L.J. 1945, 1960 (1997) (discussing *Tony & Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290 (1985), and *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991)).

146. *Id.* at 1960–61 (discussing *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), and *Gregory v. Ashcroft*, 501 U.S. 452 (1991)).

and by many of the other circuit courts. As demonstrated by the circuit split over § 2255's savings clause, both interpretations of inadequacy are plausible. The question then becomes not whether the interpretation adopted in *Jones* is actually unconstitutional, but merely whether it raises a serious constitutional doubt. As discussed above, the Court's interpretation cuts off habeas relief to a degree more extensive than in the pre-Founding suspension acts. This fact raises serious concerns with the Court's current historically focused and narrow application and interpretations of the Suspension Clause. And even if we take the Court's treatment of the clause for granted, there is a real argument to be made that the Court's interpretation is violative of the Suspension Clause, as this comment will show. That such an argument could be made is more than enough to justify the invocation of the constitutional avoidance in *Jones*.¹⁴⁷

Were the Court to find that the *Davenport* construction of § 2555 was not merely wrong but implausible, it would still not be forced to cut off relief for Jones and others in his position. The Court could instead hold that (a) § 2255 does not allow recourse to § 2241 for those pursuing legal innocence claims based on novel statutory interpretations and (b) such a statute is an unconstitutional suspension of habeas relief. While I have discussed the issues inherent in the Court's recent limitation of the clause to the Framing-era use of habeas,¹⁴⁸ I will here assume that the clause does only block the suspensions of habeas as the writ was used in 1789.¹⁴⁹

As noted by Justice Jackson in her dissent, the Court's discussion of the Suspension Clause acknowledges that a petitioner in 1789 could use habeas to challenge jurisdictional errors.¹⁵⁰ And, at that time, jurisdiction had a far broader meaning than is acknowledged by the *Jones* majority.¹⁵¹ In fact, courts would be found to lack jurisdiction where someone had been "incarcerated for noncriminal behavior."¹⁵² In such a situation the writ could issue, as demonstrated in several 19th century cases. Most notably, in *Ex parte Bollman* and *Ex Parte Swartwout* the Court issued a writ of habeas

147. An additional argument in favor of invoking the canon rests on the Eighth Amendment prohibition of cruel and unusual punishment. As put by Justice Jackson, "[t]here is a nonfrivolous argument that [the Eighth Amendment] prohibits the incarceration of innocent individuals." *Jones v. Hendrix*, 599 U.S. 465, 528 (2023) (Jackson, J., dissenting) (citing *In re Davis*, 557 U.S. 952, 953 (2009) (Stevens, J., concurring)).

148. See *supra* section IV.B.

149. In light of the Court's recent emphasis of history, as emphasized in cases like *New York State Rifle & Pistol Ass'n, Inc. v. Bruen* and *Dobbs v. Jackson Women's Health Organization*, it seems a fair assumption that the Court would not abandon a historical interpretation of the savings clause despite its flaws. See *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 591 U.S. 1 (2022) and *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022).

150. *Jones v. Hendrix*, 599 U.S. at 529 (Jackson, J., dissenting).

151. *Id.* (citing Jonathan R. Siegel, *Habeas, History, and Hermeneutics*, 64 ARIZ. L. REV. 505, 524 (2022); Lee Kovarsky, *Habeas Myths, Past and Present*, 101 TEX. L. REV. ONLINE 57, 75 (2022)).

152. *Id.*

and ordered the release of prisoners because “the crime with which the prisoners [stood] charged ha[d] not been committed.”¹⁵³ The Court could have relied on this understanding of historical habeas practice to simply strike down § 2255’s limitation on successive habeas claims because it lacked a carve-out for those with new claims of legal innocence.

CONCLUSION

After the Court’s decision, Marcus DeAngelo Jones will have no choice but to serve out the remainder of his sentence. He has already spent more than two decades incarcerated. The fact that he did not commit the crime he was sentenced for will change nothing. He is far from alone, as thousands of people have been sentenced under the same statute.¹⁵⁴ We won’t ever know whether those people are guilty or innocent unless they choose *not* to challenge their sentences. In the future, any other defendant-friendly statutory reinterpretation will have the same effect. Hundreds or thousands of people will remain incarcerated, potentially not guilty but with no avenue for relief. This wrongful incarceration will be the legacy of *Jones*. The Court has gone out of its way to gut the Suspension Clause and leave the innocent without recourse.

Tom Jordan

153. 8 U.S. (4 Cranch) 75, 136 (1807).

154. *Rehaif v. United States*, 588 U.S. 225, 239 (2019) (Alito, J., dissenting).