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Petitions from the Grave: Why Federal Executions Are a Violation of the Suspension Clause

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PETITIONS FROM THE GRAVE: WHY FEDERAL EXECUTIONS ARE A VIOLATION OF THE SUSPENSION CLAUSE

Taran Wessells*

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INTRODUCTION

The principle that a wrongful conviction is worse than a wrongful acquittal dates at least to the Book of Genesis, when God agreed not to destroy the city of Sodom if as few as ten righteous people remained.¹ The same idea can be found in classical Greek and Roman writings as well.² Later, developing European legal systems incorporated the classical abhorrence for wrongful convictions into their jurisprudence.³ Eventually, the idea made its way into Blackstone's *Commentaries* in the famous quote known as Blackstone's Ratio: "[I]t is better that ten guilty persons escape, than that one innocent suffer."⁴ American jurists later imported Blackstone's Ratio, along with the rest of his *Commentaries*, embedding the idea into the Anglo-American legal system permanently.⁵

The preference for acquittals is particularly relevant to the death penalty, because death is a truly permanent sentence. In the United States, the number of death sentences exponentially increased from the time of the first colonial settlements until the United States Supreme Court's *Furman v. Georgia* decision in 1972, which struck down all death penalty statutes nationwide.⁶ Five years later, the Court reversed itself in *Gregg v. Georgia* and reinstated the death penalty nationwide.⁷ Between the *Gregg* decision and January 21, 2021, 1,532 people were executed in the United States,⁸ with the rate of new death sentences steadily declining between 1996 and 2018.⁹ Of those 1,532, the federal government executed sixteen.¹⁰ Despite the comparative infrequency of the death penalty at the federal level, it remains an available, and clearly actionable,

¹ *Genesis* 18:32 (King James); Daniel Epps, *The Consequences of Error in Criminal Justice*, 128 HARV. L. REV. 1065, 1077 (2015).

² *See* Epps, *supra* note 1, at 1077 (noting that both Aristotle and Justinian endorsed the concept).

³ *See id.* at 1077–80.

⁴ 4 WILLIAM BLACKSTONE, COMMENTARIES *358.

⁵ *See* Epps, *supra* note 1, at 1080–81.

⁶ *See* 408 U.S. 238, 239–40 (1972); *see also History of the Death Penalty*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/facts-and-research/history-of-the-death-penalty> [<https://perma.cc/SFB9-QZCC>] (last visited Mar. 15, 2021).

⁷ 428 U.S. 153, 207 (1976).

⁸ *Execution Database*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/executions/execution-database> [<https://perma.cc/NA5M-VQPS>] (last visited Mar. 15, 2021).

⁹ *History of the Death Penalty*, *supra* note 6. The rate further declined between 2018 and 2020: twenty-five executions in 2018; twenty-two executions in 2019; and seventeen executions in 2020. *Execution Database*, *supra* note 8.

¹⁰ *Execution Database*, *supra* note 8.

sentence.¹¹ Demonstrating the federal death penalty's continued potency, in July 2019, former Attorney General William Barr ordered the Federal Bureau of Prisons to schedule executions for five federal death row inmates.¹² The inmates were originally scheduled for execution between December 9, 2019 and January 15, 2020.¹³ After the U.S. District Court for the District of Columbia initially stayed federal executions on a challenge from four of these inmates,¹⁴ on July 14, 2020, the Supreme Court allowed the executions to proceed.¹⁵ All five originally scheduled inmates have since been executed.¹⁶

While death sentences have declined since 1996,¹⁷ post-conviction exonerations have risen during the same time.¹⁸ Between 1989 and January 23, 2021, 2,705 people nationwide have been exonerated after conviction, serving a combined total of 24,609 years before their release.¹⁹ These exonerations have given scholars the tools to begin empirically evaluating the accuracy of convictions in the American judicial system.²⁰ Scholars disagree on the exact conviction error rate in the United States, but no scholar suggests that convictions in the United States are infallible.²¹ Indeed,

¹¹ See John Brigham, *Unusual Punishment: The Federal Death Penalty in the United States*, 16 WASH. U. J.L. & POL'Y 195, 196–97, 212 (2004).

¹² See Press Release, U.S. Dep't of Just., Off. of Pub. Affs., Federal Government to Resume Capital Punishment After Nearly Two Decade Lapse (July 25, 2019), <https://www.justice.gov/opa/pr/federal-government-resume-capital-punishment-after-nearly-two-decade-lapse> [<https://perma.cc/Q33T-KAPQ>].

¹³ *Id.*

¹⁴ Mark Berman & Ann E. Marimow, *Trump Administration's Plans to Resume Federal Executions Debated at Appeals Court*, WASH. POST (Jan. 15, 2020, 4:40 PM), https://www.washingtonpost.com/local/legal-issues/trump-administrations-plans-to-resume-federal-executions-return-to-court/2020/01/14/205e3ff2-3326-11ea-91fd-82d4e04a3fac_story.html [<https://perma.cc/VU7L-VLVF>].

¹⁵ Hailey Fuchs, *Supreme Court, 5–4, Lifts Block on Federal Execution*, N.Y. TIMES, <https://www.nytimes.com/2020/07/13/us/politics/federal-execution.html> [<https://perma.cc/ATG8-33Y7>] (July 16, 2020).

¹⁶ *Execution Database*, *supra* note 8.

¹⁷ *History of the Death Penalty*, *supra* note 6.

¹⁸ *Exonerations in the United States*, NAT'L REGISTRY EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/Exonerations-in-the-United-States-Map.aspx> [<https://perma.cc/UMT7-B5TJ>] (last visited Mar. 15, 2021).

¹⁹ *Id.*

²⁰ See generally D. Michael Risinger, *Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate*, 97 J. CRIM. L. & CRIMINOLOGY 761 (2007); Paul G. Cassell, *Tradeoffs Between Wrongful Convictions and Wrongful Acquittals: Understanding and Avoiding the Risks*, 48 SETON HALL L. REV. 1435 (2018).

²¹ Compare Risinger, *supra* note 20, at 762 (finding a 3.3% error rate in capital convictions), with *Kansas v. Marsh*, 548 U.S. 163, 197–98 (2006) (Scalia, J., concurring) (endorsing a 0.027% capital conviction error rate calculation (quoting Joshua Marquis, Opinion, *The Innocent and the Shammed*, N.Y. TIMES (Jan. 26, 2006), <https://www.nytimes.com/2006/01/26/opinion/the-innocent-and-the-shammed.html> [<https://perma.cc/5YBA-X4GG>])).

even the Supreme Court acknowledged in *Brady v. United States* that defendants do not always plead guilty because they are actually guilty.²²

The idea that our justice system is fallible is not new and neither is the remedy for wrongful convictions.²³ The writ of habeas corpus dates to the Norman conquest of England, and by the fourteenth century it evolved into a way for courts to review wrongful convictions.²⁴ By 1789, the writ of habeas corpus was already 700 years old.²⁵ Today, the writ is generally recognized as the primary tool for the wrongfully convicted to free themselves.²⁶

This Note will address the intersection of wrongful convictions, the federal death penalty, and habeas corpus to conclude that the federal death penalty is an unconstitutional violation of the Suspension Clause of the United States Constitution.²⁷ Part I of this Note will establish that Congress may not suspend the writ of habeas corpus outside of wartime. Then, Part II will show that wrongfully convicted prisoners therefore have a constitutional right to a habeas petition if they discover new, exonerating evidence. Part III will argue that because executed prisoners cannot file a habeas petition for release, executing wrongfully convicted prisoners is an unconstitutional suspension of the writ of habeas corpus. Finally, Part IV will extend Part III to show that the government has no way to know, prior to execution, who will be wrongfully or rightfully executed and therefore the federal government may not execute any prisoners without certainly suspending habeas corpus for some prisoners. Finally, Part V will explore counterarguments to this Note's argument.

I. SUSPENSION OF THE WRIT OF HABEAS CORPUS

The Suspension Clause reads: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."²⁸ However, suspensions of the writ of habeas corpus for U.S. citizens have been rare in American history.²⁹ President Lincoln suspended habeas corpus in

²² See 397 U.S. 742, 752 (1970).

²³ WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 12 (1980).

²⁴ See *id.* at 14, 27–28.

²⁵ *Id.* at 17.

²⁶ Stephanie Roberts Hartung, *Habeas Corpus for the Innocent*, 19 U. PA. J.L. & SOC. CHANGE 1, 4 (2016).

²⁷ The scope of this Note is limited. It does not address whether the Suspension Clause should apply to the states as an element of due process under the Fourteenth Amendment to the U.S. Constitution, whether habeas corpus is a privilege of all citizens under the Privileges and Immunities Clause, or whether federal executions in the military violate the Suspension Clause. This Note will address only federal executions of private citizens and how they violate the Suspension Clause.

²⁸ U.S. CONST. art. I, § 9, cl. 2.

²⁹ See Tor Ekeland, Note, *Suspending Habeas Corpus: Article I, Section 9, Clause 2, of the United States Constitution and the War on Terror*, 74 FORDHAM L. REV. 1475, 1487 (2005).

Maryland in 1861,³⁰ President Grant suspended the writ in parts of South Carolina in 1871,³¹ the governor of the Philippines suspended the writ in two rebellious provinces in 1905,³² and the governor of Hawaii suspended the writ following the attack on Pearl Harbor in 1942.³³ This Note will assume that no rebellion or invasion has justified the suspension of habeas corpus or the execution of any specific federal prisoner.

Habeas corpus is an ancient, deeply rooted common law writ.³⁴ Some scholars date forms of habeas corpus to the Roman Empire,³⁵ but William the Conqueror's invasion of England in 1066 marks the writ's introduction to Anglo-American law.³⁶ Originally, the writ of habeas corpus was executed by royal courts to begin an action, rather than to release a prisoner.³⁷ The writ acted as a jurisdictional tool, channeling local legal proceedings into the king's courts in order to nationalize and legitimize the new Norman government.³⁸ However, over the next 300 years the writ evolved into its current form—a way for prisoners to challenge unlawful imprisonment.³⁹ By 1787, 700 years after the writ's inception, the writ of habeas corpus had firmly entrenched itself as a basic civil right of English subjects and the newly independent American citizens.⁴⁰ The right was so fundamental that it was the only personal liberty guaranteed by the Constitution prior to the Bill of Rights.⁴¹ Furthermore, the wording of the writ's guarantee in the Suspension Clause assumes that the writ was already universally available but could now only be suspended under certain conditions.⁴²

³⁰ See *Ex parte Merryman*, 17 F. Cas. 144, 148 (C.C.D. Md. 1861) (No. 9,487).

³¹ See Ulysses S. Grant, A Proclamation (Oct. 17, 1871), reprinted in 7 A COMPILATION OF MESSAGES AND PAPERS OF PRESIDENTS: 1789–1897, 136–38 (James D. Richardson ed., 1898) (“[T]herefore, I . . . do hereby declare that in my judgment the public safety especially requires that the privileges of the writ of *habeas corpus* be suspended . . . and do hereby suspend the privileges of the writ of *habeas corpus* within [nine counties] in said State of South Carolina.”).

³² *Fisher ex rel. Barcelon v. Baker*, 203 U.S. 174, 180 (1906). Due to armed insurrection in Cavite and Batangas provinces, the governor suspended habeas corpus by proclamation, then reinstated the writ approximately three months later. *Id.* at 180–81.

³³ *Duncan v. Kahanamoku*, 327 U.S. 304, 307–08 (1946) (discussing the suspension of habeas corpus in the Hawaiian territory and petitioners' resulting prosecutions by military tribunals).

³⁴ See Erwin Chemerinsky, *Thinking About Habeas Corpus*, 37 CASE W. RES. L. REV. 748, 748–49 (1987); DUKER, *supra* note 23, at 17. See generally RANDY HERTZ & JAMES S. LIEBMAN, *FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE* (7th ed. 2018).

³⁵ See David J. Bederman, *The Classical Constitution: Roman Republican Origins of the Habeas Suspension Clause*, 17 S. CAL. INTERDISC. L.J. 405, 439–40 (2008).

³⁶ See DUKER, *supra* note 23, at 14–15, 17.

³⁷ See *id.* at 15.

³⁸ See *id.* at 14–15.

³⁹ See *id.* at 27–28.

⁴⁰ See *id.* at 115.

⁴¹ See generally U.S. CONST. arts. I–VII.

⁴² See *id.* art. I, § 9, cl. 2 (The assertion that “[t]he Privilege of the Writ of Habeas Corpus

Today, the writ of habeas corpus is a remedy for unlawful imprisonment.⁴³ As a remedy for unlawful imprisonment, a petitioner must be imprisoned before asking for the writ of habeas corpus.⁴⁴ Typically, this means that the petitioner has already been convicted of a crime and is challenging the lawfulness of his conviction.⁴⁵ In 1996, the Antiterrorism and Effective Death Penalty Act (AEDPA) radically changed the procedural requirements for a habeas petition in federal courts.⁴⁶ The AEDPA narrowed the path to a successful petition, but it still left an achievable path for release if a prisoner was wrongfully convicted.⁴⁷ This Note focuses exclusively on habeas petitions as remedies for wrongful convictions of federal prisoners following discovery of new and exonerating evidence.⁴⁸ Further, the relevant question for this Note is whether federal prisoners can file a petition for habeas corpus, not whether their petition will be granted.

A. Suspending Habeas Corpus

The Suspension Clause dictates that neither Congress nor the President may suspend habeas corpus during peacetime.⁴⁹ The clause's meaning is largely self-evident with regard to the federal government—the writ must be left alone unless the country is invaded or has a rebellion.⁵⁰ Historically, such justifications for the suspension of habeas corpus are rare.⁵¹ Only the Civil War,⁵² domestic terrorism during

shall not be *suspended*” is not a positive grant of habeas corpus but a protection against its infringement. (emphasis added)).

⁴³ See, e.g., *House v. Bell*, 547 U.S. 518, 521–22 (2006) (noting that federal habeas claims can override states’ interests in criminal proceedings (citing *Schlup v. Delo*, 513 U.S. 298, 319–22 (1995))).

⁴⁴ See, e.g., 28 U.S.C. § 2255(a) (“A prisoner in [federal] custody . . . may move . . . to vacate . . . [his] sentence.”); *Lackawanna Cnty. Dist. Att’y v. Coss*, 532 U.S. 394, 401 (2001) (“The first showing a [habeas] petitioner must make is that he is ‘in custody’”); see also *Maleng v. Cook*, 490 U.S. 488, 490–92 (1989).

⁴⁵ See HERTZ & LIEBMAN, *supra* note 34, § 5.1.

⁴⁶ See Lee Kovarsky, *AEDPA’s Wrecks: Comity, Finality, and Federalism*, 82 TUL. L. REV. 443, 447–53 (2007) (discussing each of the five obstacles imposed on prisoners under the AEDPA).

⁴⁷ See *Felker v. Turpin*, 518 U.S. 651, 665 (1996) (quoting SUP. CT. R. 20.4(a)); *Bousley v. United States*, 523 U.S. 614, 623 (1998) (first quoting *Murray v. Carrier*, 477 U.S. 478, 496 (1986); and then quoting *Schlup*, 513 U.S. at 327–28).

⁴⁸ See 28 U.S.C. § 2255(a).

⁴⁹ See U.S. CONST. art. I, § 9, cl. 2; *Boumediene v. Bush*, 553 U.S. 723, 745 (2008) (“[The Suspension Clause] ensures that, except during periods of formal suspension, the Judiciary will have a time-tested device, the writ [of habeas corpus], to maintain the ‘delicate balance of governance’ that is itself the surest safeguard of liberty.” (quoting *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004) (plurality opinion))).

⁵⁰ See *Boumediene*, 553 U.S. at 745.

⁵¹ See *supra* notes 30–33 and accompanying text.

⁵² See *Ex parte Merryman*, 17 F. Cas. 144, 145–46 (C.C.D. Md. 1861) (No. 9,487).

Reconstruction,⁵³ and unrest in the then-territory of the Philippines⁵⁴ have justified the suspension of habeas corpus for “rebellion.”⁵⁵ The governor of the Hawaiian territory in 1941 remains the only authority to invoke “invasion” following the attack on Pearl Harbor.⁵⁶ In the twenty-first century, the War on Terror introduced several questions regarding the scope of who enjoys the privilege to file for habeas corpus.⁵⁷ However, no court has questioned whether federal prisoners held within U.S. territory are entitled to petition federal courts for a writ of habeas corpus.⁵⁸

One of the forms of habeas petitions is a petition for the writ following discovery of new evidence of a constitutional defect in a prisoner’s conviction or sentence.⁵⁹ This Note will focus exclusively on such federal prisoners—those held inside the United States—and their categorical right to file a habeas petition in peacetime upon discovering new evidence demonstrating their imprisonment is unlawful.

B. The Procedural Guarantee of Habeas Corpus

The writ of habeas corpus cannot be suspended by Congress or the President, except in certain times of war.⁶⁰ When and how the writ may be lawfully suspended is not a question for this Note. However, absent a valid time of war the privilege of habeas corpus may not be suspended at all.⁶¹

When Congress passed the AEDPA in 1996, prisoners peppered the new law with suits alleging that various provisions of the AEDPA were unconstitutional suspensions of habeas corpus.⁶² The suits generally alleged that the procedural hurdles enacted by the AEDPA made filing for a writ of habeas corpus so difficult that the AEDPA or one of its provisions represented a de facto suspension of the writ of habeas corpus.⁶³ Although the AEDPA survived the onslaught of challenges, the Court made clear in *Felker v. Turpin* that while Congress could regulate the procedure of

⁵³ See Grant, *supra* note 31, at 136–38.

⁵⁴ See Fisher *ex rel.* Barcelon v. Baker, 203 U.S. 174, 178–80 (1906).

⁵⁵ See *id.* at 179–80.

⁵⁶ See Duncan v. Kahanamoku, 327 U.S. 304, 307–08 (1946).

⁵⁷ See generally Hamdi v. Rumsfeld, 542 U.S. 507 (2004); Rasul v. Bush, 542 U.S. 466 (2004).

⁵⁸ Cf. Johnson v. Eisentrager, 339 U.S. 763, 782–83 (1950) (declining to extend Fifth Amendment protections to alien combatants).

⁵⁹ See, e.g., House v. Bell, 547 U.S. 518, 536–37 (2006) (citing Schlup v. Delo, 513 U.S. 298, 327 (1995)).

⁶⁰ See generally Boumediene v. Bush, 553 U.S. 723 (2008).

⁶¹ See Felker v. Turpin, 518 U.S. 651, 663–64 (1996).

⁶² See, e.g., *id.* at 656–58; Denton v. Norris, 104 F.3d 166, 167 (8th Cir. 1997); *In re Davis*, 121 F.3d 952, 953 (5th Cir. 1997), *cert. denied*, 521 U.S. 1142 (1997); Miller v. Marr, 141 F.3d 976, 977 (10th Cir. 1998), *cert. denied*, 525 U.S. 891 (1998).

⁶³ See, e.g., *Felker*, 518 U.S. at 656–58; *Denton*, 104 F.3d at 167; *Davis*, 121 F.3d at 953; *Miller*, 141 F.3d at 977.

habeas petitions, a true suspension would be unconstitutional.⁶⁴ The Court reasoned that even procedural hurdles as byzantine as those in the AEDPA could not actually suspend habeas corpus so long as the law left a hypothetically viable path to a writ of habeas corpus.⁶⁵ Only a complete severance of access would truly suspend the writ of habeas corpus.⁶⁶

The *Felker* Court's holding provides the lynchpin of this Note's argument because it guarantees procedural access to the writ of habeas corpus. If the prisoners at issue in this Note are truly severed from all habeas access, then the government violates the Suspension Clause.⁶⁷ Therefore the difficulty, unlikelihood, or rarity of habeas petitioners actually receiving a hearing on the merits of their claim is irrelevant to this Note's argument. So long as every prisoner has a hypothetical chance to file a habeas petition after finding new evidence, then these prisoners retain their habeas corpus rights.

II. WRONGFULLY CONVICTED PRISONERS CAN BE RELEASED THROUGH WRITS OF HABEAS CORPUS WHEN NEW EXONERATING EVIDENCE SHOWS ACTUAL INNOCENCE

Federal prisoners always have a path to a writ of habeas corpus because new evidence can always open the actual innocence exception to procedural bars on habeas petitions.⁶⁸ The primary purpose of habeas corpus is to right wrongful imprisonments by the government.⁶⁹ The writ of habeas corpus acknowledges the fallibility of legal systems and offers an avenue to rectify wrongful convictions as miscarriages of justice.⁷⁰

However, where convicted and sentenced prisoners petition for the writ of habeas corpus, their strategic options are severely limited. Federal prisoners writing habeas petitions have only one substantive theory of relief available.⁷¹ Generally, a federal habeas petitioner must argue that their conviction was wrongful because it was issued

⁶⁴ See 518 U.S. at 664.

⁶⁵ *Id.* at 663–64.

⁶⁶ *Cf. id.*

⁶⁷ *Cf. id.* at 654, 660, 664.

⁶⁸ *Cf. House v. Bell*, 547 U.S. 518, 522 (2006) (citing *Schlup v. Delo*, 513 U.S. 298, 319–22 (1995)).

⁶⁹ See *Preiser v. Rodriguez*, 411 U.S. 475, 484 (1973) (“[T]he essence of habeas corpus is an attack by a person in custody upon the legality of that custody . . .”).

⁷⁰ See *id.* at 484–85.

⁷¹ See 28 U.S.C. § 2255(a) (“A prisoner in [federal] custody . . . [may] claim[] the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States . . .”). Other avenues for release are for procedural errors such as where “the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law” rather than for violations of substantive rights. *Id.*

illegally, in violation of the United States Constitution.⁷² However, the Court has hinted at a phantom theory of habeas relief where a persuasive enough claim of actual innocence could be grounds for a writ of habeas corpus itself.⁷³

Even earning a hearing on the merits of one of these limited theories of relief is difficult for federal habeas petitioners.⁷⁴ A federal prisoner must first navigate AEDPA's infamous procedural maze to reach a judge considering the habeas petition itself.⁷⁵ However, a prisoner is never completely barred from filing a valid habeas petition, because the prisoner always has the ability to use the actual innocence exception.⁷⁶ As a result of the actual innocence exception, federal prisoners who maintain their innocence always retain the potential to discover new evidence sufficient to show actual innocence, and thereby they retain the potential to obtain a writ of habeas corpus as guaranteed by the Suspension Clause.⁷⁷

A. The Wrongfully Convicted Prisoner's Path to Petition for Habeas Corpus

The path to a successful petition alleging a constitutional claim is narrow but traversable. Generally, a petition for habeas corpus must include a constitutional claim,⁷⁸ including petitions involving new evidence.⁷⁹ In a possible parallel path, the Supreme Court has suggested but never directly held that habeas petitions, which do not allege a constitutional violation are justiciable in federal courts.⁸⁰

⁷² See, e.g., *Gideon v. Wainwright*, 372 U.S. 335, 337–38 (1963) (discussing petitioner Gideon's habeas corpus petition to the Florida Supreme Court arguing that he was entitled to assistance of counsel during his criminal trial).

⁷³ If the prisoner can make a truly compelling case of innocence, allowing the sentence to continue would be an unconstitutional miscarriage of justice, even absent other constitutional error. See *infra* notes 81–84, 96–97 and accompanying text.

⁷⁴ See Marvin L. Astrada, *Death, Law & Politics: The Effects of Embracing a Liberty-Restrictive vs. a Liberty-Enhancing Interpretation of Habeas Corpus*, 48 U. BALT. L. REV. 147, 158 (2019) (discussing the AEDPA's effect of "codifying the Court's restrictive interpretation of habeas since the 1970s").

⁷⁵ See *id.* at 169–72 (detailing the procedural hurdles codified by the AEDPA).

⁷⁶ See *infra* Section II.A.

⁷⁷ See *infra* Section II.A.

⁷⁸ *United States v. Addonizio*, 442 U.S. 178, 185 (1979) ("[U]nless the claim alleges a lack of jurisdiction or constitutional error, the scope of collateral attack has remained far more limited." (citing *Stone v. Powell*, 428 U.S. 465, 477 n.10 (1976))). But see *id.* ("[A]n error of law" will not support a habeas action "unless the claimed error constituted 'a fundamental defect which inherently results in a complete miscarriage of justice.'" (quoting *Hill v. United States*, 368 U.S. 424, 428 (1962))); *House v. Bell*, 547 U.S. 518, 554–55 (2006) (citing *Herrera v. Collins*, 506 U.S. 390, 417–19 (1993)) (assuming without deciding that upon a compelling enough showing of actual innocence, a writ of habeas corpus may be granted absent other error).

⁷⁹ See, e.g., *Boumediene v. Bush*, 553 U.S. 723, 789–90 (2008).

⁸⁰ See *Herrera*, 506 U.S. at 417; see also *House*, 547 U.S. at 555 (declining to resolve *Herrera*'s open question for freestanding actual innocence claims, but holding that the petitioner did not meet the necessary threshold regardless).

Wrongfully convicted prisoners who make constitutional claims based on new evidence have several possible paths to obtain a writ of habeas corpus. First, if a prisoner discovers new evidence within the AEDPA statute of limitations, the prisoner may simply make a habeas petition under that Act.⁸¹ However, prisoners' evidentiary discoveries often fall outside of the AEDPA's procedural limitations.⁸² If the AEDPA procedurally bars a petition, then prisoners are still entitled to an adjudication on the merits of their petition if the prisoner can demonstrate "actual innocence."⁸³

The actual innocence exception to procedural bars was created in the common law and reaffirmed by the Supreme Court following the AEDPA's passage because refusing to hear the petition of an actually innocent prisoner would result in a "mis-carriage of justice."⁸⁴ To demonstrate actual innocence, a prisoner "must show that it is more likely than not that no reasonable juror would have convicted [the prisoner] in the light of the new evidence."⁸⁵ In these constitutional challenges, the actual innocence exception negates procedural bars such as state rules of criminal procedure,⁸⁶ federal rules of criminal procedure,⁸⁷ and the AEDPA statute of limitations.⁸⁸ Actual innocence only guarantees a hearing on the constitutional merits, not the substantive relief of a writ of habeas corpus itself.⁸⁹

With respect to federal habeas claims specifically, the Court held in *McQuiggin v. Perkins* that the actual innocence exception can overcome a procedural default under the AEDPA's statute of limitations.⁹⁰ It also held that the exception can overcome a procedural default for failure to raise a claim on direct review in *Bousley v. United States*.⁹¹ However, the actual innocence exception still only applies to the procedural validity of a habeas petition.⁹² A court will only grant actual habeas relief if the court subsequently agrees that the prisoner's conviction was constitutionally defective.⁹³

However, the Supreme Court has hinted that actual innocence may be relevant to substantive habeas relief as well.⁹⁴ The Supreme Court has long assumed that executing

⁸¹ 28 U.S.C. § 2255(a), (f).

⁸² See, e.g., *McQuiggin v. Perkins*, 569 U.S. 383, 386–87 (2013).

⁸³ See *id.* at 387.

⁸⁴ See *id.* at 392–94, 97 (holding that both state and federal statutes of limitation are subject to the exception).

⁸⁵ *Id.* at 399 (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995)).

⁸⁶ See *House v. Bell*, 547 U.S. 518, 555 (2006).

⁸⁷ See *Bousley v. United States*, 523 U.S. 614, 622–24 (1998).

⁸⁸ See *McQuiggin*, 569 U.S. at 399.

⁸⁹ See *id.* at 399–401.

⁹⁰ *Id.* at 399.

⁹¹ See 523 U.S. at 622.

⁹² See *McQuiggin*, 569 U.S. at 399.

⁹³ See *House v. Bell*, No. 3:96-cv-883, WL 4568444, at *9 (E.D. Tenn. Dec. 20, 2007) (granting a conditional writ of habeas corpus on remand following the Supreme Court's order to hear the petition's merits despite procedural default).

⁹⁴ See *House v. Bell*, 547 U.S. 518, 554–55 (2006) (citing *Herrera v. Collins*, 506 U.S. 390, 417 (1993)).

an actually innocent person is unconstitutional.⁹⁵ In *Herrera v. Collins*, the Court assumed without deciding that if a prisoner made a “truly persuasive” showing of actual innocence, then executing the prisoner would be unconstitutional and the prisoner would be entitled to habeas relief or some state equivalent.⁹⁶ However, the Court further noted that the threshold for such a showing would be “extraordinarily high.”⁹⁷ The Court has yet to formulate a true standard for such a freestanding actual innocence claim.⁹⁸

The Court’s language on nonconstitutional habeas petitions is not definitive.⁹⁹ However, the Court’s dicta outlining a nascent doctrine surrounding such claims suggests that the Court would entertain such petitions under the federal habeas statute if the question was squarely presented to it. Therefore, executing federal prisoners even *without* a constitutional claim may be an unconstitutional suspension of habeas corpus, because those federal prisoners may have an unelucidated right to petition for release upon making a “truly persuasive” claim of actual innocence.¹⁰⁰ Given that those federal prisoners have as much hypothetical capability to discover new evidence as prisoners with constitutional claims, executing them would suspend habeas corpus for the federal prisoners without constitutional claims as well.¹⁰¹

Ultimately, however, which specific path a prisoner takes to a petition is not important. Rather, the key concern is whether the prisoner has at least one. New evidence *can* entitle a wrongfully convicted prisoner to a writ of habeas corpus, whether constitutionally based or otherwise.¹⁰² So long as the Court holds that there is a viable path for challenging a wrongful conviction using new evidence, then any wrongful federal execution will suspend the privilege of habeas corpus for the wrongfully executed prisoner because such new evidence could surface after execution.¹⁰³

B. DNA Exoneration and Its Challenges

Beginning with the first DNA exoneration in 1989,¹⁰⁴ DNA evidence has exonerated 375 prisoners through January 23, 2021.¹⁰⁵ But for the new DNA analysis

⁹⁵ See *Herrera*, 506 U.S. at 417; *House*, 547 U.S. at 554–55.

⁹⁶ 506 U.S. at 417 (“We may assume, for the sake of argument in deciding this case, that in a capital case a truly persuasive demonstration of ‘actual innocence’ made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief [for federal prisoners].”).

⁹⁷ *Id.*

⁹⁸ *Cf. id.*; *House*, 547 U.S. at 554–55.

⁹⁹ See *Herrera*, 506 U.S. at 417; *House*, 547 U.S. at 554–55.

¹⁰⁰ *Cf. Herrera*, 506 U.S. at 417; *House*, 547 U.S. at 554–55.

¹⁰¹ See *infra* Part III.

¹⁰² See *supra* notes 81–83 and accompanying text.

¹⁰³ See *infra* Part III.

¹⁰⁴ Rob Warden, *First DNA Exoneration*, BLUHM LEGAL CLINIC: CTR. ON WRONGFUL CONVICTIONS, <http://www.law.northwestern.edu/legalclinic/wrongfulconvictions/exonerations/il/gary-dotson.html> [https://perma.cc/8EF9-RKEY] (last visited Mar. 15, 2021).

¹⁰⁵ *DNA Exonerations in the United States*, INNOCENCE PROJECT, <https://www.innocenceproject.org/>

provided by nonprofit groups and some government programs, these exonerated prisoners would have languished in prison while actually innocent.¹⁰⁶ The longest-serving exoneree represented by the Innocence Project served nearly four decades in a Louisiana state prison.¹⁰⁷ For wrongfully convicted prisoners across the country, relief could take decades of waiting and searching for suitable evidence to show actual innocence.¹⁰⁸ For prisoners sentenced to death, those decades may not be available.

1. DNA Exoneration and Nonprofit Organizations

Wrongfully convicted prisoners today may benefit from the proliferation of nonprofit organizations dedicated to exonerating prisoners using DNA evidence wherever possible. These organizations include The Innocence Project and the broader Innocence Network, the Northwestern Center on Wrongful Convictions, and the Deskovic Foundation.¹⁰⁹ Despite exoneration organizations' best efforts, their work can be slow, and their clients often remain in prison for decades before the government releases them.¹¹⁰

Much of the delay is caused by a lack of surviving DNA samples from the crime scenes or other destruction of evidence.¹¹¹ The organizations are further limited by

[cencproject.org/dna-exonerations-in-the-united-states/](https://www.innocenceproject.org/dna-exonerations-in-the-united-states/) [https://perma.cc/GU9D-VRU2] (last visited Mar. 15, 2021); *see also* *Changes in DNA Exoneration Over Time*, NAT'L REGISTRY OF EXONERATIONS 2–3 (Apr. 18, 2016), http://www.law.umich.edu/special/exoneration/Documents/Changes_In_DNA_Exonerations.pdf [https://perma.cc/53E2-VTWY] (noting an additional seventy-nine exonérations as of 2016 where DNA evidence was a contributing, but not primary, factor in release).

¹⁰⁶ *E.g.*, *Malcolm Alexander*, INNOCENCE PROJECT, <https://www.innocenceproject.org/cases/malcolm-alexander/> [https://perma.cc/NVM2-NZ8L] (last visited Mar. 15, 2021) (served thirty-eight years); *Christopher Abernathy*, INNOCENCE PROJECT, <https://www.innocenceproject.org/cases/christopher-abernathy/> [https://perma.cc/BHY6-PQ6F] (last visited Mar. 15, 2021) (served twenty-eight years); *George Allen*, INNOCENCE PROJECT, <https://www.innocenceproject.org/cases/1119/> [https://perma.cc/FVB9-YAYX] (last visited Mar. 15, 2021) (served thirty years); *Randolph Arledge*, INNOCENCE PROJECT, <https://www.innocenceproject.org/cases/Randolph-arledge/> [https://perma.cc/2TGH-57F3] (last visited Mar. 15, 2021) (served twenty-nine years).

¹⁰⁷ *Malcolm Alexander*, *supra* note 106.

¹⁰⁸ *See, e.g.*, sources cited *supra* note 106.

¹⁰⁹ *About*, INNOCENCE PROJECT, <https://innocenceproject.org/about/> [https://perma.cc/TUQ2-SX7U] (last visited Mar. 15, 2021); *About Us*, INNOCENCE NETWORK, <https://innocencenetwork.org/about/> [https://perma.cc/ALP6-KH9G] (last visited Mar. 15, 2021); *About Us*, NW. CTR. ON WRONGFUL CONVICTIONS, <https://www.law.northwestern.edu/legalclinic/wrongfulconvictions/aboutus/> [https://perma.cc/565F-NDRK] (last visited Mar. 15, 2021); *About Us*, DESKOVIC FOUND., <https://www.deskovicfoundation.org/about> [https://perma.cc/73AP-XPSB] (last visited Mar. 15, 2021).

¹¹⁰ *See, e.g.*, sources cited *supra* note 106.

¹¹¹ Cynthia E. Jones, *Evidence Destroyed, Innocence Lost: The Preservation of Biological Evidence Under Innocence Protection Statutes*, 42 AM. CRIM. L. REV. 1239, 1240–41 (2005); Catherine Greene Burnett, *"If Only": Best Practices for Evidence Retention in the Wake of the DNA Revolution*, 52 S. TEX. L. REV. 335, 349–57 (2011).

frequent resistance from local law enforcement¹¹² and the stringent procedural maze created by the AEDPA.¹¹³ The organizations also lack sufficient resources to address every purported wrongful conviction in the country.¹¹⁴ Wrongfully convicted prisoners must not only wait for nonprofit organizations to litigate their cases, the prisoners must also manage to get the attention of the organizations in the first place.¹¹⁵

Despite the challenges, these nonprofits have managed to exonerate thousands of wrongfully convicted prisoners.¹¹⁶ Further, the nonprofits may be able to serve an increasing number of prisoners as new legislation begins to require criminal prosecutions to better preserve DNA evidence for later testing.¹¹⁷ Wrongfully convicted prisoners today, including those on death row, may reasonably expect that a nonprofit group will at least investigate their cases to see if the prisoners can be exonerated. However, any wrongfully convicted prisoner may have to wait years, even decades, to begin filing a petition for a writ of habeas corpus.¹¹⁸ In the interim, those whom the government wrongly sentences to death might be executed without ever engaging with an exoneration nonprofit.¹¹⁹

2. Lack of Government-Provided DNA Investigation

Wrongfully convicted prisoners must rely so heavily on nonprofit organizations to exonerate them in large part because numerous hurdles make it nearly impossible to access comparable assistance from the federal government. The Supreme Court ruled in 2009 that convicted prisoners do not have a constitutional right to post-conviction DNA testing under the due process clause of the Fourteenth Amendment.¹²⁰

¹¹² See Jennifer E. Laurin, *Remapping the Path Forward: Toward a Systemic View of Forensic Science Reform and Oversight*, 91 TEX. L. REV. 1051, 1112 (2013); see also Aviva Orenstein, *Facing the Unfaceable: Dealing with Prosecutorial Denial in Postconviction Cases of Actual Innocence*, 48 SAN DIEGO L. REV. 401, 435–37 (2011).

¹¹³ See Kovarsky, *supra* note 46, at 447–53.

¹¹⁴ For example, the California Innocence Project (CIP) “cannot free the innocent without [financial] help from the public” since it handles over 1,500 cases every year. CAL. INNOCENCE PROJECT, <https://californiainnocenceproject.org/> [<https://perma.cc/6BAD-LXZ7>] (last visited Mar. 15, 2021).

¹¹⁵ See, e.g., *How to Submit a Case*, CAL. INNOCENCE PROJECT, <https://californiainnocenceproject.org/submit-a-case/submit-a-case/> [<https://perma.cc/36JZ-YPLL>] (last visited Mar. 15, 2021).

¹¹⁶ *Exonerations in the United States*, *supra* note 18 (reporting 2,705 exonerations of wrongfully convicted prisoners between 1989 and Jan. 23, 2021); see also *Innocence by the Numbers*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/policy-issues/innocence/innocence-by-the-numbers> [<https://perma.cc/HMX2-RR2J>] (last visited Mar. 15, 2021) (reporting 174 exonerations of wrongfully death-sentenced prisoners between 1973 and Jan. 23, 2021).

¹¹⁷ See generally Krista A. Dolan, *Creating the Best Practices in DNA Preservation: Recommended Practices and Procedures*, 49 CRIM. L. BULL. 319 (2013).

¹¹⁸ See *id.* at 319–20.

¹¹⁹ See *id.*

¹²⁰ *Dist. Att’y’s Off. for the Third Jud. Dist. v. Osborne*, 557 U.S. 52, 56 (2009).

Instead, the issue has been left to Congress, which passed a law in 2004 offering DNA testing to prisoners but under extremely limited conditions.¹²¹ To obtain post-conviction DNA testing, federal prisoners must meet ten procedural conditions.

In capital cases, 18 U.S.C. § 3600 mandates that properly petitioned DNA testing be completed within sixty days of the government's response to a testing petition, and follow-up testing be completed within 120 days of the initial testing's completion.¹²² However, the second condition for testing mandates that the government only test evidence which was previously collected in relation to the investigation of the crime for which the court convicted the prisoner.¹²³ Therefore, federal prisoners are precluded from obtaining testing to support any alternate theories not initially investigated by the government, including DNA samples from new, alternate suspects.¹²⁴ Federal prisoners' limited access to DNA testing through the government cements the reality that wrongfully convicted prisoners, including death-sentenced prisoners, could have to wait decades to prove their innocence through DNA testing. They cannot rely on government support to help them build their case, nor can they rely on swift or reliable access to nonprofit organizations.¹²⁵ For those wrongfully sentenced to death, the wait for resources could stretch past their execution date.

C. Wrongful Convictions and Police Misconduct

DNA testing is not the only way that prisoners are exonerated—some prisoners are exonerated following revelations of police and prosecutor misconduct surrounding their convictions.¹²⁶ These exonerations can also take years or decades, and prisoners have even less control over investigations into government misconduct than into DNA testing.¹²⁷ Government misconduct which requires an exoneration includes failure

¹²¹ See 18 U.S.C. § 3600; see also *H.R. 5107: The Justice for All Act of 2004*, AM. CIV. LIBERTIES UNION, <https://aclu.org/other/hr-5107-justice-all-act-2004> [<https://perma.cc/E79Q-FHZ2>] (last visited Mar. 15, 2021).

¹²² See § 3600(d).

¹²³ § 3600(a)(2) (“[T]he court that entered the judgment of conviction shall order DNA testing of specific evidence if . . . [t]he specific evidence to be tested was secured in relation to the investigation or prosecution of the [claimed wrongful conviction] . . .”).

¹²⁴ See *id.* (If an alternate suspect was not investigated initially, then a new DNA sample from such an alternate suspect will not have been “secured in relation to the investigation of the [claimed wrongful conviction].”); *United States v. Adams*, No. 4:94cr4045-WS, 2010 WL 1186563, at *2 (N.D. Fla. 2010) (rejecting a prisoner’s petition to test the DNA in a rape kit for the prisoner’s semen because the rape kit was not collected by the government during its investigation or prosecution of the prisoner).

¹²⁵ See *supra* Section II.B.1.

¹²⁶ See Christopher R. Smith, *I Fought the Law and the Law Lost: The Case for Congressional Oversight over Systemic Department of Justice Discovery Abuse in Criminal Cases*, 9 CARDOZO PUB. L., POL’Y, & ETHICS J. 85, 86–96 (2010).

¹²⁷ See *id.* at 95.

to disclose exculpatory evidence,¹²⁸ manufacturing of evidence,¹²⁹ or perjury by officers at trial.¹³⁰

Wrongful convictions which stem from such misconduct cannot be proven until the misconduct is exposed, which can take years.¹³¹ Further, police misconduct will always be a part of our legal system because human institutions are always vulnerable to human imperfections. No amount of reform or oversight can completely guarantee that no person will be wrongfully convicted due to police misconduct in the future. Like in cases where the evidence against a prisoner is refuted by new DNA testing, wrongfully convicted prisoners convicted due to police misconduct may also file for a writ of habeas corpus.¹³² However, prisoners whom the government wrongfully sentences to death may be executed before the police misconduct which led to their convictions is exposed.¹³³

D. The Future of Evidence in Wrongful Convictions

Over time, new forensic techniques will likely continue to emerge which will reveal more wrongful convictions in the future.¹³⁴ A state trial court in Illinois admitted the first fingerprint evidence in 1911.¹³⁵ DNA exonerated its first defendant in 1989.¹³⁶ Today, voice¹³⁷ and facial¹³⁸ recognition software grow more sophisticated

¹²⁸ See *id.* at 87–91; *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

¹²⁹ See Smith, *supra* note 126, at 89 (describing federal prosecutors knowingly presenting false police testimony to the court).

¹³⁰ See *id.*

¹³¹ See Kenneth Williams, *The Pros and Cons of Texas's Michael Morton Act*, 60 S. TEX. L. REV. 267, 273 (2019) (discussing two cases of men who were released from prison following discovery of prosecutorial misconduct in their convictions: Michael Morton, who served twenty-five years in prison before release, and Anthony Graves, who spent twelve years on death row before release); Jerry P. Coleman & Jordan Lockey, Brady “Epidemic” Misdiagnosis: Claims of Prosecutorial Misconduct and the Sanctions to Deter It, 50 U.S.F. L. REV. 199, 208–15 (2016) (detailing, inter alia, three instances of federal prosecutorial misconduct).

¹³² See Coleman & Lockey, *supra* note 131, at 220.

¹³³ Cf. Williams, *supra* note 131, at 273.

¹³⁴ See *Forensic Science: Problems and Solutions*, INNOCENCE PROJECT, <https://innocenceproject.org/forensic-science-problems-and-solutions/> [<https://perma.cc/J7DX-NQWQ>] (last visited Mar. 15, 2021).

¹³⁵ *People v. Jennings*, 96 N.E. 1077, 1082 (Ill. 1911) (holding that fingerprints left by Jennings at the scene of the crime in wet paint were admissible evidence).

¹³⁶ Warden, *supra* note 104.

¹³⁷ See Arielle M. Rediger, *Always-Listening Technologies: Who Is Listening and What Can Be Done About It?*, 29 LOY. CONSUMER L. REV. 229, 231–41 (2017); David Talbot, *Wiping Away Your Siri “Fingerprint,”* MIT TECH. REV. (June 28, 2012), <https://www.technologyreview.com/s/428053/wiping-away-your-siri-fingerprint/> [<https://perma.cc/PR9G-2UVE>] (explaining that human voices carry unique biometric “fingerprints” which can be used to identify speakers).

¹³⁸ See Mariko Hirose, *Privacy in Public Spaces: The Reasonable Expectation of Privacy Against the Dragnet Use of Facial Recognition Technology*, 49 CONN. L. REV. 1591, 1593–95 (2017) (discussing the proliferation of facial recognition technology in law enforcement);

by the year. Computer models continue to hone forensic ballistic analysis.¹³⁹ Scientists run “body farms” designed to study human decomposition in various conditions and times.¹⁴⁰ All of these fields have the potential to create new and powerful analyses of old information in old cases.

Prisoners might be exonerated by a ballistics algorithm analyzing crime scene photographs or by ruling out a hidden background voice in a 911 call.¹⁴¹ Computer analysis of closed-circuit television footage might find a different culprit than the prisoner on death row.¹⁴² An overlooked detail from an autopsy report might prove a victim was killed hundreds of miles from the prisoner convicted of killing the victim. Science has advanced exponentially over the past century,¹⁴³ and new techniques could easily be adapted to forensic investigation. New and sophisticated investigative techniques will certainly help law enforcement, but they will also mean that prisoners claiming actual innocence will have new methods of proving their innocence.

Over the next twenty years, it is a virtual certainty that prisoners will find new techniques and technologies to prove their innocence. It is impossible to know what those techniques will be, but history insists that they will arise. After using the new techniques to prove their innocence, some prisoners will be able to file for a writ of habeas corpus and go free.¹⁴⁴ However, wrongfully convicted prisoners executed today will never be able to use the new techniques and never be able to file for a writ of habeas corpus. Instead, such executions will suspend habeas corpus for those executed prisoners who are proven innocent through new techniques, because the dead cannot file petitions.¹⁴⁵

III. WRONGFUL EXECUTION IS A SUSPENSION OF THE WRIT OF HABEAS CORPUS

The dead cannot file for a writ of habeas corpus. Most obviously, the dead cannot file a habeas petition, because they can no longer write a petition nor ask their attorney

Stephen Rushin, *The Judicial Response to Mass Police Surveillance*, 2011 U. ILL. J.L., TECH., & POL’Y 281, 287–89 (discussing emerging facial recognition techniques and applications).

¹³⁹ *Automated Firearms Ballistics Technology*, BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES (Sept. 22, 2016), <https://www.atf.gov/firearms/automated-firearms-ballistics-technology> [<https://perma.cc/R2ZU-ZAU5>] (explaining the Bureau of Alcohol, Tobacco, Firearms & Explosives’s (ATF’s) computerized ballistic forensic analysis capabilities); see Nancy Ritter, *Study Identifies Ways to Improve ATF Ballistic Evidence Program*, NAT’L INST. JUST. J., Dec. 2014, at 12, 12–18 (identifying significant “untapped potential” in the ATF’s computerized ballistic analysis capabilities).

¹⁴⁰ See Soren Blau, *Body Farms*, 13 FORENSIC SCI., MED. & PATHOLOGY 484–85 (2017).

¹⁴¹ See Talbot, *supra* note 137. See generally Ritter, *supra* note 139.

¹⁴² See Hirose, *supra* note 138, at 1594.

¹⁴³ Compare *People v. Jennings*, 96 N.E. 1077, 1082 (Ill. 1911), with Hirose, *supra* note 138, at 1593–95 (comparing the novelty of fingerprint evidence to developments in facial recognition technology).

¹⁴⁴ See *supra* Section II.A.

¹⁴⁵ See *infra* Part III.

for the same. Legally, the dead also have no standing to file—the government no longer holds the dead in custody, and no court order could reanimate them to grant release.¹⁴⁶ In wrongful convictions, though, a prisoner must be able to file a habeas petition upon showing actual innocence under the Suspension Clause.¹⁴⁷ When the wrongfully convicted are executed and later proven innocent, under the Suspension Clause they must be able to file a habeas petition, but they cannot because they were executed by the government. In such cases where the federal government directly prevents the exercise of a constitutional right, the government has violated that right.¹⁴⁸ Here, executing wrongfully convicted prisoners is a violation of the prisoners' right to a habeas petition under the Suspension Clause.¹⁴⁹

A. Suspension of Habeas Corpus by Execution

All convictions risk being wrongful, including in the federal criminal justice system.¹⁵⁰ Death-sentenced prisoners suffer such wrongful convictions along with ordinary prisoners.¹⁵¹ Therefore, some federal prisoners sentenced to death in the federal system

¹⁴⁶ See U.S. CONST. art. III, § 2; *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992) (“[O]ur cases have established that the irreducible constitutional minimum of standing . . . [requires that] it must be ‘likely,’ as opposed to merely ‘speculative,’ that the [alleged] injury will be ‘redressed by a favorable decision.’” (quoting *Simon v. E. Ky. Welfare Rts. Org.*, 426 U.S. 26, 38, 43 (1976))).

¹⁴⁷ See *supra* Part II.

¹⁴⁸ See, e.g., *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (“[T]he freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State.”); *Obergefell v. Hodges*, 135 S. Ct. 2584, 2599 (2015) (holding that same-sex couples have a constitutional right to marry without government interference); *Texas v. Johnson*, 491 U.S. 397, 416 (1989) (“[T]he government may not prohibit expression simply because it disagrees with its message . . .”); *Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm’n*, 138 S. Ct. 1719, 1723–24 (2018) (holding that religious persons may not be persecuted by a hostile government); *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008) (holding that a total ban on handguns violates the Second Amendment right to keep and bear arms); *Gideon v. Wainwright*, 372 U.S. 335, 345 (1963) (holding that Florida violated an indigent defendant’s Sixth Amendment right to counsel by refusing to appoint an attorney for him).

¹⁴⁹ See U.S. CONST. art. I, § 9, cl. 2.

¹⁵⁰ See Meghan J. Ryan, *Remedying Wrongful Execution*, 45 U. MICH. J.L. REFORM 261, 262–72 (2012). See generally SCOTT CHRISTIANSON, *INNOCENT: INSIDE WRONGFUL CONVICTION CASES* (2004); MICHAEL L. RADELET, HUGO ADAM BEDAU & CONSTANCE E. PUTNAM, *IN SPITE OF INNOCENCE: ERRONEOUS CONVICTIONS IN CAPITAL CASES* (1992).

¹⁵¹ Since 1971, 174 death row inmates have been exonerated in the United States, although none were held by the federal government. *Innocence Database*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/policy-issues/innocence-database> [<https://perma.cc/J4QL-9B6T>] (last visited Mar. 15, 2021). The lack of a federal death row exoneree does not prove that the federal government has not or will not wrongfully convict and execute a prisoner because the number of federal death row inmates is so low. *Death Row*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/death-row/overview> [<https://perma.cc/UG8W-B9LN>]

were and will be wrongfully convicted.¹⁵² Then, once a wrongfully convicted prisoner is sentenced to death, the prisoner faces the looming prospect of wrongful execution.

Wrongfully executed prisoners cannot file a habeas petition.¹⁵³ The dead lack the voice to ask an attorney to write a petition, the dexterity to author a petition on their own, and the Article III standing to be heard in federal court.¹⁵⁴ Despite having an equal right to file a habeas petition if the prisoner finds new evidence of innocence or illegal custody,¹⁵⁵ wrongfully executed prisoners are denied their right to at least file a petition. But for their death, these wrongfully executed prisoners would have been able to file a habeas petition upon discovering new evidence.¹⁵⁶ By executing a wrongfully convicted prisoner, the federal government cuts off a prisoner's ability to ever file a habeas petition after finding exonerating evidence.¹⁵⁷ When the federal government entirely removes a prisoner's ability to file for habeas corpus, then the federal government has suspended the privilege of the writ under the Suspension Clause.¹⁵⁸ Under the Suspension Clause, the government may not suspend the wrongfully convicted prisoner's privilege of habeas corpus, except "when in Cases of Rebellion or Invasion the public Safety may require it."¹⁵⁹ Therefore, executing a wrongfully convicted prisoner is unconstitutional under the Suspension Clause, absent a lawful suspension of the privilege of the writ due to an invasion or rebellion.¹⁶⁰

B. Article III Standing for Habeas Corpus and Wrongful Convictions

Critics might argue that the lack of Article III standing for the wrongfully executed actually makes the Suspension Clause a nonissue for wrongful executions rather than a violation of the Suspension Clause.¹⁶¹ Through its standing requirement,¹⁶² Article III might sever the chain of causation between a wrongful execution and the inability of the wrongfully executed prisoner to petition for habeas corpus, rather than link

(last visited Mar. 15, 2021) (reporting that as of October 1, 2020, only about two percent of death row inmates in the United States are held by the federal government).

¹⁵² See *Innocence Database*, *supra* note 151; *Death Row*, *supra* note 151.

¹⁵³ Cf. U.S. CONST. art. III, § 2; *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992) (quoting *Simon v. E. Ky. Welfare Rts. Org.*, 426 U.S. 26, 38, 43 (1976)) (requiring a complainant to show, inter alia, redressability of an injury through favorable judgment for standing purposes).

¹⁵⁴ Cf. U.S. CONST. art. III, § 2; *Lujan*, 504 U.S. at 560–61.

¹⁵⁵ See *supra* Part II.

¹⁵⁶ See *supra* Section II.A.

¹⁵⁷ Habeas corpus relief is impossible for dead persons. See *supra* notes 146–49 and accompanying text.

¹⁵⁸ See *Felker v. Turpin*, 518 U.S. 651, 664 (1996).

¹⁵⁹ U.S. CONST. art. I, § 9, cl. 2.

¹⁶⁰ See *Felker*, 518 U.S. at 663–64.

¹⁶¹ See *LN Management, LLC v. JP Morgan Chase Bank, N.A.*, 957 F.3d 943, 953 (9th Cir. 2020) (“[T]he dead lack the capacities that litigants must have to allow for a true Article III case or controversy.”).

¹⁶² See *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992).

the two.¹⁶³ Therefore, critics might argue, the dead prisoners' habeas rights are not suspended but barred by Article III.¹⁶⁴

However, the fact that wrongfully executed prisoners cannot file for habeas relief due in part to lack of standing does not mean that the government did not suspend the privilege of the writ of habeas corpus. Wrongfully executed prisoners' inadequate Article III standing does not affect the issue of whether the government suspended those prisoners' habeas corpus right, because the prisoners would only lack standing after their executions.¹⁶⁵ The government, through its direct action in ending the wrongfully convicted prisoner's life, cuts off all future access to the writ of habeas corpus.¹⁶⁶

By causing a situation where the executed prisoners have no Article III standing, the government causes the prisoners to be cut off from their right to a habeas petition.¹⁶⁷ The execution, coupled with Article III standing, would merely be the mechanism by which the government suspends habeas corpus. Regardless of the mechanism used, the government may not suspend habeas corpus at all in peacetime.¹⁶⁸ The government may not hack rights away from a person then blame its ax for the missing rights.

IV. UNCERTAINTY OF INNOCENCE REQUIRES ENDING ALL FEDERAL EXECUTIONS

Wrongfully convicted prisoners are not wrongfully convicted intentionally. At the time of their conviction, such prisoners appeared to a judge or jury to be guilty.¹⁶⁹ This Note does not address questions of the adequacy of due process when sentencing prisoners to death. This Note assumes all sentences are carried out in good faith, free of racial or gender bias. Therefore, because wrongfully convicted prisoners appear identical to rightfully convicted prisoners in all procedural aspects prior to discovering new evidence,¹⁷⁰ the government has no way of knowing whether any given execution will kill a guilty or a factually innocent person. Because the government has no way of knowing whether an executed prisoner is wrongfully convicted, the government further

¹⁶³ See *id.*

¹⁶⁴ Cf. Elizabeth Jean Barger, *Eleventh Circuit: Survey of Recent Decisions*, 24 CUMB. L. REV. 615, 622 (1994) ("The plaintiff's lack of standing precluded the court from redressing their claims of economic, environmental, and procedural damages.").

¹⁶⁵ At the time of execution, any exonerating evidence would not be present, otherwise the prisoner would have already filed for a writ of habeas corpus. Instead, new exonerating evidence surfacing after a prisoner's execution is what would enable the prisoner to file a habeas petition.

¹⁶⁶ Cf. *Felker*, 518 U.S. at 664 (holding that Congress had the authority to change the habeas procedural landscape through the AEDPA).

¹⁶⁷ See *supra* Part II.

¹⁶⁸ See U.S. CONST. art. I, § 9, cl. 2; *Boumediene v. Bush*, 553 U.S. 723, 745 (2008).

¹⁶⁹ See Jon B. Gould & Richard A. Leo, *One Hundred Years Later: Wrongful Convictions After a Century of Research*, 100 J. CRIM. L. & CRIMINOLOGY 825, 832–34 (2010) (discussing how the factually innocent were afforded all of their rights except that they were not actually guilty of the charged crime).

¹⁷⁰ See *id.*

does not know whether the prisoner will be able to later produce new, exonerating evidence for a habeas petition several years or decades after the date of execution.¹⁷¹ From the federal government's point of view, any prisoner whom the federal government would execute has the potential to have been wrongfully convicted and able to prove their innocence later on if spared from execution.¹⁷² Therefore, so long as a wrongful conviction is possible in the federal justice system, any federal execution constitutes a suspension of the privilege of the writ of habeas corpus for the executed prisoner.

A. Innocent and Guilty Death-Sentenced Prisoners Look Identical Prior to Discovery of New Evidence

By their nature, wrongful convictions are camouflaged. On paper, a wrongful conviction will look identical to a rightful one.¹⁷³ Wrongfully convicted prisoners will have been arrested, arraigned, tried, and convicted.¹⁷⁴ They will have had the same access to evidence, the same voir dire, and the same rules of evidence as a guilty prisoner.¹⁷⁵ In fact, some wrongful convictions may not even be avoidable mistakes of the judicial system. Perhaps a forensic technique did not exist when the wrongfully convicted prisoner was tried, or maybe exonerating evidence was lost.¹⁷⁶ If wrongful convictions were easy to identify, they would be far less prevalent. However, wrongful convictions do happen, and habeas corpus ensures that prisoners have an avenue to redress them.¹⁷⁷ Regardless of why a prisoner was wrongfully convicted, the prisoner will always appear as guilty as his rightfully convicted cellmates until new exonerating evidence appears.¹⁷⁸

B. Wait and See: The Only Constitutional Option

Given that the wrongfully convicted prisoner blends in perfectly with the crowd of guilty prisoners, the government cannot know at any given time who will later find new evidence sufficient to make a habeas petition.¹⁷⁹ Ordinarily, the government does not have to concern itself with who was wrongfully convicted. So long as prisoners are housed, fed, and given necessary medical attention, the government can apply a wait-and-see policy to developing cases.¹⁸⁰ That calculus changes with regard to

¹⁷¹ See *supra* Section II.A.

¹⁷² This is true regardless of any general statistics. Ninety-nine out of one hundred prisoners might be guilty, but that statistic cannot predict which prisoner is innocent, making every prisoner potentially innocent.

¹⁷³ See Gould & Leo, *supra* note 169, at 832–34.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ See *supra* Sections II.B, II.D.

¹⁷⁷ See *supra* notes 68–70 and accompanying text.

¹⁷⁸ See Gould & Leo, *supra* note 169, at 832–34.

¹⁷⁹ See *id.*

¹⁸⁰ See Project, *Nineteenth Annual Review of Criminal Procedure: United States Supreme*

executions. For prisoners on death row, the government must consider who was wrongly convicted and who is guilty, because the prisoners' execution dates render the wait-and-see method insufficient. Executions are final, and after a prisoner's death there is no telling whether he or she would have discovered new evidence to support a habeas petition.¹⁸¹

If the government cannot tell who was wrongfully convicted by simply looking at a prisoner's file, nor can they tell who will prove themselves innocent in the future, the only method of maintaining a wrongfully convicted prisoner's right to a habeas petition based on new evidence is to wait for that prisoner to develop evidence of a constitutional violation or perhaps a strong showing of actual innocence.¹⁸² The wait-and-see approach *is the only way* to avoid suspending a wrongfully convicted prisoner's habeas corpus right. Executing a wrongfully convicted prisoner *at any time* will suspend that prisoner's habeas right.¹⁸³ Therefore, if the government cannot constitutionally execute the wrongfully convicted, and cannot distinguish between the wrongfully convicted and the guilty, then the government has only one remaining option: wait and see. Any execution at all by the federal government of a federal prisoner who might be innocent is logically indistinguishable from executing a wrongfully convicted prisoner.¹⁸⁴ Executing a wrongfully convicted prisoner is a violation of the Suspension Clause.¹⁸⁵ Therefore, any federal execution is a violation of the Suspension Clause.

V. COUNTERARGUMENTS

A. Executions Are Distinct from Other Indeterminate Violations of Civil Rights Such as in Washington v. Davis

A critic might disagree with this Note by analogizing to *Washington v. Davis*.¹⁸⁶ Given this Note's reliance on the premise that the government violates the Constitution when it acts to certainly violate someone's constitutional rights or liberties but does not know whose rights are violated or exactly when,¹⁸⁷ *Davis* provides a counterpoint by noting that even racial discrimination is not constitutionally cognizable until a concrete example appears.¹⁸⁸ Therefore, the indeterminacy of the Suspension

Court and Courts of Appeals 1988–1989, 78 GEO. L.J. 1429, 1441 (1990). *See generally* Hedieh Nasheri, *A Spirit of Meanness: Courts, Prisons and Prisoners*, 27 CUMB. L. REV. 1173 (1997).

¹⁸¹ *See supra* Sections II.B, II. C (discussing the timing of new and potentially exonerating evidence).

¹⁸² *See supra* Section II.A.

¹⁸³ *See supra* Part III.

¹⁸⁴ *See supra* Section IV.A.

¹⁸⁵ *See supra* Part III.

¹⁸⁶ 426 U.S. 229 (1976).

¹⁸⁷ *See supra* Part IV.

¹⁸⁸ *Davis*, 426 U.S. at 245–48 (holding that a police academy examination was not racially

Clause violation argued by this Note would be insufficient to show an unconstitutional act by the government.¹⁸⁹

But *Davis* is not relevant to this Note. The indeterminacy question at the heart of that case was whether any constitutionally cognizable racial discrimination existed at all.¹⁹⁰ By contrast, the indeterminacy in wrongful executions asks not *whether* wrongfully convicted prisoners exist,¹⁹¹ but rather *which* prisoner might have petitioned for habeas corpus in the future.¹⁹²

The constitutional free speech doctrine provides a more helpful analogy than the Equal Protection Clause here. The Court has consistently and explicitly overprotected speech,¹⁹³ especially in the political arena.¹⁹⁴ While the Court acknowledges that some protected speech is likely worthless or counterproductive,¹⁹⁵ the Court also errs on the side of caution to protect more speech.¹⁹⁶ To avoid labeling a speaker's message worthless when it actually does carry worth, thereby violating the Constitution, the Court instead protects even some worthless speech from censorship.¹⁹⁷

The same logic applies to wrongful convictions and executions. The justice system is fallible, so the courts allow for writs of habeas corpus to solve wrongful convictions retroactively.¹⁹⁸ However, executions are permanent. So, rather than ignore human error when determining guilt or innocence, the federal government must refrain from executing anyone at all,¹⁹⁹ even though some of the prisoners sentenced to death are actually guilty of their sentenced crimes.²⁰⁰ Any other policy

discriminatory merely because fewer black applicants passed the test than white applicants, absent more specific evidence of racial bias).

¹⁸⁹ *Cf. id.*

¹⁹⁰ *See id.*; *see also* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266–71 (1977) (reaffirming the Court's holding in *Davis* that the mere possibility of racial animus does not violate the Equal Protection Clause, rather a plaintiff must show discrimination through additional evidence).

¹⁹¹ *See supra* Part II.

¹⁹² *See supra* Part IV.

¹⁹³ *See* Snyder v. Phelps, 562 U.S. 443, 460–61 (2011) (protecting even speech of “negligible” value in the public sphere).

¹⁹⁴ *See* Reed v. Town of Gilbert, 576 U.S. 155, 171–73 (2015) (holding that the Town of Gilbert's sign ordinance banning certain kinds of signs was content-based and did not survive strict scrutiny); *see also id.* at 183–85 (Kagan, J., concurring) (emphasizing the ordinance's harmlessness and encouraging a looser scrutiny); Texas v. Johnson, 491 U.S. 397, 421 (1989) (Kennedy, J., concurring) (protecting Johnson's right to burn the American flag while denouncing the act as “repellant”).

¹⁹⁵ *See, e.g.,* Snyder, 562 U.S. at 460–61.

¹⁹⁶ *Compare id., and* Reed, 576 U.S. at 171–73 (majority opinion), *with id.* at 183–85 (Kagan, J., concurring).

¹⁹⁷ *See, e.g.,* Johnson, 491 U.S. at 421 (Kennedy, J., concurring).

¹⁹⁸ *See supra* notes 68–70 and accompanying text.

¹⁹⁹ *See supra* Part IV.

²⁰⁰ *See* David Von Drehle, *More Innocent People on Death Row than Estimated*, TIME

would knowingly allow occasional violations of the Suspension Clause, just as a stricter free speech doctrine would knowingly allow occasional violations of the Free Speech Clause.²⁰¹

B. Barring All Federal Executions Is Not Overbroad

Critics might also argue that barring all federal executions will create a slippery slope where any wrongful conviction that leads to a death will be a suspension of habeas corpus. Then, by this Note's logic, all life sentences would also suspend habeas corpus. The slippery slope might also include any sentence which is not technically for life but during which the prisoner is sure to die.²⁰²

This slippery slope argument fails to acknowledge the unique nature of executions relative to other punishments. Governmental action distinguishes executing wrongfully convicted prisoners as a suspension of habeas corpus from wrongfully convicted prisoners simply dying in prison,²⁰³ which is not a suspension of habeas corpus. While wrongfully convicted prisoners serving a custodial term (even a life sentence) might die while serving their sentences,²⁰⁴ their deaths would not be a government act. A suspension of habeas corpus must be some act or omission by the government.²⁰⁵ Merely processing petitions slowly or erecting procedural hurdles is not a suspension of the writ so long as there is some procedural path for wrongfully convicted prisoners to be granted the writ of habeas corpus if the prisoners discover new evidence.²⁰⁶ Executions of wrongfully convicted prisoners are not omissions or conditions; they are governmental actions that constitute a suspension of the privilege of the writ of habeas corpus. Natural deaths of wrongfully convicted prisoners are tragic, but so long as the government respects the prisoners' habeas right while the prisoners are alive by not actively severing the right, then the government has not suspended the right of habeas corpus.²⁰⁷

(Apr. 28, 2014, 3:00 PM), <https://time.com/79572/more-innocent-people-on-death-row-than-estimated-study/> [<https://perma.cc/6RVW-BWBG>]. Von Drehele reports that approximately 4.1% of death row convictions are erroneous—so 95.9% of such convictions must have been legally rightful. *See id.*

²⁰¹ *See supra* notes 193–97 and accompanying text.

²⁰² Imagine a 500-year total sentence or an eighty-five-year-old given a thirty-year sentence.

²⁰³ *See supra* Sections III.B, V.A.

²⁰⁴ *See, e.g., Timothy Cole*, INNOCENCE PROJECT, <https://www.innocenceproject.org/cases/timothy-cole/> [<https://perma.cc/Q97Q-ZKV9>] (last visited Mar. 15, 2021) (Although he died in prison, Timothy Cole received a posthumous pardon after serving twenty-three years for a rape which DNA evidence later proved he did not commit.).

²⁰⁵ *See Felker v. Turpin*, 518 U.S. 651, 664 (1996).

²⁰⁶ *See id.*

²⁰⁷ *See supra* Section I.B.

C. The Writ of Coram Nobis Does Not Cure the Constitutional Defect in Federal Executions

The writ of coram nobis does not cure the constitutional defect in federal executions. Coram nobis provides prisoners with a tool to overturn convictions where the prisoner was clearly actually innocent of the crime.²⁰⁸ However, the writ of coram nobis is distinct from habeas corpus because a court grants a writ of coram nobis after release.²⁰⁹ Indeed, the United States Supreme Court extended the writ of coram nobis to the federal judicial system only after the newly minted federal habeas corpus statute²¹⁰ restricted the writ of habeas corpus to current prisoners.²¹¹ Therefore, a prisoner sentenced to death in the federal system would not even have access to a writ of coram nobis because the death-sentenced prisoner would never be released. The Suspension Clause guarantees that the writ of habeas corpus, specifically, will not be suspended except in certain times of war.²¹² The Suspension Clause does not mention the writ of coram nobis.²¹³ One writ cannot paper over the suspension of another writ when they are not interchangeable remedies.

D. Federal Executions Are Unconstitutional Despite the Low Success Rate of Habeas Corpus Petitions

Habeas petitions are rarely successful,²¹⁴ so some might say that barring all federal executions to entertain hypothetical petitions which will almost certainly fail is so inefficient that the rule's burdens on judicial efficiency and finality outweigh the burden on prisoners' constitutional rights.²¹⁵ However, such an argument would ignore the text of the Suspension Clause. The Suspension Clause is categorical and

²⁰⁸ *Right to Writ of Coram Nobis as Affected by Intentional or Negligent Failure to Bring Facts to Attention of Court*, 58 A.L.R. 1286 (1929) ("The purpose of the writ of coram nobis is to bring before the court rendering the judgment matters of fact which, if known at the time the judgment was rendered, would presumably have prevented its rendition."); see also *United States v. Morgan*, 346 U.S. 502, 512–13 (1954) (holding that the writ of coram nobis is available after a sentence is completed, when a writ of habeas corpus is no longer available).

²⁰⁹ See *Morgan*, 346 U.S. at 512–13.

²¹⁰ See 28 U.S.C. § 2255.

²¹¹ See § 2255(a); *Morgan*, 346 U.S. at 510–11.

²¹² See *supra* Section I.A.

²¹³ See U.S. CONST. art. I, § 9, cl. 2.

²¹⁴ See Stephanie Roberts Hartung, *Missing the Forest for the Trees: Federal Habeas Corpus and the Piecemeal Problem in Actual Innocence Cases*, 10 STAN. J. CIV. RTS. & CIV. LIBERTIES 56, 58 (2014) (noting that when prisoners petition for habeas corpus, less than 0.4% of petitioners receive any relief from the federal courts).

²¹⁵ See *United States v. Ruiz*, 536 U.S. 622, 631–32 (2002) (citing *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985)) (weighing three due process factors to decide whether to extend *Brady*'s right to exculpatory evidence disclosure to impeachment evidence in the plea bargain phase of prosecution).

absolute within its limits;²¹⁶ judicial and law enforcement efficiency cannot justify entirely abrogating a constitutional guarantee.²¹⁷

Further, the Supreme Court only guarantees access to habeas corpus, not the relief of the writ itself in every case.²¹⁸ In other words, there is no constitutional guarantee to have a petition for a writ of habeas corpus granted, it is the filing of the petition which is protected by the Suspension Clause.²¹⁹ Therefore, the frequency of successful habeas petitions does not bear on whether the right to petition for a writ of habeas corpus is infringed.²²⁰

CONCLUSION

The Suspension Clause of the United States Constitution guarantees that federal prisoners are always entitled to the right to file a petition for habeas corpus with the courts, except in certain times of war.²²¹ Anglo-American law holds a long tradition of disgust for wrongful convictions.²²² Among other uses, the writ of habeas corpus is a tool to right such wrongful convictions.²²³

Today, the ancient writ serves as the primary correction vehicle for those wrongfully convicted prisoners who find new evidence through new technology or new information that helps prove their convictions were handed down in violation of the Constitution or that they are undeniably innocent of the convicted crime.²²⁴ When new evidence comes to light that provides wrongfully convicted federal prisoners the grounds to challenge their convictions, they challenge their convictions by exercising their right to the writ of habeas corpus.²²⁵ For those who were wrongfully executed, the writ of habeas corpus cannot help.

The dead cannot file a petition for a writ of habeas corpus, no matter how demonstrably innocent they may have been. Those who died in prison of nongovernmental deaths and are later revealed to have been wrongfully convicted do present a tragedy of injustice. However, for those who were executed by the federal government, the revelation of their innocence renders their executions unconstitutional.²²⁶ If not for

²¹⁶ See U.S. CONST. art. I, § 9, cl. 2.

²¹⁷ Cf. *Ruiz*, 536 U.S. at 629–32 (using policy to determine whether due process requires a governmental disclosure by determining what due process is, as opposed to whether it can be violated).

²¹⁸ See U.S. CONST. art. I, § 9, cl. 2.

²¹⁹ See *id.*

²²⁰ See John L. Carroll, *Habeas Corpus Reform: Can Habeas Corpus Survive the Floor*, 6 CUMB. L. REV. 363, 374–75 (1975).

²²¹ *Supra* Part I.

²²² See *supra* notes 23–26 and accompanying text.

²²³ Hartung, *supra* note 26, at 4.

²²⁴ See *supra* Part II.

²²⁵ *Supra* Part II.

²²⁶ *Supra* Part III.

the government, wrongfully executed prisoners might have filed a petition for a writ of habeas corpus and gone free or reduced their sentences. Instead, the government's execution stripped any wrongfully executed prisoners of their constitutional right to a petition for the writ of habeas corpus.

The only remedy for the constitutional violation of wrongfully executed prisoners' right to a petition for a writ of habeas corpus is not to execute those prisoners who were wrongfully convicted.²²⁷ The question then becomes how the government can tell which death-sentenced prisoners were wrongfully convicted and which were not.²²⁸ That question has no answer, and the government will never be able to tell who was rightfully or wrongfully convicted with any true certainty.

As such, the government must either knowingly execute prisoners who hold a right to a future petition for habeas corpus when they discover evidence of their innocence, or not execute anyone at all to avoid wrongful executions entirely. Because any execution carries the certainty that the prisoner *could be* innocent and *could be* entitled to a future petition for a writ of habeas corpus, any execution by the federal government violates the Suspension Clause of the United States Constitution. The federal government's only remaining legal option is to completely abstain from executions; any other policy would be unconstitutional.²²⁹

²²⁷ See *supra* Part IV.

²²⁸ See *supra* Section IV.A.

²²⁹ See *supra* Section IV.B.