

**FRIENDLY HABEAS REFORM— RECONSIDERING
A DISTRICT COURT’S THRESHOLD ROLE
IN THE APPELLATE HABEAS PROCESS**

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I. INTRODUCTION

Few areas of the law receive deeper Supreme Court treatment than federal habeas corpus jurisprudence. Yet even under the high court’s ever-watchful eye, federal habeas procedure has become a maudlin dance in which the convicted, counsel, and courts often engage in unconventional—even counterintuitive—steps. To the outside observer, habeas procedure may seem less like a ballerina’s graceful pirouette and more like the contorted and frenzied flailing of an epileptic fit. Courts and commentators continually grapple with making sense of this square dance of whirling dervishes. Despite continual Supreme Court guidance, the habeas waltz still appears laden with mistimed moves and multifarious missteps.

For the past century, Congress’ occasional tinkering with habeas’ “Byzantine maze of procedures”¹ has created more deep ebbs than effusive flows in the writ’s availability. While in some cases congressional action has gently massaged the habeas process into a more orderly beast, other strained efforts have shredded and torn prior procedure. A decade ago, Congress set out on wholesale habeas reform intending to create, by its own legislative title, a more “[e]ffective” procedure.² Ostensibly honoring the high-minded principles of comity, federalism, and the finality of state-court judgments, the resultant revisions cast into legislative code by the

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1. *Lowery v. Estelle*, 696 F.2d 333, 337 (5th Cir. 1983).

2. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996).

Anti-Terrorism and Effective Death Penalty Act (“AEDPA”)³ revolutionized federal habeas law. Aside from cabining federal examination of state-court decisions into unprecedentedly narrow parameters, the AEDPA sped up federal habeas, particularly through its novel limitations period and prohibitive successive petition requirements.⁴

Notwithstanding Congress’ intention, vestiges of inefficiency remain. Several reasons underlie the stubborn permanency of procedural imperfections, not least among them the AEDPA’s clumsy language. As Supreme Court Justice Souter pithily remarked, “in a world of silk purses and pigs’ ears, the Act is not a silk purse of the art of statutory drafting.”⁵ The proverbial army of chimps pounding on typewriters could repeatedly recreate the AEDPA’s shoddy language before reproducing even one melodious Shakespearean sonnet. Even members of Congress concede that habeas inefficiency springs from “the poor drafting of the law itself[.]”⁶ One oft-

3. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 101-08, 110 Stat. 1214. Since the advent of the AEDPA, “comity, federalism, and the finality of judgments,” *Williams v. Taylor*, 529 U.S. 420, 436 (2000), hums like a sacred mantra throughout Supreme Court habeas opinions, often reaching shrill tonalities when decrying the reckless award of habeas relief. *See e.g.*, *Woodford v. Garceau*, 538 U.S. 202, 206 (2003); *Duncan v. Walker*, 533 U.S. 167, 178 (2001).

4. *Hohn v. United States*, 524 U.S. 236, 264-65 (1998) (Scalia, J., dissenting) (“The purpose of AEDPA is not obscure. It was to eliminate the interminable delays in the execution of state and federal criminal sentences, and the shameful overloading of our federal criminal justice system, produced by various aspects of this Court’s habeas corpus jurisprudence.”).

5. *Lindh v. Murphy*, 521 U.S. 320, 336 (1996). Circuit courts echo Justice Souter’s witticism and criticism. *See West v. Vaughn*, 204 F.3d 53, 59 (3d Cir. 2000) (“AEDPA is less than a masterpiece of clarity.”); *United States v. Burch*, 202 F.3d 1274, 1277 (10th Cir. 2000) (“[T]he AEDPA is not exactly a model of careful statutory drafting.”); *United States v. Skandier*, 125 F.3d 178, 183 (3d Cir. 1997) (“The AEDPA is not a mode of the legislative drafter’s art.”).

6. *Hearing on Habeas Corpus Proceedings and Issues of Actual Innocence: Hearing Before the United States Comm. on the Judiciary*, July 13, 2005, available at http://judiciary.senate.gov/member_statement.cfm?id=1569&wit_id=2629 (last visited Mar. 01, 2007) (statement of Sen. Patrick Leahy, Ranking Member, Comm. on the Judiciary). Ambrose Bierce’s sardonic mockery of man’s laws rings true with respect to the AEDPA:

Satan, n. One of the Creator’s lamentable mistakes, repented in sashcloth and axes. Being instated as an archangel, Satan made himself multifariously objectionable and was finally expelled from Heaven. Halfway in his descent he paused, bent his head in thought a moment and at last went back.

“There is one favor that I should like to ask,” said he.

“Name it.”

“Man, I understand, is about to be created. He will need laws.”

“What, wretch! you his appointed adversary, charged from the dawn of eternity with hatred of his soul—you ask for the right to make his laws?”

neglected area of confusion stems from the AEDPA's imprecise method of establishing appellate jurisdiction.

Modern habeas cases follow a predictable pattern. Once an individual in penal custody files a federal petition, and the federal court determines that his claims do not facially disentitle him to relief,⁷ the warden or other person responsible for the petitioner's detention files a response or "answer."⁸ In some jurisdictions, the respondent traditionally couples the answer with a dispositive pleading, such as a summary judgment motion attacking the merits or a motion to dismiss highlighting procedural inadequacies.⁹ Recent revisions in the Rules Governing Section 2254 Cases in the United States District Courts resurrected a petitioner's right to reply—*née* traverse—if he wishes to rejoin the answer.¹⁰ If the federal district court decides under the applicable standards that the petitioner's contentions either substantively or procedurally do not merit habeas relief, the court enters both an order rejecting the petition and a separate final judgment.¹¹

Before the AEDPA, federal procedure required inmates to seek a Certificate of Probable Cause ("CPC") if they wanted appellate habeas jurisdiction to vest over their habeas petition.¹² The AEDPA now requires habeas petitioners to obtain a "Certificate of Appealability" ("COA").¹³ Aside from awkwardly changing the certificate's title into a linguistic albatross that would vex the spell-

"Pardon; what I have to ask is that he be permitted to make them himself."

It was so ordered.

AMBROSE BIERCE, *THE ENLARGED DEVIL'S DICTIONARY* 258 (1967).

7. Rule 4 of the Rules Governing § 2254 Cases in the United States District Courts, 28 U.S.C. § 2254 R.4 (amended Dec. 1, 2004) ("If it plainly appears from the face of the petition and any attached exhibits that the petitioner is not entitled to relief in the district court, the judge must dismiss the petition and direct the clerk to notify the petitioner.").

8. Rule 5 of the Rules Governing § 2254 Cases in the United States District Courts, 28 U.S.C. § 2254 R. 5 (amended Dec. 1, 2004).

9. *See, e.g.,* Rowell v. Dretke, 398 F.3d 370 (5th Cir. 2005); Thompson v. Dixon, 987 F.2d 1038 (4th Cir. 1993).

10. Rule 5(E) of the Rules Governing § 2254 Cases in the United States District Courts, 28 U.S.C. § 2254 R. 5(E) (amended Dec. 1, 2004).

11. *See, e.g.,* Rowell, 398 F.3d 370; Thompson, 987 F.2d 1038.

12. 28 U.S.C. § 2253 (1994) (prior to 1996 amendment) ("An appeal may not be taken to the court of appeals from the final order in a habeas corpus proceeding where the detention complained of arises out of process issued by a State court, unless the justice or judge who rendered the order or a circuit justice or judge issues a certificate of probable cause.").

13. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 102, 110 Stat. 1214 (codified at 28 U.S.C. § 2253 (2006)).

check of even the best word-processor,¹⁴ Congress failed to establish a clear procedure for those inmates who could not woo a habeas writ from the district court. The habeas statute says that federal appellate jurisdiction vests when a “circuit justice or judge” issues a COA, an oblique phrase that once applied only to appellate courts.¹⁵ Rule 22 of the Federal Rules of Appellate Procedure, however, stands in stark contrast by requiring the district court to consider the certification issue in the first instance.¹⁶ The unwieldy interplay between these dueling mandates initially confused post-AEDPA procedure.¹⁷

Congress’ conflicting and apathetic messages about a *district court’s* role in the new COA procedure forced the judiciary to craft procedures, both formal and informal, to solidify the lower courts’ threshold place in the appellate process. Cases eventually harmonized the conflicted provisions to preserve the district court’s primary certification review. All the same, difficult questions still plague the relationship between the trial-level and appellate habeas courts. For instance, pre-AEDPA law considered a district-granted certificate inalterable. Some circuits now undercut the integrity of the district courts’ certification role by freely vacating a district-granted COA, placing the district court in an effectively advisory role. These and other procedural oddities in the certification process insert inefficiency into habeas appeals.¹⁸

14. What kind of word is “appealability”? To be sure, “appealability” is not a completely uncommon word, but it certainly is an ungainly one. The “legislatability” of such terms must result from a political desire to inundate the judiciary with superfluous vowels and consonants. Such language should have no “congressionability.”

15. 28 U.S.C. § 2253.

16. FED. R. APP. P. 22.

17. In his testimony concerning the overburdened judiciary’s workload, Judge Richard S. Arnold, Chief Judge of the Eighth Circuit Court of Appeals, told members of the Senate Subcommittee on Administrative Oversight and the Courts, Committee on the Judiciary, that [a] number of important issues have also had to be resolved concerning the Antiterrorism and Effective Death Penalty Act of 1996, *including such fundamental questions as who has the authority to issue a Certificate of Appealability*. More litigation . . . lies ahead. All of these factors have complicated portions of the appeal which used to be left as routine matters to the Clerk’s office or the district court.

Federal Judicial Workload: Hearing Before the Subcomm. on Admin. Oversight and the Courts, Comm. on the Judiciary, United States S., Thursday Sept. 4, 1997, 1997 WL 545709 (F.D.C.H.) (statement of Richard S. Arnold, Chief Judge, Eighth Circuit Court of Appeals) (emphasis added).

18. In the name of efficiency, Congress recently considered legislation that would ratchet up the AEDPA’s stringent provisions. See Streamlined Procedures Act of 2005, S. 1088, 109th Cong. (2005). One little-discussed portion of the proposed bill would have firmed-

Federal courts, burdened with increasing caseloads and constrained by diminishing budgets, crave streamlined habeas procedures. In 1970, respected jurist Henry J. Friendly proposed several modifications to federal habeas procedure, notably removing the threshold certification question from the district courts.¹⁹ This Article reviews the evolution of habeas appellate procedure, particularly emphasizing the shifting role held by each court. Examination of the habeas process as it has operated in the past and now exists reveals that structural quirks retard the efficiency and permanency of the district court's role in appellate habeas review. This Article then examines jurisdictional questions that compel reconsideration of the current certification scheme. Finally, this Article examines policy arguments for shifting habeas certification to the appellate courts alone. In an attempt to fully align habeas procedure with Congress' long-expressed interest in habeas efficiency, and in an effort to ameliorate the confusion and contention flowing from recent circuit precedent, this Article champions "Friendly" reform.

II. EVOLUTION OF HABEAS APPELLATE PROCEDURE

A. *Genesis of the Shifting Certification Scheme*

The "Great Writ," both enabled by and curtailed through congressional fiat, preserves a federal court's ability to rectify an egregious constitutional deprivation associated with criminal proceedings. Congress possesses great latitude in fashioning the contours of habeas relief.²⁰ At the outer boundaries, only the

up the district court's role in the habeas process, but would not have cleansed habeas procedure of other lingering inefficiencies, and possibly would have introduced new problems. The "Streamlined Procedures Act," would have codified several judicial doctrines, such as the procedural bar, and extinguish others, such as the equitable tolling of the AEDPA's harsh limitations period. *Id.* An integral and explosive part of the proposed legislation would completely remove federal jurisdiction from capital cases in states that "opt-in" to a restrictive statutory scheme, though amendment killed that controversial provision. *Id.* Though the reason behind that drastic provision is not immediately evident, it seems that one sponsoring Senator wished to bypass the Ninth Circuit's reluctance to allow Arizona to opt-in to the AEDPA's special capital-habeas provisions. What madness ensues when habeas dances the congressional cha-cha.

19. Henry J. Friendly, *Is Innocence Irrelevant?: Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142 (1970).

20. For the sake of simplicity, this Article will most frequently refer to the habeas process with respect to its review of state-court judgments, as authorized by 28 U.S.C. § 2254.

Suspension Clause's guard against complete abolition of habeas corpus tempers congressional action in the habeas arena.²¹ The 1789 Judiciary Act provided the first vehicle for federal courts to consider a federal prisoner's petition "for the purpose of inquiry into the cause of confinement."²² In 1867, Congress extended federal-court jurisdiction to recognize a state inmate's challenge to his conviction and sentence.²³ Subsequent legislation has displayed varied and vacillating intent with respect to how a habeas appeal should begin.

Congress initially excluded the circuit courts from habeas review, allowing a habeas appeal directly to the Supreme Court.²⁴ Congress set the stage for the creation of appellate certification through the Habeas Act of 1867, which required an automatic abatement of all other "pending" proceedings when a federal court had a habeas petition before it, thus resulting in a mandatory stay of any set execution date.²⁵ On March 10, 1908, Congress first passed legislation establishing the Certificate of Probable Cause ("CPC") as a

Since the enactment of the AEDPA, the habeas law discussed in this Article applies with equal strength in those habeas cases arising from federal criminal convictions, as authorized by 28 U.S.C. § 2255. Courts universally agree that the modern federal appellate procedure for both types of habeas claims is fundamentally the same. See RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE, § 41.8 (4th ed. 2001) ("[T]he same procedures and standards apply in [appeals from § 2255 actions] as in section 2254 cases brought by state prisoners.").

21. See U.S. CONST. art. I, § 9, cl. 2 ("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.").

22. Judiciary Acts, Sept. 24, 1789, ch. 20, 1 Stat. 73, 81-82 (amended 1867).

23. An Act to amend "An Act to establish the judicial courts of the United States," Feb. 5, 1867, ch. 28, 14 Stat. 385, 385-86.

24. Federal law provided that "appeals and writs of error may be taken from the District Courts . . . direct to the Supreme Court . . . [i]n any case that involves the construction or application of the Constitution of the United States." § 238, 36 Stat. 1157. The courts interpreted this section to authorize habeas appeals directly to the Supreme Court. See Santiago Salgado v. Garcia, 384 F.3d 769, 771 (9th Cir. 2004); Grammar v. Fenton, 268 F. 943, 946-47 (8th Cir. 1920).

25. 14 Stat. 386, Rev.Stat. § 766. See also Barefoot v. Estelle, 463 U.S. 880, 892-93 n.3 (1983) (reviewing the Habeas Act of 1867); Rogers v. Peck, 199 U.S. 425, 435-36 (1905) ("This section provides in substance that any proceeding against a person imprisoned or confined or restrained of his liberty, in any state court, or by authority of any state, pending the proceedings or appeal in *habeas corpus* cases in the Federal courts, and until final judgment therein, and after final judgment of discharge, shall be null and void.") (emphasis in original); Lambert v. Barrett, 159 U.S. 660, 662 (1895) ("As no order staying proceedings under state authority is made a condition to such stay, the bare pendency of the appeal has that effect . . ."). Interestingly, the new "opt-in" provisions of the AEDPA require a mandatory stay of any execution date, though the statute places limits on the length of federal review. See 28 U.S.C. § 2262.

precursor to Supreme Court jurisdiction.²⁶ Annoyed that federal habeas proceedings delayed state executions, Congress apparently intended the CPC to curb the drawn-out appeal of frivolous claims.²⁷

26. Congress' first threshold barrier to appellate consideration of a habeas petition read as follows:

[F]rom a final decision by a court of the United States in a proceeding in habeas corpus where the detention complained of is by virtue of process issued out of a State court no appeal to the Supreme Court shall be allowed unless the United States court by which the final decision was rendered or a justice of the Supreme Court shall be of opinion that there exists probable cause for an appeal, in which event, on allowing the same, the said court or justice shall certify that there is probable cause for such allowance.

Act of Mar. 10, 1908, ch. 76, 35 Stat. 40.

27. The Committee of the Judiciary of the House of Representatives expressed its intent as follows:

The purpose of this bill is to correct a very vicious practice of delaying the execution of criminals by groundless habeas corpus proceedings and appeals therein taken just before the day set for execution The attention of the committee was called to a condition existing in one of our States where petition for habeas corpus after petition and successive appeals from adverse decisions thereon in the same case had been prosecuted, involving a purely factious delay of three or four or more years. This statute makes it impossible to continue this vicious practice, as under it no appeal can be prosecuted unless either the United States court making a final decision or a justice of the Supreme Court shall be of the opinion that there exists probable cause for such appeal. That the delay of execution and punishment in criminal cases is the most potent cause in inducing local dissatisfaction, not infrequently developing into lynching, is obvious, and it is certainly the duty of Congress to eliminate so far as possible all unnecessary and factious delay, and this will be accomplished by the passage of this bill.

H.R. Rep. No. 23, 60th Cong., 1st Sess. (1908). Crafting a certification procedure under the circumstances existent in 1908, with limited post-conviction review and a mandatory stay of execution, most likely expedited the appellate process measurably. Some debate exists over the scope of Congress' intent in creating the certification procedure. Most courts broadly read the legislative history as intending to remedy unnecessary delay caused by *all* state prisoners frivolously appealing the denial of their federal habeas petition, signifying a general concern for the efficient resolution of habeas cases. *See* Santiago Salgado v. Garcia, 384 F.3d 769, 771 (9th Cir. 2004); Hunter v. United States, 101 F.3d 1565, 1582 (11th Cir. 1996); Garris v. Lindsay, 794 F.2d 722, 725 (D.C. App. 1986); United States *ex rel.* Tillery v. Cavell, 294 F.2d 12, 15 (1961); Arsenault v. Gavin, 248 F.2d 777, 778 (1st Cir. 1957); *Ex parte* Farrell, 189 F.2d 540, 543 (1st Cir. 1951). Other courts and commentators, however, narrowly view Congress' intent as only attacking the protracted delay of state executions during a frivolous appeal, rather than deterring general inefficiency in the system. *See* United States v. Jeffes, 571 F.2d 762, 765 (3d Cir. 1978); Ira P. Robbins, *The Habeas Corpus Certificate of Probable Cause*, 44 OHIO ST. L. J. 307, 314 (1983). Supreme Court statements regarding the 1908 statute cite both the frivolous appeals and protracted stays as motivation for the 1908 legislation. *See* Barefoot v. Estelle, 463 U.S. 880, 892-93 n.3 (1983) ("In 1908, concerned with the increasing number of frivolous habeas corpus petitions challenging capital sentences which delayed execution pending completion of the appellate process, Congress inserted the requirement that a prisoner first obtain a certificate of probable cause to appeal before being entitled to do so."); *cf.* Miller-El v. Cockrell, 537 U.S. 322, 337 (2003) ("Congress established

The first CPC statute allowed either the district court or a Supreme Court justice to certify a habeas appeal.²⁸ The absence of a certificate under this statute deprived the Supreme Court of statutory jurisdiction over habeas actions.²⁹

The 1908 statute included no allowance for circuit court jurisdiction over habeas appeals.³⁰ All appeals went from the district court directly to the Supreme Court.³¹ In 1925, Congress broadened the circuit courts' jurisdiction and amended CPC practice so that it would "apply to appellate proceedings . . . as [it] heretofore [has] applied to direct appeals to the Supreme Court[.]"³² The text of the new 28 U.S.C. § 466 provided that no appeal

shall be allowed unless *the United States court by which the final decision was rendered* or a judge of the circuit court of appeals shall be of opinion that there exists probable cause for an appeal, in which event, on allowing the same, the said court or judge shall certify that there is probable cause for such allowance.³³

The 1925 statute, interestingly, concomitantly deprived the Supreme Court of any ability to issue a CPC.³⁴ Circuit courts considered the certification process to be a necessary precursor to their appellate jurisdiction without any equitable exceptions.³⁵ The district court's rejection of a CPC, however, was by no means

a threshold prerequisite to appealability in 1908, in large part because it was "concerned with the increasing number of frivolous habeas corpus petitions challenging capital sentences which delayed execution pending completing of the appellate process" However narrowly one can read the legislative history, in practice courts used the CPC process as a means to expedite all habeas appeals, whether the petitioner faced death or not.

28. Act of Mar. 10, 1908 ch. 76, 35 Stat. 40.

29. See Bilik v. Strassheim, 212 U.S. 551 (1908); Ex parte Patrick, 212 U.S. 555 (1908).

30. Act of Mar. 10, 1908, ch. 76, 35 Stat. 40.

31. *Id.*

32. 28 U.S.C. § 466 (1925).

33. *Id.* (emphasis added).

34. See *id.*

35. See *Millsagle v. Olson*, 130 F.2d 212, 213 (8th Cir. 1942) ("The presence of a certificate of probable cause is a statutory jurisdictional requirement[.]"); see also Bilik v. Strassheim, 212 U.S. 551 (1908); McCarthy v. Harper, 449 U.S. 1309, 1310-11 (1981) (Rehnquist, J., in chambers) (noting in his role as a circuit justice an appeals court's inability to consider the merits of a habeas petition absent a CPC.); Ex parte Patrick, 212 U.S. 555 (1908); Botwinski v. Dowd, 118 F.2d 829, 830 (7th Cir. 1941); U.S. ex rel. Kreuter v. Baldwin, 49 F.2d 262, 263 (7th Cir. 1931); Gebhart v. Amrine, 117 F.2d 995, 996 (10th Cir. 1941); Nally v. Scott, 114 F.2d 562 (8th Cir. 1940); Schenk v. Plummer, 113 F.2d 726 (9th Cir. 1940); Ex parte Cowen, 98 F.2d 1019, 1019 (9th Cir. 1938); Comerford v. Hogsett, 79 F.2d 486 (1st Cir. 1935); Wilson v. Lanagan, 79 F.2d 702 (1st Cir. 1935); Genna v. Frazier, 24 F.2d 706, 707 (5th Cir. 1928).

dispositive and circuit courts independently considered the certification question even after the lower court refused to grant one.³⁶

In 1948, Congress again revisited certification procedure, trimming and modernizing the CPC statute's language while largely preserving the same basic procedure.³⁷ Congress' action inserted one substantial change into CPC practice—a “circuit justice or judge” could certify an appeal.³⁸ The circuit courts applied the oddly placed modifier “circuit” to both nouns, reading the phrase as “circuit justice” or “circuit judge.” The term “circuit justice” evidently referred to the assignation of Supreme Court Justices to individual circuit courts.³⁹ Because the statute elsewhere explicitly referred to the district court, nothing suggested that the term “judge” referred to anything but appellate court officers.⁴⁰ By returning certification power to the Supreme Court, the 1948 amendment provided for a potentially tripartite certification approach. A district court considered the CPC question in the first instance, the circuit courts could also issue a CPC, and the “circuit *justice*” language theoretically gave the Supreme Court some authority, though almost

36. See, e.g., *Anderson v. Jones*, 281 F.2d 684, 685 (6th Cir. 1960) (“Notwithstanding the denial by the District Court of appellant’s application for a certificate of probable cause, this Court or an individual Judge therefore may, upon proper showing, grant a certificate of probable cause.”); *United States ex. rel. Ristich*, 162 F.2d 180, 181 (7th Cir. 1947) (“[E]ven when the District Court denies a certificate of probable cause, it yet remains the duty of the judges of the Circuit Court of Appeals to consider whether the case is one in which a certificate of probable cause should be issued.”); *but see Eyer v. Brady*, 128 F.2d 1012, 1013 (4th Cir. 1942) (considering various appellate motions in the absence of a CPC).

37. The 1948 statute read as follows:

An appeal may not be taken to the court of appeals from the final order in a habeas corpus proceeding where the detention complained of arises out of process issued by a State court, unless the justice or judge who rendered the order or a circuit justice or judge issues a certificate of probable cause.

Act of June 25, 1948, 62 Stat. 97 (codified at 28 U.S.C. § 2253).

38. *Id.*

39. See 28 U.S.C. § 42 (“The Chief Justice of the United States and the associate justices of the Supreme Court shall from time to time be allotted as circuit justices among the circuits by order of the Supreme Court. The Chief Justice may make such allotments in vacation. A justice may be assigned to more than one circuit, and two or more justices may be assigned to the same circuit.”).

40. See *Ex parte Farrell*, 189 F.2d 540, 544 (1st Cir. 1951); *United States ex rel. Rheim v. Foster*, 175 F.2d 772, 773 (2d Cir. 1949). Later courts would “acknowledge that, prior to the AEDPA, this Court had invoked the phrase ‘circuit justice or judge’ in section 2253 to mean a circuit justice or a circuit judge.” *Lozada v. United States*, 107 F.3d 1011, 1015 n.3 (2d Cir. 1997); see also *United States v. Eyer*, 113 F.3d 470, 472-73 (3d Cir. 1997); *Soto v. United States*, 185 F.3d 48, 52 n.3 (2d Cir. 1999).

never used, to issue a CPC.⁴¹

As habeas law slowly developed into a patchwork of statutory authority and judicial accommodation, court rules came to govern portions of the habeas system. In 1966, Congress endowed the Supreme Court with the ability to create “rules of practice and procedure” for the appellate courts.⁴² Under that authority, the Supreme Court promulgated Rule 22 of the Federal Rules of Appellate Procedure that regulated the CPC process.⁴³ The Advisory Committee Notes strongly emphasize a desire for the expedient resolution of habeas cases, noting that the Committee hoped that Rule 22 would “insur[e] that the matter of the certificate will not be

41. See Brent E. Newton, *Applications for Certificates of Appealability and the Supreme Court's "Obligatory" Jurisdiction*, 5 J. APP. PRAC. & PROCESS 177, 180 (2003) (“In 1948, Congress again amended the CPC statute—recodified in the current statute, 28 U.S.C. § 2253—and inexplicably resurrected the 1908 statute's provision that a Supreme Court Justice possessed the authority to rule on a CPC application (in addition to the authority of a district or circuit judge to do so.)”); *Davis v. Jacobs*, 454 U.S. 911, 914-15 (1981) (Stevens, J., on denial of certiorari) (recognizing that the Supreme Court can issue a CPC); *In re Hunt*, 348 U.S. 968 (1955) (denying application for a CPC); FEDERAL PROCEDURAL FORMS § 3:241 (“If the Court of Appeals also refuses to issue a certificate of probable cause, one may be requested from a Supreme Court Justice sitting as a Circuit Justice.”). According to one commentator, while around three dozen published cases from the Supreme Court have denied a certificate, the justices have only granted a certificate in one case in the past thirty years. See Newton, *supra* at 178 n. 8 (citing *Autry v. Estelle*, 464 U.S. 1301 (1983)).

42. See 28 U.S.C. § 2072 (“The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals.”).

43. Former Rule 22 of the Federal Rules of Appellate Procedure stated that:

In a habeas corpus proceeding in which the detention complained of arises out of process issued by a state court, an appeal by the applicant for the writ may not proceed unless a district or a circuit judge issues a certificate of probable cause. If an appeal is taken by the applicant, *the district judge who rendered the judgment shall either issue a certificate of probable cause or state the reasons why such a certificate should not issue.* The certificate or the statement shall be forwarded to the court of appeals with the notice of appeal and the file of the proceedings in the district court. If the district judge has denied the certificate, the applicant for the writ may then request issuance of the certificate by a circuit judge. If such a request is addressed to the court of appeals, it shall be deemed addressed to the judges thereof and shall be considered by a circuit judge or judges as the court deems appropriate. If no express request for a certificate is filed, the notice of appeal shall be deemed to constitute a request addressed to the judges of the court of appeals. If an appeal is taken by a state or its representative, a certificate of probable cause is not required.

Former Rule 22 of the Federal Rules of Appellate Procedure (emphasis added). Previously, the various circuit courts created their own appellate rules, including some dealing with the certification of a habeas appeal. See, e.g., former Rule 9(e) of the Rules for the Seventh Circuit; *United States ex rel Geach v. Ragen*, 231 F.2d 455, 456 (7th Cir. 1956).

overlooked” by the district court.⁴⁴ Rule 22, in tandem with 28 U.S.C. § 2253, firmly placed the district court as the initial gatekeeper in the appellate habeas process. The duties of that role expanded as Rule 22 required the district court to provide reasons for *denying* a certificate. Interestingly, the statute required no justification when a district court awarded a certificate.⁴⁵ As cemented by a trio of Supreme Court cases in the late 1960s, discussed *infra*, the appellate courts viewed a district court certificate as inalterable regardless of its validity.

In *Nowakowski v. Maroney*,⁴⁶ the seminal case addressing the district court’s role in habeas certification, a lower court appointed counsel to a habeas petitioner and, though denying relief, granted a CPC. After his attorney withdrew from representation, the petitioner sought leave from the Third Circuit to proceed on appeal *in forma pauperis*, requested permission to file written briefs, and asked for the appointment of new counsel.⁴⁷ The Third Circuit rejected all his requests and dismissed the habeas appeal.⁴⁸ The Supreme Court wasted little effort in finding that the Third Circuit erred in not allowing the appeal to proceed.⁴⁹ The Supreme Court succinctly held that “when a district court grants [a CPC], the court of appeals must grant an appeal *in forma pauperis* (assuming the requisite showing of poverty), and proceed to a disposition of the merits of the appeal in accord with its ordinary procedure.”⁵⁰ In essence, the *Nowakowski* Court held that, once a CPC issued, the circuit then must reach the merits.

Subsequent cases built upon *Nowakowski* and reaffirmed the permanency of appellate jurisdiction once the district court granted a

44. See FED. R. APP. P. 22.

45. See 28 U.S.C. § 2253.

46. 386 U.S. 542 (1967).

47. *Id.* at 542-43.

48. *Id.* at 543.

49. *Id.* at 543.

50. *Id.* at 543; see also *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983) (“When a certificate of probable cause is issued by the district court . . . or later by the court of appeals, petitioner must then be afforded an opportunity to address the merits, and the court of appeals is obligated to decide the merits of the appeal.”); *Brooks v. Estelle*, 459 U.S. 1061, 1066 (1982) (Brennan, J., Marshall, J., and Stevens, J., dissenting from the denial of a stay of execution) (“[A] court of appeals must review the merits of an appeal when a certificate of probable cause has been issued.”); Harry Blackmun, *Allowance of In Forma Pauperis Appeals in § 2255 and Habeas Corpus Cases*, 43 F.R.D. 343, 351 (1968) (“[W]hen the district court issue[s] the certificate the appellate court must indulge in a full review.”).

CPC. In *Carafas v. LaVallee*,⁵¹ and again in *Garrison v. Patterson*,⁵² the Supreme Court clarified that a district-granted CPC vested appellate jurisdiction, though summary proceedings could vanquish unwarranted, but certified, appeals.⁵³ As one element of those summary appellate procedures, the *Garrison* Court allowed the circuits to consider whether a CPC should issue in an uncertified appeal and to consider the merits of a habeas petition together.⁵⁴ The Supreme Court, nevertheless, would not allow the circuit courts to ignore a certificate even where there was facially apparent frivolity.⁵⁵ *Nowakowski* and its progeny refused to downplay the district court's participation in appellate selection, firmly placing the district as the initial gatekeeper in the appellate habeas process.

Following the *Nowakowski* line of cases, the circuit courts recognized "the absolute power of a district judge to allow a habeas appeal by granting a certificate of probable cause[.]"⁵⁶ The appellate

51. 391 U.S. 234, 242 (1968).

52. 391 U.S. 464, 466 (1968).

53. In *Barefoot v. Estelle*, the Supreme Court held that the *Nowakowski* opinion's mandate to review the merits of certified appeals also applies to those situations where a district court refuses to stay an execution, but still certifies an appeal. In those circumstances, the circuit court must consider the merits of the capital petitioner's stay request, if not the substance of his appeal, but may so using summary procedures. *Barefoot*, 463 U.S. at 888-89.

54. *Garrison*, 391 U.S. at 466 ("[N]othing we say here prevents the courts of appeals from considering the questions of probable cause and the merits together . . .").

55. *Id.* at 466 ("The principle underlying that decision was that if an appellant persuades an appropriate tribunal that probable cause for an appeal exists, he must then be afforded an opportunity to address the underlying merits.").

56. *Gardner v. Pogue*, 558 F.2d 548, 550 (9th Cir. 1977) ("The absolute power of a district judge to allow a habeas appeal by granting a certificate of probable cause implies that the right to a 'first level' ruling is substantive."); *see also* *Lonchar v. Thomas*, 517 U.S. 314, 320 (1996) (citing approvingly the requirement that a circuit court consider the merits of a certified appeal, subject to summary procedures); *Brooks*, 459 U.S. at 1066 (Brennan, J., Marshall, J., and Stevens, J., dissenting from the denial of a stay of execution) ("The courts of appeals have consistently followed the mandate of *Nowakowski* that a court of appeals must review the merits of an appeal when a certificate of probable cause has been issued."); *Campbell v. Woods*, 18 F.3d 662, 680 (9th Cir. 1994) ("Where the district court has denied a stay of execution, but issued a certificate of probable cause, the petitioner 'must then be afforded an opportunity to address the merits, and the court of appeals is obligated to decide the merits of the appeal.'"); *Harris v. Vasquez*, 901 F.2d 724, 725 (9th Cir. 1990) ("Where a [CPC] is issued, the petitioner must be afforded an opportunity to address the merits."); *Barefoot v. Estelle*, 697 F.2d 593, 596 (5th Cir. 1983) (quoting *Carafas*, 391 U.S. at 242 (stating that *Nowakowski* requires that the circuit court "duly consider[]" the merits of an appeal)); *Taylor v. Swenson*, 458 F.2d 593, 595 (5th Cir. 1977) (finding that a circuit court "must review" the merits when a district court grants CPC); *Flint v. Howard*, 464 F.2d 1084, 1086 n.* (1st Cir. 1972) ("[W]hen a district court has issued a [CPC], a court of appeals must allow the docketing of the appeal *in forma pauperis* (assuming the requisite showing of

courts generally refused to “negate the office of the certificate of probable cause”⁵⁷ by revisiting the district court’s certification of an appeal. The implementation of summary appellate proceedings ameliorated any unwanted or unwarranted jurisdiction. Any divergence from *Nowakowski*’s pronouncement was sporadic and unauthorized by precedent,⁵⁸ though *Nowakowski*’s deference certainly authorized appeals which the circuit courts otherwise would not have certified. In the end, the circuits’ summary proceedings probably wasted little more judicial effort than would have been expended in reconsidering a district-granted certificate.

B. Attempted Habeas Reform

Not long after the Supreme Court decided *Nowakowski*, Henry J. Friendly, an influential jurist sitting on the Second Circuit Court of Appeals, authored a law review article championing dramatic federal habeas reform. Judge Friendly’s article advocated constricting the writ to only those cases raising a valid actual-innocence claim.⁵⁹

poverty has been made) and must then proceed to a disposition in the ordinary manner.”); *Stewart v. Beto*, 454 F.2d 268, 269 (5th Cir. 1971) (“Congress has vested absolute power in the district courts to allow habeas appeals by granting the certificate in the first instance.”); Blackmun, *supra* note 50, at 344 (“Once a district judge issues that certificate of probable cause in a state prisoner’s federal habeas case, he binds his appellate court to accept the appeal, whether paid or *in forma pauperis*, in its ordinary course.”). Prior to the AEDPA, some debate existed over whether a district court could issue a limited CPC with respect to only some issues rather than the entire case. The majority of the courts refused to acknowledge such limitations. See *Smith v. Chrans*, 836 F.2d 1076, 1079 (7th Cir. 1988); *Van Pilon v. Reed*, 799 F.2d 1332 (9th Cir. 1986); *Houston v. Mines*, 722 F.2d 290, 293 (6th Cir. 1983); *United States ex rel. Hickey v. Jeffes*, 571 F.2d 762 (3d Cir. 1978); *Johnson v. Bennett*, 386 F.2d 677 (8th Cir. 1967); *but see Barber v. Scully*, 731 F.2d 1073, 1073 (2d Cir. 1984) (allowing a limited CPC). Such practice, however, nowise contradicted *Nowakowski* because the circuits were more concerned with their lack of jurisdiction over the uncertified issues than their own obvious jurisdiction over the certified ones.

57. *Carafas*, 391 U.S. at 242; see also *Barefoot*, 463 U.S. at 894 (“[A] court of appeals may adopt expedited procedures in resolving the merits of habeas appeals, notwithstanding the issuance of a [CPC].”); *Garrison*, 391 U.S. at 466 (finding that *Nowakowski* did not require “full briefing and oral argument in every instance in which a certificate is granted”).

58. One circuit justified departing from *Nowakowski* after the AEDPA by pointing to a pre-AEDPA case in which it had reconsidered the district court’s grant of a CPC. See *Tiedeman v. Benson*, 122 F.3d 518, 522 (8th Cir. 1997) (citing *Kramer v. Kemna*, 21 F.3d 305, 307 (8th Cir. 1994)). Aside from the obvious fact that a circuit court’s departure from Supreme Court precedent cannot overturn the high court’s law, sporadic case law that served as an exception to established precedent cannot justify later departures absent additional compelling justifications.

59. See Friendly, *supra* note 19, at 142 (“My thesis is that, with a few important exceptions, convictions should be subject to collateral attack only when the prisoner supplements his constitutional plea with a colorable claim of innocence.”).

Judge Friendly yoked this drastic substantive limitation with procedural modifications that would expedite consideration of habeas petitions.⁶⁰ Although confined to a footnote, Judge Friendly theorized that removing the district court from the certification process would reduce inefficiency in habeas appellate proceedings.⁶¹

Judge Friendly's proposal emerged from the blossoming—nearly exploding—increase in federal prisoner litigation. Yet Judge Friendly did not take issue with the ever-increasing expenditure of district court resources involved in the certification process: “any judge could [tell] . . . how small [the time spent in resolving a CPC] is as compared to the time spent in hearing an appeal and the burden on assigned counsel of having to argue a hopeless case.”⁶² Rather, Judge Friendly focused on inefficiency at the circuit-court level, complaining that the CPC procedure forced circuit courts “to hear [an] appeal although it believed the certificate was improvidently issued.”⁶³ Judge Friendly objected to how the opinion in *Nowakowski* stripped all appellate discretion from the circuits and placed it in the lower courts.⁶⁴ In light of the “staggering growth in the case loads of the courts of appeals and prospective further increases,” Judge Friendly called for Congress to “move promptly to amend [the habeas statute] so as to place the authority to issue certificates of probable cause solely in the courts of appeals[.]”⁶⁵ In Judge Friendly's view, removing the certification question from the district court would allow the circuits to reject quickly those unnecessary and

60. *See id.* at 142-46.

61. *Id.* at 144 n.9.

62. *Id.* Other contemporaneous commentators, however, opined that the COA wasted resources even at the district-court level, though that opinion may be colored somewhat by a general dislike for the certification procedure:

The justification for the probable cause requirement lies in the need to protect the courts of appeals from an inundation of habeas corpus cases. Even if this were a laudable goal, the complexities of the requirement make it only marginally useful. The procedure must be time consuming, for it requires the district judge, and then perhaps a circuit judge, to pass on the need for appeal before an appeal is taken. It may produce two quasi-appeals going to the merits before a real appeal can be had. Also, the requirement has created a procedural trap for petitioners because of complicated timing rules. Furthermore, the courts have failed to develop standards concerning the meaning of probable cause, or the issuance of the certificate generally.

Developments in the Law—Federal Habeas Corpus, 83 HARV. L. REV. 1038, 1193-94 (1970).

63. Friendly, *supra* note 19, at 144 n.9.

64. Friendly, *supra* note 19.

65. Friendly, *supra* note 19 at 144 n.9.

inappropriate habeas appeals that otherwise consumed judicial resources.

Judge Friendly's views on habeas reform soon found a voice in the federal legislature. At the urging of the Department of Justice, in 1972, Senator Roman L. Hruska of Nebraska first introduced a bill that would codify Judge Friendly's proposed streamlining of habeas appeals.⁶⁶ Senator Hruska's proposed legislation specified that an inmate could proceed on appellate review "only if the *court of appeals* issues a certificate of probable cause,"⁶⁷ thus removing the district court's threshold role in the appellate habeas process. Senator Hruska's bill did not become law, nor did a similar bill introduced in the next Congressional session. Though unsuccessful, efforts to excise district courts from the certification process repeatedly resurfaced.

Some academics forcefully objected to the proposed habeas reform.⁶⁸ Eminent law professor Ira P. Robbins authored a law review article in 1983 that challenged those reforms introduced in Congress, and also suggested alternative means of transforming the writ.⁶⁹ In Professor Robbins view, those proposed bills "manifested

66. To Revise Court Review of Habeas Corpus Petitions Under Sections 2253-2255 Title 18, S. 3833, 92d Cong., 2d Sess. (1972).

67. The proposed language in Senator Hruska's bill sought to amend 28 U.S.C. § 2253 as follows:

An appeal may be taken to the court of appeals from the final order in a habeas corpus proceeding or a proceeding under section 2255 of this title only if the court of appeals issues a certificate of probable cause: *Provided, however*, that the certificate need not issue in order for a State or the Federal Government to appeal the final order.

To Revise Court Review of Habeas Corpus Petitions Under Sections 2253-2255 Title 18, S. 3833, 92d Cong. 2d Sess. (1972). The legislation proposed thereafter also intended to revise the language in Rule 22, thus adverting the statutory dissonance that the AEDPA would later create.

68. See *Hunter*, 101 F.3d at 1583 ("The Friendly approach, which would have changed the law to divest district judges of that authority, drew opposition as well as support over the years.").

69. Ira P. Robbins, *The Habeas Corpus Certificate of Probable Cause*, 44 OHIO ST. L. J. 307 (1983). Professor Robbins proposed six reforms to the CPC process: (1) The adoption, preferably through statutory language, of a uniform probable-cause standard for courts to employ in the CPC analysis. Professor Robbins advocated adoption of the "nonfrivolous issue test" that governed *in forma pauperis* appeals. See *id.*, *supra* at 333; see also 28 U.S.C. § 1915(a); *Coppedge v. United States*, 369 U.S. 438, 447 (1962) ("[U]nless the issues raised are so frivolous that the appeal would be dismissed in the case of a nonindigent . . . the request of an indigent for leave to appeal *in forma pauperis* must be allowed."). The standard eventually adopted by the Supreme Court and codified in the AEDPA is not as lenient as Professor Robbins's proposed test. (2) The allowance for certification by an entire appellate

the intent . . . to keep the certificate an opaque obstacle ready to trip up those who wish to appeal denials of habeas petitions, and more generally to restrict all prisoners' access to the federal courts."⁷⁰ Professor Robbins objected strenuously to the elimination of "one level of review for the certificate now open to the state prisoner,"⁷¹ mostly fearing that constricting the certification process would foreclose habeas relief. Professor Robbins viewed the certification debate as one deciding what "we, as a people, wish to stand for—pessimism and the acceptance of a passive legal system, or optimism and the vision of a dynamic one."⁷² Professor Robbins saw the proposed bills based on Judge Friendly's approach as

an attempt by opponents of any federal habeas corpus review to get all that they can while the prevailing criminal justice climate appears to be receptive—to further restrict and encumber the procedures for obtaining the writ and bar from review as many prisoner petitions as possible, both frivolous and nonfrivolous.⁷³

panel, rather than a single circuit judge. The Supreme Court had left "for the Court of Appeals to determine whether a [CPC] application to the court is to be considered by a panel of the Court of Appeals, by one of its judges, or in some other way deemed appropriate by the Court of Appeals within the scope of its powers." *In re Burwell*, 350 U.S. 521, 522 (1956). (3) Requiring States and their representatives, not only inmates, to seek a CPC when appealing an adverse district-court ruling. Professor Robbins made this recommendation without discussing the different concerns raised when a district court grants, rather than denies, relief. True, "a State's appeal can be as frivolous as a state prisoner's appeal." Robbins, *supra* at 333. Yet, the important considerations of comity, finality, and federalism that drive the federal habeas process encourage appellate review whenever a district court grants relief. Notwithstanding a potential decrease in efficiency, a blanket statement that, essentially, what is good for the goose is good for the gander, fails to honor the bedrock principles at play when the Great Writ intrudes into the state criminal justice system, even if that system is flawed. Rule 22(b)(3) now clarifies that "[a] certificate of appealability is not required when a state or its representative or the United States or its representative appeals." (4) Permitting the district court's CPC decision to extend beyond the thirty-day period in which a petitioner must file a notice of appeal. In practice, circuit courts do not now force the district court to rule on a COA before a petitioner files his notice of appeal. Instead, the circuit court delays the appellate proceedings until the district court reviews the certification question. (5) Requiring district courts to provide unsuccessful petitioners with instructions on the CPC process and appellate procedures generally. (6) Creating a general CPC form so that petitioners "as legal neophytes" need not "bear the burden of overcoming arcane procedures."

70. *Id.* at 332. Professor Robbins severely criticized Senator Strom Thurmond, "chief sponsor of the drafts and an ardent opponent of habeas relief . . ." *Id.* at 331.

71. *Id.* at 330.

72. *Id.* at 336.

73. *Id.* at 334-35. If Professor Robbins was correct and those members of Congress who supported the Friendly approach were "anti-habeas"—a phrase only one step away from "anti-constitution"—then it is remarkable that those bills never passed Congress "[g]iven the well-known fact that anticrime legislation is far more popular than legislation providing protections for persons guilty of violent crime[.]" *Atkins v. Virginia*, 536 U.S. 304, 315 (2002). Polemics

Professor Robbins strongly counseled Congress to deny those bills that would have removed the district court from the CPC process. Over time, legislation and legal precedent have brought about many of Professor Robbins' suggested reforms. Most notably, the Supreme Court soon thereafter adopted a uniform certification standard in *Barefoot v. Estelle*.⁷⁴

In giving birth to habeas certification, Congress created a filter to preserve federal resources against frivolous claims and to end "factious delay."⁷⁵ From the 1908 Act's apparent intent, Congress wanted the district court to cull the blatant chaff from the possible wheat. Congress, however, created this threshold weeder without setting up a standard to discern frivolity. The circuit courts, therefore, crafted standards by which to determine whether or not a court should certify an appeal.⁷⁶ Nevertheless, for the CPC's first three-quarters-

aside, this Article proposes to make a reasonable argument for the removal of the district court from the COA procedure that would not seriously impair the availability of habeas relief or close the courthouse doors to viable constitutional claims. A concern for efficiency by no means signifies antagonism to fair administration of constitutional principles.

74. 463 U.S. 880, 892-93 (1983). Soon after Professor Robbins published his article, the Supreme Court in *Barefoot* confronted the same question that prompted Congress to create the CPC provisions in 1908: how to deal with last-minute appeals that would stay an inmate's execution. *Barefoot* arose after *Furman v. Georgia*'s execution hiatus as the state governments and the courts were still developing procedures to accommodate the actualization of the ultimate punishment. When *Barefoot* came before the Supreme Court, the circuit courts had only considered 34 capital cases since the reauthorization to employ capital punishment in 1976. See *Barefoot*, 463 U.S. at 915 (Marshall, J., dissenting). To hasten the consideration of last-minute capital cases, the Fifth Circuit developed an expedited procedure whereby it would quickly resolve capital habeas appeals without granting a stay of execution. With an execution date looming near, the lower federal court in *Barefoot* denied a death-row inmate's last-minute habeas petition, but granted a CPC. The Fifth Circuit entered an order both refusing to stay his execution and rejecting his habeas claims. As noted by one commentator, "within the span of twenty-eight hours, the Fifth Circuit had not only denied the stay of execution, but had also effectively considered and rejected the merits of the issues presented on appeal." Gailon W. McGowen, Jr., *An Opportunity to Address the Merits: Barefoot v. Estelle*, 463 U.S. 880 (1983), 17 COLUM. HUM. RTS. L. REV. 83, 86 (1985). *Barefoot* came before the Supreme Court under the specific question of whether a petitioner, having shown the probable cause necessary for meriting a CPC, likewise had shown entitlement to a stay of his impending execution. The Supreme Court's resultant decision, nevertheless, broadly addressed how the circuits should approach certification of habeas appeals.

75. Robbins, *supra* note 69.

76. These standards varied both between and within the circuits. For instance, the Ninth Circuit's approach to the CPC standard ranged from "if it appeared from the petition itself that appellant (petitioner) was not entitled to" habeas relief, *In re Mooney*, 72 F.2d 503, 505 (9th Cir. 1934), to a finding of no frivolousness, *Poe v. Gladden*, 287 F.2d 249, 251 (9th Cir. 1961) (granting a CPC if the case is "not plainly frivolous"), to requiring a substantial question of federal law, *Application of Burwell*, 236 F.2d 770, 772 (9th Cir. 1956) (finding a CPC appropriate for "questions of sufficient substance"). See also *Alexander v. Harris*, 595 F.2d

of-a-century existence the Supreme Court never defined what showing a petitioner needed to make in order to merit certification of his case. Prior to *Barefoot*, the Supreme Court had only hinted at the probable-cause standards employed in the CPC analysis.⁷⁷ On one level, it seems surprising that the Supreme Court allowed the certification procedure to operate for seventy-five years before adopting a universal methodology. On the other hand, however, the nature of the high court's review of habeas cases made definition largely inappropriate. Between 1925 and 1948, the Supreme Court possessed no certification power of its own and, as discussed below, used the All Writs Act to engage in broad habeas review that extended beyond the question of whether a certificate should issue. Even after 1948, the Supreme Court justices only rarely used their capacity as a "circuit justice" to certify habeas appeals.

The *Barefoot* opinion characterized the decision to grant or deny certification as "[t]he primary means of separating meritorious from frivolous appeals[.]"⁷⁸ The Court in *Barefoot*, however, eschewed establishing a test that tested only such vague concepts as frivolity.⁷⁹

87, 89-91 (2d Cir. 1979) ("[T]he standard of probable cause to appeal requires the district court to find that the petition is not frivolous and that it presents some question deserving appellate review."); *Madison v. Tahash*, 359 F.2d 60 (8th Cir. 1966) (denying a CPC when there was nothing in the record to indicate that the petitioner was deprived of any constitutional right); *Player v. Steiner*, 292 F.2d 1 (4th Cir. 1961) (requiring substantial constitutional question); *Burgess v. Maryland*, 284 F.2d 486 (4th Cir. 1960) (denying a CPC when that petition was entirely devoid of merit); *McCoy v. Tucker*, 259 F.2d 714 (4th Cir. 1958) (requiring a sufficient likelihood of merit in the case). Then-Judge Blackmun noted that little difference existed, as a practical matter, between those courts that looked at frivolity and those that focused on the presence of a substantial constitutional issue: "(i)f there is a difference in these expressions (we) suspect that it is of no significance. . . . Certainly, if a matter is frivolous, it is clearly without probable cause. Thus, the cases which speak of frivolity . . . would arrive at the same conclusion on a more substantive standard." Blackmun, *supra* note 50, at 352.

77. See *Robbins*, *supra* note 69, at 315-16 ("The only Supreme Court precedent on the standard for issuing a certificate of probable cause is found in a memorandum written by Justice Harlan in 1963, in *Rosoto v. Warden, Cal. State Prison*. *Rosoto* involved the application by a state prisoner for the issuance of a certificate of probable cause that had previously been denied by a federal district court and by a judge of the circuit court of appeals. Justice Harlan denied the issuance of the certificate on the ground that the issues did not give rise to a 'substantial constitutional question.'") (quoting *Rosoto v. Warden, Cal. State Prison*, 83 S. Ct. 1788 (1963) (Harlan, J., in chambers)).

78. *Barefoot*, 436 U.S. at 892.

79. Relying on the legislative history containing statements that Congress sought to prevent frivolous appeals through the COA standard, one treatise opines that the Supreme Court "[e]schew[ed] Congress's 'not frivolous' formulation" in adopting the *Barefoot* standard, though it "preferred to state affirmatively what, on analysis, amounts to nearly the same standard." HERTZ & LIEBMAN, *supra* note 20, at § 35.4(c), at 1443. In reality, though

Instead, the court in *Barefoot* adopted a well-proven standard that would govern the consideration of the certification question: “a certificate of probable cause requires petitioner to make a ‘substantial showing of the denial of [a] federal right.’”⁸⁰ Having confirmed how a federal court would review a habeas petitioner’s desire to appeal, the Supreme Court established a step-by-step procedure that would regulate, consistent with 28 U.S.C. § 2253, Rule 22 and precedent, the handling of CPC requests and last-minute habeas petitions.⁸¹ Of particular interest, the Supreme Court fully endorsed both *Nowakowski*’s obligatory jurisdiction and the circuit’s ability to use summary procedures to adjudicate those compulsory appeals.⁸² The Supreme Court, however, inserted some uncertainty about whether a circuit court possesses some jurisdiction absent a certificate by allowing the circuits to resolve the merits of an appeal at the same time they considered whether to issue a certificate, a practice it already approved of in *Garrison v. Patterson*.⁸³

C. The AEDPA

After debating and discussing habeas reform for years without meaningful results, Congress passed the Anti-Terrorism and Effective Death Penalty Act of 1996. The AEDPA cut a broad swath through

Congress established the CPC procedure without adopting any specific formulation for its implementation, the *Barefoot* standard subsumes a mere frivolous inquiry by disallowing all insubstantial showings of federal legal violations, which presumably includes at the very least frivolous claims. In practice, however, a species of claims exists which is not wholly frivolous, but still makes an insubstantial showing of a constitutional denial.

80. *Barefoot*, 463 U.S. at 892 (quoting *Stewart v. Beto*, 454 F.2d 268, 270 n.2 (5th Cir. 1971)). The Supreme Court clarified what substantial showing standard required:

In requiring . . . a “substantial showing of the denial of [a] federal right,” obviously the petitioner need not show that he should prevail on the merits. He has already failed in that endeavor. Rather, he must demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are “adequate to deserve encouragement to proceed further.”

Barefoot, 463 U.S. at 893, n.4 (quoting *Gordon v. Willis*, 516 F.Supp. 911, 913 (N.D. Ga. 1980)).

81. *Barefoot*, 463 U.S. at 892-96.

82. *Barefoot*, 463 U.S. at 894 (stating that “a court of appeals may adopt expedited procedures in resolving the merits of habeas appeals, notwithstanding the issuance of a certificate of probable cause”). The Supreme Court, however, cautioned “that the issuance of a certificate of probable cause generally should indicate that an appeal is not legally frivolous, and that a court of appeals should be confident that petitioner’s claim is squarely foreclosed by statute, rule or authoritative court decision, or is lacking any factual basis in the record of the case, before dismissing it as frivolous.” *Id.*

83. 391 U.S. 464 (1968).

federal criminal law and, most germane to this Article, revamped federal habeas review. Using its great power to define the class of those eligible for the habeas writ and how that relief may come about, Congress favors a system of streamlined circumscription, reigning in any far-flung constitutional review. Congress confines federal habeas review both by erecting procedural limitations and by polishing a deferential lens for viewing substantive claims. Modern judicial understanding reinforces these restraints, particularly through a strongly rooted, and sometimes nearly slavish, adherence to procedure. The AEDPA set in place two separate standards for the review of state-court judgments: one for the great majority of habeas cases and one for adjudication of capital habeas cases arising from States that “opted-in” to a more rigorous procedure through the appointment of competent legal counsel.⁸⁴ Both systems apply highly deferential standards in reviewing the constitutional integrity of criminal convictions and sentences. In most cases, a state prisoner only merits relief after showing that the state court’s rejection of his claims was “contrary to, or involved an unreasonable application of, clearly established Federal law”⁸⁵ or resulted in “an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.”⁸⁶ Courts refuse to water down these standards, thus severely limiting the availability of habeas relief.

Aside from deferentially altering a federal court’s substantive review of state-court judgments, the AEDPA erected high procedural hurdles. Congress intended the AEDPA to do more than complement existing habeas jurisprudence: it wished to supplant traditional practices with a more-streamlined process. For example, the federal habeas rules long discouraged unnecessary delay in a petitioner’s advancement of habeas claims.⁸⁷ Congress displaced the previously

84. Congress codified the opt-in provisions at Chapter 154, 28 U.S.C. §§ 2261-66 (2006). To date, only Arizona has been able to avail itself of the AEDPA’s opt-in provisions, though the Ninth Circuit has somewhat limited its application. *See Spears v. Stewart*, 283 F.3d 992 (9th Cir. 2002).

85. 28 U.S.C. § 2254(d)(1) (1996).

86. 28 U.S.C. § 2254(d)(2) (1996).

87. Former Rule 9 of Rules Governing Section 2254 Cases in the United States District Courts, provided:

A petition may be dismissed if it appears that the state of which the respondent is an officer has been prejudiced in its ability to respond to the petition by delay in its filing unless the petitioner shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the state occurred.

amorphous standard with the rigorous one-year limitations period now found in section 2244(d)(1).⁸⁸ With the same apparent desire for efficiency, Congress also modified the CPC statute, christening it a Certificate of Appealability, by codifying the *Barefoot* standard and otherwise tinkering with the statute's language.⁸⁹

As previously discussed, Congress' drafting of the AEDPA created anything but a model of clarity. Some provisions of the AEDPA on their face, manifest Congress' intent, such as the adoption of *Barefoot*'s certification standard. Congress' intent with other modifications of the certification process is less than obvious. Courts and commentators have lambasted the AEDPA's poorly chosen language, unclear mandates, and contradictory provisions. Of particular relevance, the AEDPA jettisoned the old certification language referring to the "judge who rendered the order." Congress revised section 2253 to allow an appeal only when authorized by a "circuit justice or judge,"⁹⁰ apparently removing the district court

88. Recent revisions to the federal habeas rules omit the now-superfluous timeliness language, acceding to Congressional intent as to the punctuality of a habeas petition. See Former Rule 9 of Rules Governing Section 2254 Cases in the United States District Courts, Advisory Committee Notes, 2004 Amendment ("[C]urrent Rule 9(a) has been deleted as unnecessary in light of the applicable one-year statute of limitations for § 2254 petitions . . ."). The courts, however, temper 28 U.S.C. § 2244(d) the timeliness requirement with equitable tolling in appropriate cases. See *Pace v. DiGuglielmo*, 544 U.S. 408, 418, 125 S. Ct. 1807, 1814-15 (2005).

89. "Except for substituting the word 'constitutional' for the word 'federal,' the present § 2253 is a codification of the CPC standard announced in *Barefoot* . . ." *Slack v. McDaniel*, 529 U.S. 473, 475 (2000). At least one circuit initially held that the AEDPA created a more stringent standard than existed under *Barefoot*, *Williams v. Calderon*, 83 F.3d 281, 286 (9th Cir. 1996). ("The standard for obtaining a [COA] under the Act is more demanding than the standard for obtaining a [CPC] under the law as it is exercised prior to the enactment of the Act.") though every other circuit found the standards to be identical. See *Reyes v. Keane*, 90 F.3d 676, 680 (2d Cir. 1996); *Nelson v. Walker*, 121 F.3d 828, 832 (2d Cir. 1997); *Muniz v. Johnson*, 114 F.3d 43, 45 (5th Cir. 1997); *Porter v. Gramley*, 112 F.3d 1308, 1312 (7th Cir. 1997); *Lennox v. Evans*, 87 F.3d 431, 433 (10th Cir. 1996); *Drinkard v. Johnson*, 97 F.3d 751, 770 (5th Cir. 1996). "The two certificates differ only in scope: a certificate of probable cause places the case before the court of appeals, but a certificate of appealability must identify each *issue* meeting the 'substantial showing' standard . . ." *Herrera v. United States*, 96 F.3d 1010, 1012 (7th Cir. 1996).

90. The relevant portions of 28 U.S.C. section 2253 now provide as follows:

(c) (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from--(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or (B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which

from habeas certification. Yet Congress paradoxically left unaltered the district court's role in the newly amended Rule 22.⁹¹

In addition to leaving the district court's role cloudy, the two provisions when read together required a district court to justify both granting a COA (through identifying specific issues for appeal) and denying one, where former practice only required the district court to explain why no certificate would issue. The disconnect between the amended 28 U.S.C. § 2253, which requires the certification of appellate cases, and the amended Rule 22 of the Federal Appellate Rules, outlining the procedure governing the certification process, epitomize the problems created by the AEDPA.⁹² Congress had before it several proposed bills that would have expressly divested the district court of all certification power,⁹³ but chose to enact one that still left vestiges of the pre-AEDPA procedure. Why Congress drafted such obscure mandates cannot be discerned from the

specific issue or issues satisfy the showing required by paragraph (2).

91. "In a habeas corpus proceeding in which the detention complained of arises from process issued by a state court, or in a 28 U.S.C. § 2255 proceeding, the applicant cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. § 2253(c) (1996). If an applicant files a notice of appeal, the district judge who rendered the judgment must either issue a certificate of appealability or state why a certificate should not issue. The district clerk must send the certificate or statement to the court of appeals with the notice of appeal and the file of the district-court proceedings. If the district judge has denied the certificate, the applicant may request a circuit judge to issue the certificate." Fed. R. App. P. 22(b)(1) (emphasis added).

92. A noted treatise on habeas corpus law identified three ways in which the statute and rule both differ and conflict. HERTZ & LIEBMAN, *supra* note 20 at § 35.4(b). First, the statute seems to require a certificate in *all* habeas appeals from district court rulings, even when the government is the losing party. The rule, however, only requires a certificate when the district court rules against the state or federal prisoners. Although some doubt originally existed over whether the COA procedure applied to 28 U.S.C. § 2255 cases, *Hohn v. United States*, 524 U.S. 236, 243 (1998) ("On its face, [Rule 22(b)] applies only to state, and not federal, prisoners."), courts have found that federal prisoners must also seek certification before appellate jurisdiction vests. *See, e.g.*; *United States v. Youngblood*, 116 F.3d 1113, 1114-15 (6th Cir. 1997); *Edwards v. United States*, 114 F.3d 1083, 1084 (11th Cir. 1997); *United States v. Orozco*, 103 F.3d 389, 390 (5th Cir. 1996). Second, the rule and statute apparently differ on whether a single judge or an appellate panel may consider a COA. Finally, the statute's imprecise language requires a "circuit justice or judge" to rule on the COA question—the modifier traditionally applying to both nouns and requiring action only on the circuit court's part. Notwithstanding section 2253's exclusion, Rule 22 explicitly included the district court in the certification process.

93. "Like similar bills from the 1980s, those 1995 bills would have not merely inserted the ambiguous 'circuit justice or judge' language into § 2253, they also would have amended Rule 22(b) to provide that 'an appeal by the applicant or movant may not proceed unless a circuit judge issues a certificate of probable cause.' (citations omitted). It was the language amending Rule 22(b) that left no doubt district judges would be precluded from issuing appeal certificates, if any of these bills were enacted." *Hunter v. U.S.*, 101 F.3d 1565, 1581 (1996).

legislative history.

Congress knew of these problems before passing the AEDPA.⁹⁴ During Congress' consideration of the habeas reform, Judge James K. Logan, Chair of the Advisory Committee on Appellate Rules, informed Congress that the new version of 28 U.S.C. § 2253 did not explicitly include the district court in the certification process, making it uncertain whether a district court could issue a COA.⁹⁵ Two weeks before Congress' final vote on the AEDPA, the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States sent a letter to Representative John Conyers, then ranking minority member of the House Judiciary Committee, identifying the conflicting allocation of responsibilities between section 2253(c) and Rule 22(b).⁹⁶ The Committee's letter pleaded that "the courts will have a nearly impossible task" in resolving the friction and also proposed ways to end the discord.⁹⁷ Congress made no change to the legislation, and apparently did not respond to the Committee's letter. Congress provided no clue as to how it expected courts to resolve the new 28 U.S.C. 2253's seeming divergence from prior practice.⁹⁸ Congress simply left no indication as to why it enacted the conflicting provisions. Indeed, one court opined that "it is unlikely that contemplation played any role at all" in Congress' tinkering with certification.⁹⁹

D. Amendment of Rule 22 and Current Procedure

Habeas litigants quickly identified section 2253's amended language and promptly challenged the district court's ability to issue a COA.¹⁰⁰ Some district courts initially held that the AEDPA placed

94. Congress amended § 2253 as § 102 and amended Rule 22 as § 103 of the AEDPA. Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996). The simple text of the legislation should have altered members of Congress to the conflicting provisions.

95. Minutes of the Advisory Committee on Appellate Rules, April 3 & 4, 1997, www.uscourts.gov/rules/Minutes/ap4-97.htm. (last visited March 5, 2007).

96. *Lyons v. Ohio Adult Parole Authority*, 105 F.3d 1063, 1071 (6th Cir. 1997).

97. *Id.*

98. *Id.* ("The 1996 Act's legislative history is similarly unhelpful; to the extent it relates to the question of who may issue the certificates it serves to muddy rather than clarify.")

99. *Houch v. Zavaras*, 924 F.Supp. 115, 117 (D. Colo. 1996).

100. *See Williams v. United States*, 150 F.3d 639, 640 (7th Cir. 1998) ("The deletion of any reference to 'the justice or judge who rendered the order' could imply that the district judge is no longer entitled to issue a certificate.")

the new certification determination in the circuit courts alone,¹⁰¹ though no strong consensus emerged.¹⁰² District courts relied on several arguments to support their exclusion from habeas certification. First, district courts noted Congress' wholesale revision of the COA procedure in section 2253, at least in comparison to its minor tinkering when revising Rule 22. Essentially, the district courts felt the cosmetic changes to Rule 22 were not a decisive statement of the anticipated procedure. Thus, the district courts saw Rule 22 as a halted and incomplete revision, not fully aligned to Congress' manifested intent in section 2253.

Second, district courts relied on the preservation of the "circuit justice or judge" phrase that never referred to the district court before the AEDPA. Refusing to stray beyond the pre-AEDPA understanding that "circuit" modified both nouns, some districts found no reason to believe that Congress intended the AEDPA's use of "judge" to encompass all federal judicial officers.

Third, district courts noted that, insofar as Rule 22 referenced the district courts, it conditioned their certification role on compliance with section 2253. While amended Rule 22 allowed a district judge to issue a COA, it also specified that "an appeal . . . may not proceed unless a district or a circuit judge issues a certificate of appealability pursuant to section 2253(c) of title 28, United States Code."¹⁰³ Section 2253 did not authorize the district court to issue a certificate. Thus, in some courts' view, the statute prevented the creation of certification power by appellate rule alone.

Finally, the district courts read the exclusion in section 2253 as only one thread in a greater mosaic that emphasized the circuit court's habeas role to the exclusion of the district and Supreme Court. As a whole, the AEDPA represented a shift in emphasis to the circuit

101. See, e.g., Witt v. Edwards, 1996 WL 719249, at *2 (N.D. Ohio, Dec. 12 1996); Burke v. United States, 1996 WL 711270, at *1-3 (E.D. Pa. Dec. 4, 1996); Parker v. Morris, 929 F.Supp. 1190, 1192-93 (E.D. Ark. 1996). Because Rule 22 referenced "habeas corpus proceeding[s] in which the detention complained of arises out of process issued by a State court," some districts also found no authority to grant a certificate in § 2255 proceedings. See United States v. Cota-Loaiza, 936 F.Supp. 756, 759 (D. Colo. 1996); United States v. Coyle, 944 F.Supp. 418, 420 (E.D. Pa. 1996); United States v. Johnson, 940 F.Supp. 167, 171 (W.D. Tenn. 1996); Burke v. United States, 1996 WL 711270 (E.D. Pa. 1996).

102. Some districts found that Rule 22 allowed a district court to certify an appeal after the AEDPA. See, e.g., Houchin v. Zavaras, 924 F.Supp. 115 (D. Colo. 1996); Mercuri v. United States, 952 F.Supp. 98 (D. Conn. 1996); Laboy v. Demskie, 947 F.Supp. 733, 744 (S.D.N.Y. 1996).

103. 28 U.S.C. § 2253 (emphasis added).

courts, as manifested, for instance, by their exclusive ability to authorize successive petitions. Some districts saw the AEDPA as an effort by Congress to give the circuit courts the ultimate say as to which issues should receive encouragement to proceed.

Notwithstanding Rule 22's vestigial language, the Eleventh Circuit in *Hunter v. United States*¹⁰⁴ soon clearly and authoritatively rejected any argument that Congress intended to isolate district courts from the appellate habeas context. Subsequent circuit courts found themselves "reluctant to precipitate a circuit split on an issue that will arise almost every day in every district court in the country."¹⁰⁵ Following *Hunter*, courts universally found that, notwithstanding other changes in the habeas procedure required by the AEDPA, district courts would continue serving as the gateway through which a petitioner would first pass in habeas appeals.¹⁰⁶

The circuit courts generally followed two themes in preserving the district court's certification role. First, the circuits seemed wary, especially because of Rule 22, to read too much into Congress' revision of section 2253. Courts found it unlikely that "Congress, after carefully crafting an express provision to divest the district courts of authority to entertain a second or successive habeas corpus petition, in the absence of court of appeals permission, would have ambiguously precluded the district courts from issuing a COA."¹⁰⁷ Second, circuits seemed willing to read Rule 22 broadly, notwithstanding its explicit reference to consistency with section 2253. Circuits evidently felt that any other interpretation would have rendered portions of Rule 22 meaningless, a highly disfavored result.¹⁰⁸

104. 101 F.3d 1565 (11th Cir. 1996), *cert. denied*, 520 U.S. 1211 (1997).

105. *Lozada v. United States*, 107 F.3d 1011, 1016 (2d cir. 1997).

106. *See, e.g.*, *Grant-Chase v. Commissioner, New Hampshire Dep't of Corrections*, 145 F.3d 431, 435 (1st Cir.), *cert. denied*, 525 U.S. 941 (1998); *Lozada v. United States*, 107 F.3d 1011, 1016 (2d cir. 1997); *United States v. Eyer*, 113 F.3d 470, 472-73 (3rd Cir. 1997); *Else v. Johnson*, 104 F.3d 82, 83 (5th Cir. 1997); *Lyons v. Ohio Adult Parole Authority*, 105 F.3d 1063, 1068-73 (6th Cir.), *cert. denied*, 520 U.S. 1224 (1997); *Williams v. United States*, 150 F.3d 639, 640 (7th Cir. 1998); *Tiedeman v. Benson*, 122 F.3d 518, 522 (8th Cir. 1997); *United States v. Asrar*, 108 F.3d 217, 218 (9th Cir. 1997); *Houchin v. Zavaras*, 107 F.3d 1465, 1468-69 (10th Cir. 1997); *United States v. Mitchell*, 216 F.3d 1126, 1129 (D.C. Cir. 2000).

107. *Lozada v. United States*, 107 F.3d 1011, 1015 (2d Cir. 1997).

108. *See Hunter*, 101 F.3d at 1576 ("If we were to construe the phrase 'circuit justice or judge' in § 2253(c), as amended by § 102 of the AEDPA, to exclude district judges, we would violate the Supreme Court's admonition that we not construe legislative enactments 'so as to render superfluous other provisions in the same enactment,' *Freytag v. C.I.R.*, 501 U.S. 868, 877, 111 S. Ct. 2631, 2638, 115 L.Ed.2d 764 (1991), such as Rule 22(b), as amended by § 103

This, however, left circuits unable to rely on their pre-AEDPA jurisprudence and forced a rejection of their decades-old application of 2253's modifier "circuit" to both "justices and judges." Circuit courts' understanding of the revised statute's terminology included the district court in a phrase that had never applied to the trial-level bodies before. Courts expressed concern over wrongly interpreting the AEDPA based on the "grammatical possibility that 'circuit' modifies both 'justice' and 'judge,'" a possibility that was a reality for several decades.¹⁰⁹ Instead, the circuit courts assumed that Congress, *sub silentio*, changed that into a disjunctive phrase meaning "circuit justices" (that is, a Supreme Court justice sitting by designation) and judges (that is, circuit and district judges).¹¹⁰

In short, section 2253's muddled language left an imprecise guide to habeas procedure and the circuit courts did the best they could to make up for Congress' poor drafting skills.¹¹¹ The Supreme

of the AEDPA.").

109. *Lozada v. United States*, 107 F.3d 1011, 1015 (2d Cir. 1997). Other circuits that have addressed this issue have similarly concluded that the word "judge" is not modified by "circuit," and that the district court has the power to issue COAs. *See, e.g., United States v. Asrar*, 108 F.3d 217, 218 (9th Cir. 1997); *Houchin v. Zavaras*, 107 F.3d 1465, 1468-69 (10th Cir. 1997); *Lyons v. Ohio Adult Parole Auth.*, 105 F.3d 1063, 1070 (6th Cir. 1997); *Hunter v. United States*, 101 F.3d 1565, 1574-83 (11th Cir. 1996) (en banc). More succinctly put, "'circuit justice or judge' in 2253(c)(1) should be read as '(circuit justice) or judge' rather than 'circuit (justice or judge)'" *Williams v. United States*, 150 F.3d 639, 640 (7th Cir. 1998); *see also Valerio v. Crawford*, 306 F.3d 742, 763 (9th Cir. 2002) ("The word 'judge' in §2253(c)(1) included not only a circuit judge but a district judge.").

110. *Hunter*, 101 F.3d at 1576 ("We have a choice. On the one hand, we could interpret the ambiguous phrase 'circuit justice or judge' in § 2253(c) to mean 'circuit justice or circuit judge,' which will conflict with and render meaningless much of the plain language of Rule 22(b). Indeed, at least some of the language in each of the first four sentences of the rule would be negated by such an interpretation of § 2253(c). On the other hand, we could interpret the ambiguous phrase in § 2253(c) to mean a 'circuit justice' or a 'judge,' which would include district judges as well as circuit judges. That interpretation would reconcile the statutory provision with the rule and give effect to each word of both provisions. The right choice seems clear, at least insofar as common sense is concerned."); *Lozada*, 107 F.3d at 1016 n.3 ("Admittedly, it is anomalous to conclude that the meaning of the phrase 'circuit justice or judge' changed when § 2253 was amended by the AEDPA, but it would be even more anomalous to conclude that the language Congress inserted into the amended Rule 22(b), explicitly authorizing a district judge to issue a COA, is devoid of meaning.").

111. Initially, the conflict between Rule 22 and the new 28 U.S.C. § 2253 caused the First Circuit to adopt a dual certification procedure, whereby the circuit court would re-certify any issue certified by the district court. The First Circuit adopted a local rule requiring that the circuit court affirm the lower court's grant of a COA:

Once the district court grants or denies a certificate of appealability, the petitioner should promptly apply to the court of appeals for issuance of a certificate of appealability. The motion should be accompanied by a copy of the district court's order and a memorandum giving specific and substantial reasons, and not mere

Court has never explicitly addressed whether the conflict between section 2253 and Rule 22 expunged the district court's certification responsibility. Some language in post-AEDPA cases suggests that the Supreme Court would hesitate to find that section 2253's language alone permits district-court certification.¹¹² However, the district courts' exercise of COA authority for a decade since the AEDPA's enactment makes it unlikely that the Supreme Court would upset the habeas world and reconsider such a basic issue now.¹¹³ In fact, the nature of modern Supreme Court review shelters the district court's role in the certification process because the high court review focuses on the circuit court's own COA analysis, rather than reaching far below to evaluate the district court's action.

generalizations, why a certificate should be granted. Ten days after the district court file has been received in this court, the clerk will present the record to the court, with or without a separate motion for a certificate of appealability, addressed to that court. If no sufficient memorandum has been filed by that time, the certificate may be denied without further consideration. The effect of a denial is to terminate the appeal.

FORMER 1ST CIR. R. 22.1(c); *see* *Grant-Chase v. Commissioner, New Hampshire Dept. of Corrections*, 145 F.3d 431, 435 (1st Cir. 1998). The current First Circuit local rule no longer requires the dual certification procedure. 1ST CIR. R. 22.1(c) *available at* <http://www.ca1.uscourts.gov/files/rules/rules.pdf> (last visited May 27, 2005). As more circuits chimed in on the issue, the First Circuit revised its practice of requiring the "superfluity" of a second certificate. *See Grant-Chase*, 145 F.3d at 435. Most circuits dealt with the issue as it arose in appeals subject to the AEDPA.

112. For instance, in *Hohn v. United States*, 524 U.S. 236, 241-42 (1998), the Supreme Court suggested that the word "circuit" still modifies the term "judge": "[t]hat the statute permits the certificate to be issued by a 'circuit justice or judge' does not mean the action of the *circuit judge* in denying the certificate is his or her own action, rather the action of the court of appeals to whom the judge is appointed." (emphasis added).

113. Congress' recent attempt at revising habeas through the Streamlined Procedures Act would have amended the statute to refer to a "district or circuit judge," returning the certificate's scope to that which existed from 1925 to 1948. The proposed legislation, which unintentionally strips the Supreme Court of certification power, labels this a "technical correction." One supporter of the bill testified:

Subsection (a) of section 13 fixes a drafting error in the 1996 Act, concerning who has the authority to issue a certificate of appealability when a habeas petition is denied by the district courts. Section 2253 currently states that these certificates can be issued by a "circuit justice or judge," and the new language would replace this with "district or circuit judge." This change will not work a substantive change in the law, because the courts have been applying the law as if the new language were already included.

The Streamlined Procedures Act: United States Senate, Committee on the Judiciary, Legislative Hearing on S. 1088, July 13, 2005, Testimony of Thomas Dolgenos, Chief, Federal Litigation Unit Philadelphia District Attorney's Office, Philadelphia, Pennsylvania. While largely correct, this testimony fails to recognize that the proposed amendment would have removed a "circuit justice's" ability to issue a certificate, this removing the Supreme Court's COA powers.

Subsequent developments have solidified the district court's threshold capacity, regardless of Congress' indiscernible intent. Soon after the passage of the AEDPA, the Appellate Rules Advisory Committee attempted to ascertain how Congress viewed the district's certification role.¹¹⁴ Congress gave no direction other than that "the problem could be worked out by the courts."¹¹⁵ Recognizing that "section 2253 is ambiguous; it states that a certificate of appealability may be issued by 'a circuit justice or judge,'"¹¹⁶ the Advisory Committee amended Rule 22 in 1998 ostensibly to "bring[] the rule into conformity with section 2253."¹¹⁷ In reality, the Advisory Committee sought to make Rule 22 consistent with circuit law.¹¹⁸ The 1998 amendment reaffirmed that "the applicant cannot take an appeal unless a circuit justice or a circuit or *district judge* issues a certificate of appealability."¹¹⁹

Thus, the 1998 amendment of Rule 22 officially resurrected the pre-AEDPA tripartite certification review. Pursuant to Rule 22, the district court again considers certification first. Section 2253 then gives the circuit court authority to issue a COA.¹²⁰ Finally, the awkward "circuit justice" language that survived the 1998

114. Minutes of the Advisory Committee on Appellate Rules, *supra* note 95.

115. *Id.*

116. FED. R. APP. P. 22, Advisory Committee Notes, 1998 amendments.

117. FED. R. APP. P. 22, Advisory Committee Notes, 1998 amendments.

118. *See id.* (citing *Else v. Johnson*, 104 F.3d 82 (5th Cir. 1997), *Lyons v. Ohio Adult Parole Authority*, 105 F.3d 1063 (1997), and *Hunter v. United States*, 101 F.3d 1565 (11th Cir. 1996)).

119. FED. R. OF APP. P. 22 now reads in its entirety as follows:

(b) Certificate of Appealability.

(1) In a habeas corpus proceeding in which the detention complained of arises from process issued by a state court, or in a 28 U.S.C. § 2255 proceeding, the applicant cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. § 2253(c). If an applicant files a notice of appeal, the district judge who rendered the judgment must either issue a certificate of appealability or state why a certificate should not issue. The district clerk must send the certificate or statement to the court of appeals with the notice of appeal and the file of the district-court proceedings. If the district judge has denied the certificate, the applicant may request a circuit judge to issue the certificate.

(2) A request addressed to the court of appeals may be considered by a circuit judge or judges, as the court prescribes. If no express request for a certificate is filed, the notice of appeal constitutes a request addressed to the judges of the court of appeals.

(3) A certificate of appealability is not required when a state or its representative or the United States or its representative appeals.

120. FED. R. APP. P. 22.

amendments presumably allows a Supreme Court Justice to certify an appeal, though they have hardly ever used that procedure.¹²¹ The Supreme Court instead carves its role in certification jurisprudence by superintending the circuits' application of COA standards. This recent shift has caused the circuits to reevaluate their own habeas jurisdiction. These transforming views of habeas jurisdiction shape any discussion of the district court's place in the certification process.

III. MODERN QUESTIONS OF APPELLATE HABEAS JURISDICTION

The question of certification is jurisdictional. By barring frivolous claims from appellate review, Congress severely limited federal appellate authority over those claims not warranting certification. By circumscribing appellate review to precisely designated issues rather than entire cases, and then codifying the judicial requirement that the chosen claims substantially show a constitutional deprivation, the AEDPA signaled an intent to reign in any far-flung appellate review. Troublingly, the question of what jurisdiction accompanies the issuance of a COA has consumed significant judicial resources. As such, the courts selectively reached back into pre-AEDPA law and, through court practice and appellate rules, reaffirmed the district court's role as the threshold gatekeeper.

While resurrecting the district court's *role* in certification, some circuits have not resuscitated the district court's previous certification

121. The Supreme Court *denies*, rather than *dismisses*, applications for a COA filed in that court, signaling its ability to entertain COA petitions. *See Savage v. United States*, 545 U.S. 1157, 126 S.Ct. 21 (2005); *Clayton v. Runnels*, 545 U.S. 1157, 126 S. Ct. 21 (2005); *Maxwell v. Smith*, 544 U.S. 998, 125 S. Ct. 1929 (2005); *Kroncke v. Hood*, 125 S. Ct. 819 (2004); *Sugden v. United States*, 125 S. Ct. 22 (2004); *Russ v. United States*, 541 U.S. 985 (2004); *Moss v. Hofbauer*, 541 U.S. 931 (2004); *Taylor v. Booker*, 540 U.S. 979 (2003); *Nevarez-Diaz v. United States*, 539 U.S. 978 (2003); *Butler v. Cockrell*, 537 U.S. 1183 (2003); *Moore v. Cockrell*, 535 U.S. 901 (2002); *Alley v. Bell*, 534 U.S. 1038 (2001); *Roberts v. Luebbers*, 534 U.S. 946 (2001); *Palmore v. Johnson*, 533 U.S. 966 (2001); *Nevius v. McDaniel*, 531 U.S. 1049 (2000); *Johnson v. Luebbers*, 531 U.S. 1006 (2000); *Roquemore v. Rice*, 527 U.S. 1061 (1999); *Lindow v. United States*, 526 U.S. 1108 (1999); *Leisure v. Bowersox*, 526 U.S. 1083 (1999); *Davis v. Bowersox*, 526 U.S. 1062 (1999); *Monroe v. Bading*, 526 U.S. 1002 (1999); *Corwin v. Johnson*, 525 U.S. 1049 (1998); *Wise v. Bowersox*, 525 U.S. 1038 (1998); *Griffin-El v. Bowersox*, 523 U.S. 1015 (1998); *Beavers v. Pruett*, 522 U.S. 1023 (1997). If the Supreme Court lacked authority to issue a COA itself, it would presumably *dismiss* any COA application. What procedure accompanies the grant of a COA by the Supreme Court is murky. Presumably, the Supreme Court grants a COA and the circuit court then must address the merits. *See generally Audry v. Estelle*, 464 U.S. 1301 (1983). In that case, it seems more appropriate to call it a "Certificate of Remandability" because the Supreme Court forces lower-court consideration of the merits.

power endowed by the decision in *Nowakowski*.¹²² As discussed below, pre-AEDPA law allowed a district court an unfettered ability to force appeals through certification, explicitly requiring circuit-court acquiescence to the district court's evaluation of whether a case needed appellate development. Some circuits now feel empowered to redefine that precursory role. A circuit split currently exists as to whether district courts continue to merit unquestioned deference and freedom from appellate reexamination of a COA. The existence of this circuit split goes far beyond mere academic curiosity—reconsideration of a COA invokes trial-level and appellate jurisdictional questions and detracts from habeas efficiency.¹²³ Those circuits reconsidering a district-granted COA possibly mirror fundamental shifts in the Supreme Court's view of its own habeas jurisdiction.

A. The Supreme Court's Modern View of Appellate Habeas Jurisdiction

When Congress, between 1925 and 1948, removed the Supreme Court's certification power, it did not render all habeas actions unreviewable by the High Court. The Constitution gives Congress control over the Supreme Court's appellate jurisdiction (except its constitutionally specified original jurisdiction).¹²⁴ Congress has chosen to limit the Supreme Court's appellate jurisdiction through 28 U.S.C. § 1254 to those “[c]ases *in* the court of appeals.”¹²⁵ In 1925, the Supreme Court in *House v. Mayo*¹²⁶ interpreted this provision to mean that absence of a CPC kept a habeas case from ever being “in”

122. 386 U.S. at 542.

123. For the purposes of this article, the author refers primarily to those cases in which the lower court grants a certificate. The case law is the same, however, in those cases in which a circuit panel considers the COA question after the district court denial, and the “merits panel” reconsiders the circuit court's own grant of a COA.

124. U.S. CONST. art. III, § 2 (“The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . .”).

125. 28 U.S.C. § 1254(1) (“Cases *in* the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.”) (emphasis added). For a history of the origins and traditional interpretation of § 1254, see Scott E. Grant, *The Law of Unintended Consequences: Supreme Court Jurisdiction Over Interlocutory Class Certification Rulings*, 6 J. APP. PRAC. & PROCESS 249, 253-61 (2004).

126. 324 U.S. 42 (1945).

the circuit court.¹²⁷ The *House* Court held that if the district and circuit courts declined to issue a CPC, it lacked statutory jurisdiction to grant a writ of certiorari.¹²⁸

Reluctant to surrender all authority in habeas cases, the Supreme Court nonetheless employed the common-law certiorari power latent in the All Writs Act to exert jurisdiction over habeas appeals.¹²⁹ As early as 1897, the Supreme Court recognized that the All Writs Act allowed common-law review in excess of its statutory authority.¹³⁰ The Supreme Court used the common-law certiorari as an independent vehicle for the consideration of circuit-court action otherwise unreviewable by statute.¹³¹ While the Supreme Court has

127. *Id.* at 44 (“Our authority under [the relevant statutory] section extends only to cases ‘in a circuit court of appeals, or in the (United States) Court of Appeals for the District of Columbia.’ Here the case was never ‘in’ the court of appeals, for want of a certificate of probable cause.”); *see also* *Davis v. Jacobs*, 454 U.S. 911, 913-14 (1981) (memorandum opinion) (“*House* reflects the historically correct view of the scope of the common-law writ of certiorari . . .”).

128. *House*, 324 U.S. at 44. The Supreme Court’s analysis that led to this conclusion can most favorably be termed succinct, and should be called superficial: “This Court cannot issue a writ of certiorari in the present case under § 240(a) of the Judicial Code Our authority under that section extends only to cases ‘in a circuit court of appeals, or the (United States) Court of Appeals for the District of Columbia.’ Here, the case was never ‘in’ the court of appeals, for want of a certificate of probable cause.” *Id.*; *see also* *Davis v. Jacobs*, 454 U.S. 911, 912 (1981), *cert. denied* (“Because none of the petitioners obtained a certificate of probable cause, none of these cases was properly “in” the Court of Appeals and therefore 28 U.S.C. § 1254 does not give this Court jurisdiction over the petitions for certiorari.”); *Holiday v. Johnson*, 313 U.S. 342, 348 n.2 (1941) (invoking the All Writs Act to acquire certiorari jurisdiction without providing any substantive legal analysis). Rather than engage in any probing analysis, the Supreme Court, through its reference to *Ferguson* which denied certiorari review without any substantive discussion, seemed to rely more on its traditional practice than any searching statutory justification. The Supreme Court would follow *Hohn* in name, though not necessarily in practice, for half a century.

129. *House*, 324 U.S. at 44. Under the All Writs Act, the Supreme Court can “issue all writs not specifically provided for by statute, which may be necessary for the exercise of [its jurisdiction], and agreeable to the usages and principles of law.” 28 U.S.C. § 1651. For an excellent review of the common-law writ of certiorari, see Dallin H. Oaks, *The “Original” Writ of Habeas corpus in the Supreme Court*, 1962 THE SUPREME COURT REVIEW 182-86 (1962).

130. *Ex parte Chetwood*, 165 U.S. 443, 461-62 (1897) (“[T]his court and the circuit and district courts of the United States were empowered by congress ‘to issue all writs, not specifically provided for by statute, which may be agreeable to the usages and principles of law;’ and, under this provision, we can undoubtedly issue writs of certiorari in all proper cases.”); *see also* *McClellan v. Carland*, 217 U.S. 268, 280 (1910) (holding that an extraordinary writ “may issue in aid of the appellate jurisdiction which otherwise might be defeated by the unauthorized action of the court below.”); *Whitney v. Dick*, 202 U.S. 132, 138 (1906) (“It may be said that the power of this court to issue original and independent writs of certiorari has been upheld under the authority given by [the All Writs Act]”).

131. WRIGHT, *infra* note 135 at § 4005 (“[The Supreme Court] established common-law

never defined the parameters of its common-law power with precision,¹³² the expansive breadth of this authority allowed the Supreme Court to leap over the question of whether the Court of Appeals should have certified a habeas appeal to examine the petition's merits, notwithstanding its own inability to issue a CPC.¹³³ The All Writs Act allowed the Supreme Court to review a habeas petition, even if neither the district nor circuit court issued a certificate.¹³⁴ Even when Congress returned certificate power to the Supreme Court in 1948, the High Court took up uncertified habeas cases using its common-law certiorari power, rather than issuing its own CPC.

While the Supreme Court showed an interest in superintending the certification process in *Barefoot*, the sweeping common-law certiorari power allowed focused Supreme Court review over habeas petitions and provided little incentive for the Supreme Court to regulate extensively the certification process. Any uncertified appeal was never "in" the circuit courts so the Supreme Court could sidestep the question of whether a CPC should issue because the All Writs Act allowed the Supreme Court to address the merits directly. The Supreme Court showed little concern for whether the circuits correctly applied the *Barefoot* standard because that court could proceed to the merits of any uncertified appeal.

The Supreme Court was sloppy in its use of the common-law certiorari power. The Supreme Court rarely specified whether it considered a habeas appeal pursuant to a statutory or common-law

certiorari as an independent means of reviewing lower court action . . . to avoid the limits on other forms of review.").

132. *See id.* ("The limits of this open-ended authority have never been precisely defined.").

133. *House*, 324 U.S. at 44-45 ("And not only does our review extend to a determination of whether the circuit court of appeals abused its discretion in refusing to allow the appeal, but if so, also extends to questions on the merits sought to be raised by the appeal. We hold that the same principles are applicable here. Hence we are brought to the question whether the district court rightly denied the petition."). A reading of *House* as holding that "CPC denials were not appealable," Ryan Haggland, *Review and Vacatur of Certificates of Appealability Issued After the Denial of Habeas Corpus Petitions*, 72 U. CHI. L. REV. 989, 995 (2005), may be correct with respect to the scope of the statutory certiorari power, but ignores the Supreme Court's broad use of common-law certiorari to reach the merits of an appeal. *See Oaks, supra* note 129, at 187 ("[T]he scope of review extended not only to whether the court of appeals should have allowed the appeal, but also to the questions on the merits sought to be raised by the appeal.").

134. 28 U.S.C § 1651.

mandate.¹³⁵ Beyond the obfuscation created by the Supreme Court's failure to distinguish between the two writs, the Supreme Court's regular use of the common-law writ of certiorari created untenable tension with its own case law. The Supreme Court otherwise characterized the writ as "extraordinary," to be used "rarely,"¹³⁶ not to be used as a substitute for authorized appellate procedures, and not to be used as a means of overcoming Congress' intent to foreclose

135. In several cases, the Supreme Court considered the question of certiorari review without specifying whether it did so under statute or common law even though the lower courts denied the petitioner's request for a CPC. *See, e.g.,* *Lynce v. Mathis*, 519 U.S. 433 (1997); *Allen v. Hardy*, 478 U.S. 255 (1986); *Smith v. Digmon*, 434 U.S. 332 (1978); *Humphrey v. Cady*, 405 U.S. 504 (1972). Some justices objected to the careless manner in which the Supreme Court addressed uncertified habeas appeals. Most markedly in *Jefferies v. Barksdale*, 453 U.S. 914 (1981), a dissent from denial of certiorari by Justice Rehnquist and two other justices criticized the Court for not dismissing the petition, because the case had never been "in" the circuit court. In *David v. Jacobs*, 454 U.S. 911 (1981), the same three justices again dissent on the same grounds. One treatise noted:

The Strength of Justice Rehnquist's position lies in the fact that the circuit justice can issue a certificate of probable cause if the court of appeals, circuit judges, and district court have acted unwisely. There is a means of correction short of resort to an extraordinary writ. As a functional matter, however, it does not seem likely that the Court must work any harder to dispose of these cases by denial rather than dismissal, nor that the number of petitions will be affected. Absent some more cogent showing that Congress in fact intended the language of the statutes to close off any Supreme Court review, the old common law certiorari cases should be honored against the remote possibility that corrective action may be required in a particular case.

WRIGHT, MILLER, & COOPER, 17 FEDERAL PRACTICE AND PROCEDURE § 4036 (2005) (noting that the Supreme Court "raised some questions as to the availability of either statutory or common law certiorari"). Justice Stevens wrote a concurrence in *Davis* supporting the use of common-law certiorari to review uncertified appeals because "[a]s a practical matter, given the volume of frivolous, illegible, and sometimes unintelligible petitions that are filed in this Court, our work is facilitated by the practice of simply denying certiorari once a determination is made that there is no merit to the petitioner's claim." *Davis*, 454 U.S. at 914; *see also* WRIGHT, MILLER, & COOPER, 17 FEDERAL PRACTICE AND PROCEDURE § 4036 (noting that the Supreme Court jurisprudence "raised some questions as to the availability of either statutory or common law certiorari").

136. *See, e.g.,* *Ohio Citizens For Responsible Energy, Inc. v. NRC*, 479 U.S. 1312, 1313 (1986) (Scalia, J., in chambers) ("The issuance by the Court of an extraordinary writ authorized by 28 U.S.C. § 1651(a) is not a matter of right, but of discretion sparingly exercised."); *Pennsylvania Bureau of Correction v. United States Marshals Service*, 474 U.S. 34, 42 (1985) ("The All Writs Act is a residual source of authority to issue writs that are not otherwise covered by statute. Where a statute specifically addresses the particular issue at hand, it is that authority, and not the All Writs Act, that is controlling. Although that Act empowers federal courts to fashion extraordinary remedies when the need arises, it does not authorize them to issue ad hoc writs whenever compliance with statutory procedures appears inconvenient or less appropriate."). *See also* *Oaks*, *supra* note 129, at 188 ("The [Supreme] Court has made clear, however, that as a matter of discretion its power to use the common-law writ will seldom be exercised.").

Supreme Court review.¹³⁷ The Supreme Court violated its precedent by using the All Writs Act in most uncertified appeals—a regular and ordinary circumstance. The Supreme Court often *denied* a certiorari petition rather than *dismissing* it for a lack of jurisdiction, because “it is not too much bother to simply deny a petition for certiorari.”¹³⁸

Soon after the AEDPA’s enactment, the Supreme Court signaled that, like Congress, it too began to rethink habeas procedure. Foreshadowing the assumption of the Supreme Court’s statutory jurisdiction over habeas appeals, the 1990 revision of the Supreme Court rules deleted the former provision explicitly outlining the procedures for filing a common-law petition for a writ of certiorari.¹³⁹

137. See *United States Alkali Export Assn. v. United States*, 325 U.S. 196, 203 (1945); *De Beers Consolidated Mines, Ltd. v. United States*, 325 U.S. 212 (1945).

138. *Jefferies*, 453 U.S. at 916 (Rehnquist, J., dissenting from denial of certiorari); *but cf. Davis*, 454 U.S. at 914-15 (“As a practical matter, given the volume of frivolous, illegible, and sometimes unintelligible petitions that are filed in this Court, our work is facilitated by the practice of simply denying certiorari once a determination is made that there is no merit to the petitioner’s claim. As the dissenters recognize, that determination must be made in all cases because Circuit Justices have the power—and indeed the duty—to issue certificates of probable cause in proper cases. Imposing on the Court the additional burden of determining in every case whether the form of the order should be a denial or a dismissal is not a trivial matter because in many cases more time would be required in searching the record to be sure that no certificate of probable cause was issued than is required in evaluating a contention that has been unsuccessfully advanced by countless other prisoners.”); see also *Oaks*, *supra* note 129, at 186, n.152 (noting the Supreme Court’s failure to distinguish between the statutory and common-law writs). Justice Rehnquist criticized the haphazard practice of denying rather than dismissing the certiorari request because “[t]he exercise of jurisdiction over a case which Congress has provided shall terminate before reaching [the Supreme] Court . . . is a serious matter. The imperative that other branches of Government obey [its] duly issued decrees is weakened whenever [it] decline[s], for whatever reason other than the exercise of [its] own constitutional duties, to adhere to the decrees of Congress and the Executive.” *Id.* Justice Scalia has also criticized the use of the All Writs Act as superfluous in light of the Supreme Court’s ability to certify appellate issues itself. See *Hohn*, 524 U.S. at 264 (“Because petitioner may obtain the relief he seeks from a circuit justice [that is, a Supreme Court justice], relief under the All Writs Act is not ‘necessary.’”). For a more thorough development of the Supreme Court’s practical abdication of *House* see Scott E. Grant, *The Law of Unintended Consequences: Supreme Court Jurisdiction Over Interlocutory Class Certification Rulings*, 6 J. APP. PRAC. & PROCESS 249, 256-63 (2004). Succinctly put, the Supreme Court “continued its practice of granting certiorari in some cases where a certificate of probable cause had been denied—notwithstanding that [*House v. Mayo*] remained ‘good law.’” *Id.* at 258.

139. See WRIGHT, MILLER, & COOPER, 17 FEDERAL PRACTICE AND PROCEDURE at § 4036 (“Until 1980, Supreme Court Rules 31(1) and 31(2) governed practice on petition for common law certiorari. The petition was to be prefaced by a motion for leave to file, a requirement that made it easy to distinguish between petitions for statutory and common law certiorari so long as the proper procedure was followed. Rule 27.4, adopted in 1980, omits the requirement of a motion for leave to file the petition.”). The pre-1990 Supreme Court rules outlined a specific procedure for filing a petition seeking “issuance of a common-law writ of

While the Supreme Court left intact other language mentioning the common-law writ, it no longer commanded special filing requirements.¹⁴⁰ One explanation for this revision may be that the Supreme Court frequently invoked its common-law powers, increasingly treating appeals on uncertified habeas cases as if it held statutory authority to do so. Removal of the procedures governing the common-law writ blurred the distinction between the Supreme Court's use of equitable and statutory certiorari.¹⁴¹

The question of habeas jurisdiction came to the forefront in *Hohn v. United States*,¹⁴² where the Supreme Court questions what jurisdiction it could exert when a circuit court denied certification, directly challenging *House's* authority.¹⁴³ In *Hohn*, the petitioner sought a COA from the circuit court, which denied certification because the petitioner's claims apparently rested on pure statutory construction which the circuit court felt failed to challenge the denial of a constitutional right.¹⁴⁴ In response to his petition for certiorari review, the government conceded that the circuit court had interpreted section 2253 wrongly and that, indeed, the petitioner raised a constitutional issue. The government asked the Supreme Court to remand the case for reconsideration of the COA issue.¹⁴⁵ Under its

certiorari under 28 U.S.C. § 1651(a). SUP. CT. R. 24(4). Some commentators opined that the Supreme Court's removal of the rule governing common-law certiorari meant that it would no longer use that extraordinary remedy, 2 FEDERAL PROCEDURE, LAWYER'S EDITION, § 3.1 (2005) ("In the 1990 revision of the rules, the Supreme Court saw fit to delete the provision for a common-law writ of certiorari, and presumably the Supreme Court does not intend to entertain this species of extraordinary writ in the future."), though the fluid and imprecise nature of Supreme Court jurisprudence in this area always leaves open the future use of the common-law writ.

140. The current Supreme Court rules only mention the common-law writ to specify that in those cases seeking its issuance "the parties shall proceed to print a joint appendix pursuant to Rule 26." Sup. Ct. R. 20.6.

141. "With this abolition of a seemingly trivial procedural step, the distinction is likely to become more obscure and more frequently ignored." WRIGHT, MILLER, & COOPER, 17 FEDERAL PRACTICE AND PROCEDURE at § 4036. "The more modern cases have blurred the distinction between review by common-law certiorari and by statutory certiorari pursuant to 28 U.S.C.A. § 1254(1) by granting certiorari without indicating the nature of the writ, in cases where there was no certificate of probable cause to appeal or leave was denied to appeal in forma pauperis." 2 FEDERAL PROCEDURE, LAWYER'S EDITION, § 3:1.

142. 524 U.S. 236 (1998).

143. *Hohn v. United States*, 522 U.S. 944 (1997) (Specifically, "[i]n light of the fact that the Court of Appeals denied the petitioner's request for a Certificate of Appealability, does this Court have jurisdiction to grant certiorari, vacate, and remand this case per the suggestion of the Acting Solicitor General?").

144. *United States v. Hohn*, 99 F.3d 892, 893 (8th Cir. 1996).

145. Brief of Appellant at 10, *Hohn v. United States*, No. 96-8986 (8th Cir. Feb. 12,

traditional use of the All Writs Act authority, the Supreme Court could have considered the merits of the appeal unencumbered by the certification question. The *Hohn* Court instead chose to consider the procedural implications of the appeal.¹⁴⁶

In a move that would significantly alter the Supreme Court's habeas review, the *Hohn* Court held that *House's* understanding that uncertified appeals were never "in" the circuit court was an "erroneous" reading of its authority.¹⁴⁷ Rather than concentrate, like the court in *House*, on 28 U.S.C. § 1254's use of the word "in," the Court in *Hohn* focused more on whether the certification request amounted to a "case" under the statute.¹⁴⁸ The Supreme Court easily found that, since a COA request bore the traditional characteristics of what it considered a "case," the statute allowed jurisdiction over an uncertified habeas appeal.¹⁴⁹ The Supreme Court stated that, because a COA request "is a proceeding seeking relief for an immediate and redressable injury, i.e., wrongful detention in violation of the Constitution,"¹⁵⁰ and the certification proceedings otherwise resembled a "case" or "cause," certification proceedings sufficiently complied with the precursors to the establishment of Supreme Court authority.¹⁵¹

Given the Supreme Court's lax adherence to *House*, *Hohn's* result was not surprising. The Supreme Court's "common sense practice" of regularly denying uncertified certiorari petitions, even when explicit precedent and controlling statutory authority prevented such review, allowed the "normal functioning of reviewing possible misapplications of law by the courts of appeals without having to

1998).

146. *Hohn v. United States* 537 U.S. 801 (2002).

147. *Hohn*, 524 U.S. at 251.

148. The Supreme Court has limited *Hohn's* definition of the term "case" to its use in 28 U.S.C. § 1254. See *Woodford v. Garceau*, 538 U.S. 202, 210 (2003); see also *Moore v. Gibson*, 195 F.3d 1152, 1163 (10th Cir. 1999); *Williams v. Coyle*, 167 F.3d 1036, 1039-40 (6th Cir. 1999).

149. *Hohn*, 524 U.S. at 236.

150. *Id.* at 241.

151. See *Hohn*, 524 U.S. at 246. The Supreme Court found support in *Ex parte Quirin*, 317 U.S. 1 (1942), that "confronted the analogous question whether a request for leave to file a petition for a writ of habeas corpus was a case in a district court for the purposes of the then-extant statute governing court of appeals review of district court decisions." *Hohn*, 524 U.S. at 246. In *Ex parte Quirin* the Court found that such a request was reviewable as a case because "[p]resentation of the petition for judicial action is the institution of a suit. Hence denial by the district court of leave to file the petitions in these causes was the judicial determination of a case or controversy reviewable on appeal." *Ex parte Quirin*, 317 U.S. at 24.

resort to extraordinary remedies.”¹⁵² The decision in *Hohn* seems driven by the Supreme Court’s effort to vindicate its practice of assuming jurisdiction over uncertified habeas appeals and refusal to abdicate a role in habeas review.¹⁵³ Further, *Hohn* may have been a defensive reaction in response to the AEDPA’s constriction of Supreme Court jurisdiction, particularly in cases involving successive habeas petitions.¹⁵⁴

As a practical matter, *Hohn*’s impact has little to do with the explicit result in that case: the Supreme Court would have continued to review habeas cases, whether through certiorari as authorized by 28 U.S.C. § 1254 or through the All Writs Act, even when neither the circuit nor district court had certified issues for appeal.¹⁵⁵ The precise

152. *Hohn*, 524 U.S. at 251-52. In an opinion joined by three other dissenters, Justice Scalia criticized the majority’s result-oriented approach:

At bottom, the only justification for the Court’s holding—and the only one that prompts the concurrence to overrule House—is convenience: it “permits us to carry out our normal function” of appellate review. Our “normal” function of appellate review, however, is no more and no less than what Congress says it is. U.S. CONST., art. III, § 2. The Court’s defiance of the scheme created by Congress in evident reliance on our precedent is a display not of “common sense,” but of judicial willfulness. And a doctrine of stare decisis that is suspended when five Justices find it inconvenient (or indeed, as the concurrence suggests, even four Justices in search of a fifth) is no doctrine at all, but simply an excuse for adhering to cases we like and abandoning those we do not.

Id. at 263 (Scalia, J., dissenting).

153. See WRIGHT, *supra* note 135, at § 4005 (“The tensions evident in the *Hohn* decision surely arise as much from the common passions that surround federal habeas corpus review of state convictions as from the more rarified passions generated by debate whether Supreme Court review should be effected by statutory certiorari or by common-law certiorari.”).

154. See 28 U.S.C. § 2244(b)(3)(E) (“The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.”). Some circuit courts may have recently reopened the door somewhat to Supreme Court review of successive petitions, albeit inadvertently. The AEDPA requires petitioners to file any successive habeas action initially in the circuit, not district, court. 110 Stat. 1214. Petitioners—even when represented by attorneys—occasionally file successive actions in the district courts first. The circuits have faced the question of whether a petitioner erroneously filing a successive petition in district court must receive a COA from the dismissal to consider the issue on appeal. Some circuits hold that the AEDPA’s COA provisions govern such appeals. See *Resendiz v. Quarterman*, 454 F.3d 456, 458 (5th Cir. 2006); *Sveum v. Smith*, 403 F.3d 447, 448 (7th Cir. 2005). In doing so, however, they may unintentionally allow a petitioner to seek Supreme Court review, possibly under its own COA power, to consider whether the circuit court erred in not granting a COA in the case. The Supreme Court still could not authorize a successive petition, but could strongly signal if it felt that action was appropriate by holding that the circuit should have granted a COA.

155. *Hohn* has allowed the high court to craft an advisory method of signaling the need

holding in *Hohn*, a rejection of the certification process as “a threshold inquiry separate from the merits which, if denied, prevents the case from ever being *in* the court of appeals,”¹⁵⁶ extends no farther than the esoteric world of certiorari jurisprudence, particularly since the Supreme Court has an “objectively low chance” of granting certiorari review from an uncertified appeal.¹⁵⁷ The ripples from this facially limited holding, however, have changed the tide of Supreme Court habeas review. While not changing *if* the Supreme Court will consider an appeal, *Hohn* has greatly influenced *how* the Supreme Court considers habeas appeals. The shift from the Court’s execution of common-law powers to its statutorily defined review retracted the broad traditional review of an uncertified appeal’s merits.¹⁵⁸ Common-law certiorari provided a vehicle for a penetrating review of the merits that bypassed the certification process. Under that power, the Supreme Court had left the lower courts’ certification jurisprudence virtually untouched until *Barefoot*, and even then its CPC pronouncements were largely advisory as the Court there circumvented the procedural questions to reach whether the courts

for change by the lower courts without accepting responsibility for reforming constitutional or habeas law itself. Recent Supreme Court cases have apparently used COA determinations to hint, quite strongly, when the circuit courts need to adjust their habeas jurisprudence. Most notably, the Supreme Court has recently reversed the Fifth Circuit in several cases involving the consideration of a COA, with substantial dicta that addresses the circuit’s approach to legal issues. *See, e.g.,* *Tennard v. Dretke*, 542 U.S. 274 (2004); *Banks v. Dretke*, 540 U.S. 668 (2004); *Miller-El v. Cockrell*, 537 U.S. 322 (2003). An unscientific and cursory review of the Fifth Circuit’s reaction to these appellate nudges shows the Fifth Circuit more willing to grant a COA, but not noticeably more willing to grant habeas relief. As the Supreme Court reconsiders the Fifth Circuit denial of relief after remand without the venire of the COA inquiry and grants habeas relief as in *Miller-El v. Dretke*, 545 U.S. 231, 125 S.Ct. 2317 (2005), the Fifth Circuit may eventually become more liberal in its bestowal of habeas remedies. Without *Hohn*’s loosening of its certiorari practice, whether authorized by statute or not, the Supreme Court would not use COA as a corrective tool.

156. *Hohn*, 524 U.S. at 246 (emphasis added).

157. *Gonzalez v. Crosby*, 545 U.S. 524, 125 S. Ct. 2641, 2655 n.7 (2005) (Stevens, J., dissenting) (“A petition for certiorari seeking review of a denial of a COA has an objectively low chance of being granted. Such a decision is not thought to present a good vehicle for resolving legal issues, and error-correction is a disfavored basis for granting review, particularly in noncapital cases.”).

158. Some commentators, however, have opined that there would be little difference between the Supreme Court’s review under the common-law writ and the statutory authority. *See* WRIGHT, *supra* note 135, at § 4005 (“In terms of the Court’s own procedure, it is difficult to suppose that there is much significance in the refined distinctions that might be drawn between the discretionary considerations that inform exercise of statutory certiorari discretion and the ‘extraordinary writ’ considerations that govern common-law certiorari. The procedural distinction, if it were adhered to at all, would be more likely to prove a trap for the unwary than a meaningful restriction on review.”).

should have issued a habeas writ.¹⁵⁹ By abandoning the expansive power endowed by the All Writs Act, the Supreme Court has generally trimmed its examination to whether the circuit court properly denied a certificate, a sharp retreat from its previous broad foray into the merits. Beginning in *Hohn*, the Supreme Court focused uncertified appeals on whether a certificate, not the habeas writ, should issue.¹⁶⁰ In *Hohn*, the discovery of statutory authority gave birth to the Supreme Court's modern certification jurisprudence.

As with its pre-*Hohn* caselaw, the Supreme Court has been far from consistent in respecting the contours of its new certiorari jurisdiction. While the Supreme Court since *Hohn* has regularly addressed only the certification issue in an uncertified appeal, even when its reasoning obviously indicated that it thought habeas relief would be appropriate,¹⁶¹ it has occasionally reverted to a merit-based review.¹⁶² Nonetheless, the holding in *Hohn* has allowed the Supreme Court to insert itself decidedly into the certification process, allowing it to govern and regulate the circuit court's implementation of 28 U.S.C. § 2253. With this power, the Supreme Court has repeatedly criticized circuit courts for not giving a liberal enough reading to the certification standard. In several notable cases, the Supreme Court spanked the circuit courts for not certifying appellate issues.

Hohn's strident view of appellate jurisdiction has trickled down to the circuit courts. *Hohn* created a penumbral influence that led circuit courts to question their inherent jurisdiction in habeas appeals. *Hohn* possibly created a supervisory climate that has filtered down into some circuits' habeas practice, empowering them to bypass *Nowakowski's* procedure and reconsider a district court's COA grant.

159. 463 U.S. at 887-96.

160. Even in *Hohn* itself, the Supreme Court never reached the merits of the petitioner's claim, but remanded on the question of whether the circuit court improperly denied a COA. *Hohn*, 524 U.S. at 253.

161. It should have been apparent to the Fifth Circuit that the Supreme Court's analysis in the *Miller-El*, *Banks*, and *Tennard* cases, while cloaked in the COA procedure, actually favored granting habeas relief.

162. For instance, the Supreme Court has bypassed the COA issue and addressed the merits rather than the certification question when reversing the circuit court, *Penry v. Johnson*, 532 U.S. 782 (2001), as well as when affirming the lower court judgment, *Weeks v. Angelone*, 528 U.S. 225 (2000). In *Gonzales v. Crosby*, 545 U.S. 524, 125 S. Ct. 2641 (2005), the Supreme Court recently avoided the question of certification, though the circumstances of *Gonzales* suggest that the result had more to do with the fact that the case arose from the Eleventh Circuit's characterization of a Rule 60(b) motion as a successive habeas petition, and it is not entirely clear that a certificate is needed to appeal those post-judgment motions.

B. Disregarding the Districts—Circuit Court Consideration of Certification

Judge Friendly advocated removing the certification question from the district courts because, in his view, allowing the district courts to obligate appellate review deprives a circuit of the ability to regulate its own caseload and determine for itself what issues need encouragement to proceed further.¹⁶³ Presumably, though a district court has a better familiarity with a claim's merits, the circuit court has a greater understanding of what issues deserve appellate attention. While Congress did not formally adopt Judge Friendly's suggested reform, some circuit courts have taken measures to fulfill the intent of that reform by minimizing the obligatory appellate review that once accompanied a certificate.¹⁶⁴ These accommodations, however, cut against the AEDPA's intended efficiency.

Reducing the decision in *Nowakowski* to its most elemental proposition, the Supreme Court implied that the district court's issuance of a certificate creates circuit court jurisdiction over the merits of a petitioner's claims. A recent Supreme Court case reiterates that a COA is a "jurisdictional prerequisite."¹⁶⁵ While the Supreme Court's post-AEDPA case law holds that circuit courts "lack jurisdiction to rule on the merits of appeals from habeas petitioners"¹⁶⁶ absent a COA, the Supreme Court has not yet clarified the AEDPA's jurisdictional implications when a district court *grants* a certificate. The Supreme Court's *Nowakowski* case presumed that, once a circuit court acquired jurisdiction of the merits, the appeals courts should proceed to the merits and leave procedural niceties alone.¹⁶⁷ Some circuits now question the wisdom of that approach when the certified claims may not make a substantial showing of the denial of a constitutional right.¹⁶⁸

Section 2253's specificity requirement created a novel circumstance where appellate jurisdiction would only vest for a portion of a habeas petition. Circuit courts have universally

163. See Friendly, *supra* note 19, at 144.

164. Cite some circuits that have done this.

165. *Cockrell*, 537 U.S. at 335.

166. *Id.* at 336.

167. 386 U.S. at 543.

168. While the *Nowakowski* jurisprudence could not anticipate 28 U.S.C. § 2253(c)(3)'s specificity requirement, the Supreme Court in *Barefoot* applied the precursors to 28 U.S.C. § 2253(c)(2)'s standard while adhering to *Nowakowski*. 463 U.S. at 887-96.

recognized that circuit courts hold authority to expand a COA to cover any uncertified issues.¹⁶⁹ Circuits soon began to question whether the power to expand and grant a certificate inferred a complementary authority to retract or extinguish a COA. Several circuits now reconsider the certification of claims by the district court, though they differ in the scope and availability of that review. Nothing in the AEDPA expressly changed the interplay between the lower and appellate courts so drastically as to signal a wholesale abdication of *Nowakowski*'s principles. The new COA differs from prior habeas practice in two important ways: (1) the AEDPA requires a certifying court to specify which issues require appellate review and (2) the AEDPA essentially adopted the judicially crafted standard for certification—the “substantial showing of the denial of a constitutional right.” Notwithstanding these important changes, the Supreme Court has left untouched areas of pre-AEDPA habeas practice not directly changed by the AEDPA. That is not to say that all practice passed through the fire of reform unscathed, but that the federal courts recognize that the AEDPA did not require them to write on a blank page. As one law professor has adroitly observed, “the [Supreme] Court had shaped habeas corpus law to its liking prior to 1996 and is unwilling to read AEDPA as imposing any significant additional restrictions.”¹⁷⁰ Thus, the enactment of the AEDPA gives courts no license to ignore pre-AEDPA practice, unless it clashes with the new statute's explicit provisions.

The Supreme Court has dodged the opportunity to decide whether or not a district-granted COA is subject to further review.¹⁷¹

169. See *Valerio v. Crawford*, 306 F.3d 742, 764 (9th Cir. 2002) (“Although neither AEDPA nor Federal Rule of Appellate Procedure 22 specifically so provides, a court of appeals not only has the power to grant a COA where the district court has denied it as to all issues, but also to expand a COA to include additional issues when the district court has granted a COA as to some but not all issues.”); see also HERTZ & LIEBMAN, *supra* note 20, at § 35.4b, 1576-79 (4th Ed.) (discussing cases that allow expansion of a COA); Advisory Committee Notes, Rule 22, 1998 amendment (acknowledging that the circuit courts can broaden the scope of a certified appeal).

170. Eric M. Freedman, *Milestones in Habeas Corpus: Part II Leo Frank Lives: Untangling the Historical Roots of Meaningful Federal Habeas Corpus Review of State Convictions*, 51 ALA. L. REV. 1467, 1540 n. 13 (2000) (citing *Williams v. Taylor*, 120 S. Ct. 1479 (2000); *Hohn*, 524 U.S. at 236; *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998); *Felker v. Turpin*, 518 U.S. 651 (1996)).

171. In *Peguero v. United States*, 526 U.S. 23 (1999), the government argued in its briefing that the lower court improvidently granted a COA, though the Supreme Court chose to ignore that contention. The Supreme Court likewise sidestepped a recent challenge to whether the circuit court could grant a COA under the statute. See *Medellin v. Dretke*, 544 U.S. 660,

Circuits now vary wildly on if, how, and why they will reconsider a district court's certification. The question of reconsideration arises in two contexts. First, circuits after the AEDPA quickly tackled how to treat a **defective** certificate; that is, one not complying with the AEDPA's technical requirements. The circuits vary on how to treat a certificate that does not "indicate which specific issue or issues"¹⁷² deserve appellate attention. Second, circuits struggled with how to treat a potentially **improvidently granted** certificate, that is, one that facially complies with 28 U.S.C. § 2253(c)(3)'s technical requirements but may not meet the substantial showing of a constitutional deprivation required by 28 U.S.C. § 2253(c)(2). Courts adopt varying, and inconsistent, approaches to these two certification errors, often without necessarily recognizing the difference between the two.¹⁷³

1. *Defective Certificates*

After the AEDPA, questions quickly arose over how to treat a certificate that failed to specify which issues needed appellate attention. Circuit courts take somewhat opposing approaches to this problem. Most circuits refuse to countenance any certificate that fails to specify what issue needs appellate review, viewing a defective certificate as "insufficient to vest jurisdiction" in the appellate court.¹⁷⁴ In light of Rule 22's insistence that the district courts consider the COA question in the first instance, circuit courts generally remand a defective certificate for lower-court clarification of what issues need appellate review, though some discretion and

125 S. Ct. 2088 (2005).

172. 28 U.S.C. § 2253(c)(3).

173. This Article labels certificates not complying with 28 U.S.C. § 2253(c)(3) as "erroneously issued" or "defective" and those not complying with 28 U.S.C. § 2253(c)(2) as "improvidently granted." The case law fails to make this fine distinction in terminology, though it usually treats the two types of questionable certificates differently. Greater clarity would exist in the case law if the circuit courts employed consistent language and plainly distinguished between the two.

174. *Muniz v. Johnson*, 114 F.3d 43, 45 (5th Cir. 1997). Under the pre-AEDPA procedure in which a district court needed to provide reasons for denying the certificate, see former FED. R. APP. PRO. 22(b) (amended 1996), available at http://www.access.gpo.gov/uscode/title28a/28a_3_6.html, the circuits sometimes remanded for the district courts to justify their denial of a CPC, see, e.g., *Gardner v. Pogue*, 558 F.2d 548, 550-52 (9th Cir. 1977); *Stewart v. Beto*, 454 F.2d 268, 269 (5th Cir. 1971), but often did not, see *Lara v. Nelson*, 449 F.2d 323, 324 (9th Cir. 1971). Pre-AEDPA procedure did not require the Courts to sift through the claims and differentiate between those issues that need appellate attention and those that did not.

variance exists in this area.¹⁷⁵ One circuit has adopted a local appellate rule requiring remand for noncompliance with 28 U.S.C. § 2253(c).¹⁷⁶ While ordinarily remanding the case to the district court to issue a proper certificate, some circuits may consider the appeal without remand if the absence of a valid COA only comes to light after the parties have fully briefed the merits of the claims,¹⁷⁷ it can

175. *Gonzalez v. Sec'y for Dep't. of Corr.*, 317 F.3d 1308, 1310 (11th Cir. 2003); *Hunter v. United States*, 101 F.3d 1565, 1575 (11th Cir. 1996) (*en banc*); *Beyer v Litscher*, 306 F.3d 504, 505-06 (7th Cir. 2002); *Porterfield v. Bell*, 258 F.3d 484, 485 (6th Cir. 2001); *Lyons v. Ohio Adult Parole Auth.*, 105 F.3d 1063, 1075-76 (6th Cir. 1997); *In re Certificates of Appealability*, 106 F.3d 1306, 1307 (6th Cir. 1997); *Peoples v. Haley*, 227 F.3d 1342, 1346 (11th Cir. 2000); *Muniz*, 114 F.3d at 45; *United States v. Weaver*, 195 F.3d 52, 53 (D.C. Cir. 1999); *Jackson v. Leonardo*, 162 F.3d 81, 84 (2d Cir. 1998); *United States v. Roberts*, 118 F.3d 1071, 1072 (5th Cir. 1997); *United States v. Youngblood*, 116 F.3d 1113, 1114 (5th Cir. 1997); *United States v. Asrar*, 108 F.3d 217, 218 (9th Cir. 1997). Where the district court failed to provide any reason for the broad grant of a certificate, remand would be appropriate because “the district court is already deeply familiar with the claims” and thus “is in a far better position from an institutional perspective than [the appellate court] to determine which claims should be certified for appeal.” *Porterfield*, 258 F.3d at 487. A law professor testifying before Congress against the Friendly approach acknowledged that the district court’s history with a case placed it in the best position to consider certification:

[L]et me say something about the proposal that only a circuit judge be empowered to issue a certificate of probable cause. Now, either the district judge who denied the petition or a circuit judge may issue one. The reason for the current rule is plain. The district judge is most familiar with the merits of the case and therefore is in the best position to say whether an appeal is in order. The circuit judge to whom the petition for a certificate of probable cause comes must first familiarize himself with the case before deciding whether to issue such a certificate. In other words, much of the work the judge may ultimately have to do on the merits will have to be done in deciding whether a certificate should issue. This argument might lead to the conclusion that only district judges, already familiar with the case, be authorized to issue such certificates. The problem with that, however, is that it gives the district judge the power to block review of his own decision simply by denying a certificate. I recognize Judge Friendly’s earlier criticism, but I have not been persuaded by it. Nor have I seen data which would suggest that the current regime has resulted in abuses.

Hunter, 101 F.3d at 1580 (quoting The Habeas Reform Act of 1982: Hearing on S. 2216, 97th Cong., 2d Sess. 146).

176. 3D CIR. R. 22.1(c), available at <http://www.ca3.uscourts.gov/Rules/2002lar.pdf> (last visited Dec. 1, 2005).

177. See *Lambert v. Blackwell*, 387 F.3d 210, 231 (3d Cir. 2004) (“Where the parties have fully briefed the substantive issues before bringing to our attention that the COA was inadequately specific, however, this Court has viewed the District Court’s certificate as a nullity and construed the petitioner’s notice of appeal as a request for us to issue a COA.”); *Szuchon v. Lehman*, 273 F.3d 299, 311 n. 5 (3d Cir. 2001) (“Ordinarily, when a District Court grants a certificate of appealability but fails to specify the issues for appeal, we would remand the matter for a clarification of the order granting the certificate. We have elected not to follow that course here, as the parties had fully briefed this matter by the time it was brought to our attention that the certificate of appealability was inadequate.”); *Frazier v. Huffman*, 343

readily identify from the record the issues that the district court intended to certify,¹⁷⁸ the parties do not dispute the integrity of the certificate,¹⁷⁹ or if, in their discretion, they can “fix” the certificate with little effort.¹⁸⁰ Occasionally, circuit courts prefer to use their own certification power rather than “toss it back to a district judge who may have forgotten what the fuss is about.”¹⁸¹

The Fourth and Tenth Circuits, however, rely on the *Nowakowski* case to treat a defective certificate as authorizing not only an appeal, but also as allowing consideration of all claims raised in a habeas petition.¹⁸² This minority approach fails to appreciate section 2253(c)(3)’s intent. Pre-AEDPA law placed no technical requirement on a district court’s COA review; the AEDPA’s required designation of particular issues for appellate review constitutes a procedural requirement unforeseen by the opinion in *Nowakowski*. A purported COA not specifying issues for appeal fails to meet the

F.3d 780, 788-89 (6th Cir. 2003).

178. *United States v. Eyer*, 113 F.3d 470, 474 (3d Cir. 1997); *Cummings v. Yukins*, 61 Fed. App’x 188, 189-91 (6th Cir. 2003).

179. *See Burch v. Corcoran*, 273 F.3d 577, 582 n.4 (4th Cir. 2001), *cert. denied*, 535 U.S. 1104 (2002); *Gatlin v. Madding*, 189 F.3d 882, 887 (9th Cir. 1999) (concluding that “once a COA has been issued without objection . . . the procedural threshold for appellate jurisdiction has been passed and we need not revisit the validity of the certificate in order to reach the merits.”); *Eyer*, 113 F.3d at 474; *Putman v. Head*, 268 F.3d 1223, 1228 (11th Cir. 2001) (“[I]n exercising our discretion, we may either remand to the district court with instructions to enumerate the issues, or we may rule which issues raised by the petitioner warrant a COA.”); *Haley*, 227 F.3d at 1346 (“[I]t is within the discretion of the court of appeals whether to apply the COA standards itself, or remand to the district court. Considerations of judicial economy will influence this decision.”). The Eleventh Circuit has “most frequently chosen simply to amend a CPC so that it conforms to § 2253’s new requirements, rather than dismissing the appeal or remanding the CPC to the district court.” *Thomas v. Crosby*, 371 F.3d 782, 796 (11th Cir. 2004) (Tjoflat, C.J., specially concurring). The exercise of this discretion may allow the circuit court to dismiss summarily an appeal when the district court issued a defective certificate, but the appeal lacked any arguable merit. *See Davis v. Borgen*, 349 F.3d 1027 (7th Cir. 2003). Often courts have refused to question the validity of an admittedly defective certificate if the respondent did not oppose the unspecific nature of the COA.

180. *Eagle v. Linahan*, 279 F. 3d 926, 935-36 (11th Cir. 2001); *Sassounian v. Roe*, 230 F.3d 1097, 1100-01 (9th Cir. 2000); *Franklin v. Hightower*, 215 F.3d 1196, 1199 (11th Cir. 2000); *Cade v. Haley*, 222 F.3d 1298, 1302 n.5 (11th Cir. 2000).

181. *Sassounian*, 230 F.3d at 1101 n. 1 (quoting *Williams v. United States*, 150 F.3d 639, 641 (7th Cir. 1998)).

182. *See Burch*, 273 F.3d at 582 n.4; *Thomas v. Gibson*, 218 F.3d 1213, 1219 (10th Cir. 2000); *LaFevers v. Gibson*, 182 F.3d 705, 711 (10th Cir. 1999); *United States v. Talk*, 158 F.3d 1064, 1068 (10th Cir. 1998). The Tenth Circuit views *Nowakowski* as authorizing appellate review whenever the district court certifies an appeal, regardless of compliance with 28 U.S.C. § 2253(b) or (c). *See LaFevers*, 182 F.3d at 711; *Talk*, 158 F.3d at 1068.

explicit statutory requirements and can be viewed as void *ab initio*.

As district courts have become more familiar with the COA requirements in the past decade, circuits face fewer defective certificates. Any tension between the reconsideration of defective certificates and the obligatory review as set forth in *Nowakowski* has diminished, and almost been extinguished, with time.¹⁸³ The circuits, however, show greater and more persistent disunity with respect to a certificate that complies with section 2253(c)(3)'s specificity requirement but possibly misapplies section 2253(c)(2)'s substantive standard.

2. *Improviently Granted Certificates*

The circuits have divided into three separate camps concerning what procedure appellate courts must follow if the district court's certificate possibly fails to comply with section 2253(c)(2)'s substantial-showing-of-the-denial-of-a-constitutional-right standard. First, some circuits religiously follow *Nowakowski*, holding that a certificate, whether compliant with section 2253(c)(2) or not, vests jurisdiction in the circuit court over the *merits*. Those circuits, following what is here termed the **obligatory review approach**, ignore a certificate's alleged non-compliance with the substantial-showing standard because the *Nowakowski* approach forces appellate review over certified claims. Second, one circuit holds that noncompliance with 28 U.S.C. § 2253(c)(2) does not deprive the circuit of jurisdiction over the certification question, but that only a certificate identifying claims that meet the section 2253(c)(2) standards allows a review of the merits. Under that view, here termed the **conditional review approach**, only a valid COA entitles a circuit to reach the merits. Finally, a third group of circuits, following the **permissive review approach**, recognize their authority to reach the merits of a claim notwithstanding the invalidity of a certificate, but use reconsideration of the COA process as a screening device when expedient to ferret out those claims that the district court improviently certified. Those circuits integrate the reconsideration of a certificate into the summary appellate proceedings authorized by

183. Occasionally, however, a district court will otherwise run afoul of section 2253(c)(2). For instance, the Sixth Circuit recently remanded a case where the district court "granted a COA as to all [the petitioner's] claims without individualized analysis, explained only by an expression of the district court's awareness of its own fallability, thus manifestly failing to follow the requirements set forth in 28 U.S.C. § 2253, *Slack*, and *Miller-El*." *Bradley v. Birkett*, 156 Fed. App'x 771, 772 (6th Cir. 2005).

Carafas and *Garrison*, but will not reconsider a district-granted COA in every case.¹⁸⁴

Young v. United States,¹⁸⁵ an early and influential circuit case addressing the interaction between the circuit and district courts in the COA process, defined the obligatory review approach. In *Young*, the Seventh Circuit confronted the question of whether a “proper certificate is a jurisdictional requirement.”¹⁸⁶ The district court in *Young* committed two errors when certifying an appeal: the lower court both failed to pinpoint a specific issue for appeal and, insofar as it provided justification for a certificate, failed to identify the denial of a constitutional right. In light of these dual deficiencies, the Seventh Circuit had to determine whether “an erroneously issued certificate [should] be treated the same as the lack of a certificate[.]”¹⁸⁷ The Seventh Circuit, in a holding that would not be universally followed, but still broadly influential, found that improperly entered certificates still established appellate jurisdiction over the merits of a petition.¹⁸⁸ The Seventh Circuit characterized the certificate as “a screening device, helping to conserve judicial (and prosecutorial) resources”¹⁸⁹ by weeding out insubstantial claims. The Seventh Circuit, however, decided that “[o]nce a certificate has issued, . . . [i]t is too late to narrow the issues or screen out weak claims.”¹⁹⁰ In its view, any other holding “would increase the complexity of appeals in collateral attacks and the judicial effort required to resolve them, the opposite of the legislative plan.”¹⁹¹ Since *Young*, the circuits have taken the three separate paths described above.

184. A recent law review note, while focusing on the circuit court’s approach to the COA rather than the jurisdiction created by a certificate, roughly grouped the circuits into two categories, instead using the terms “absolute” and “intermediate” to describe the methods by which the circuits approach the COA question. Ryan Hagglund, Comment, *Review and Vacatur of Certificates of Appealability after the Denial of Habeas Corpus Petitions*, 72 U. CHI. L. REV. 989 (2005).

185. 124 F.3d 794 (7th Cir. 1997).

186. *Id.* at 799.

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.* The Seventh Circuit found some utility in reconsidering a COA before appellate briefing began, but after that point any scrutinizing of the certificate would only thwart the judicial economy encouraged by the COA. *Young v. United States*, 124 F.3d 794, 799 (7th Cir. 1997).

191. *Id.*

a. *Obligatory Review Circuits*

Some circuits still honor the *Nowakowski* holding, though often without expressly invoking the specter of pre-AEDPA law, by unquestionably accepting a certificate once granted. At least six circuits (the First, Second, Fourth,¹⁹² Fifth,¹⁹³ Tenth, and Eleventh) have, through explicit holdings or in practice, adopted the obligatory review approach by refusing to reconsider the COA once issued.¹⁹⁴ By and large, these circuits adhere to the *Young* Court's view that any certificate "suffices to confer appellate jurisdiction" so "once a [COA] is issued, . . . appellate jurisdiction has vested, and this result holds even if the [COA] is issued improvidently."¹⁹⁵ Those circuits

192. The Fourth Circuit, while not extensively addressing the issue, has hinted that it will not revisit the propriety of a COA once granted. See *Reid v. True*, 349 F.3d 788, 795 (4th Cir. 2003) ("Prior to oral argument, we granted a COA as to all issues. Thus, the question of whether to issue a COA in this case is no longer before us.").

193. The Fifth Circuit has not squarely addressed whether the circuit courts can reconsider the district court certification, but has approvingly cited *Nowakowski* after the AEDPA's enactment. See *Cannon v. Johnson*, 134 F.3d 683, 686 (5th Cir. 1998). Without decisively confronting the question, the Fifth Circuit generally considers the merits of an appeal once the district court grants a COA. Before the AEDPA, the Fifth Circuit viewed the "right [conferred by a CPC as] one of substance as will be seen from the fact that Congress has vested absolute power in the district courts to allow habeas appeals by granting the certificate in the first instance." *Stewart v. Beto*, 454 F.2d 268, 269 (5th Cir. 1971) (citing *Nowakowski*). The Fifth Circuit contrasted the grant of a COA with "the non-absolute power in the district courts to grant interlocutory appeals" because "both the district court and the court of appeals must assent to the interlocutory appeal." *Id.* Under the CPC process, however, "a district judge, in his sole discretion, may permit an appeal if probable cause to appeal is found." *Id.* at 269-70. Yet, at least once, the Fifth Circuit has *overruled* a district court's *denial* of a COA, suggesting a more supervisory role over a district court's certification review. *Bigby v. Dretke*, 402 F.3d 551, 575 (5th Cir. 2005) ("We REVERSE the district court's denial of Bigby's application for a COA . . ."). That case, however, seems to be an anomaly because neither the Fifth Circuit nor any other court frequently reverses the district court's COA decision. There is no need to censure the district court in that manner. The statute allows the circuit court to grant a COA without expressly overruling the lower court's action.

194. Of those courts, only the Fourth and the Tenth Circuits refuse to reconsider both erroneously and improvidently granted certificates. The First, Second, Fifth, and Eleventh Circuits will reconsider an erroneously granted certificate, but not an improvidently granted one.

195. *Soto v. United States*, 185 F.3d 48, 52 (2d Cir. 1999) ("Since jurisdiction is an issue that each federal court has a duty to examine *sua sponte*, and since jurisdiction cannot be created by consent of the parties, the Supreme Court's example suggests that a certificate of appealability that does not meet the denial of a constitutional right requirement—and hence, is erroneously issued—nevertheless suffices to confer appellate jurisdiction."). The Second Circuit views the certificate as granting jurisdiction over the merits. See *Green v. United States*, 260 F.3d 78, 82 n.3 (2d Cir. 2001) ("Our jurisdiction vested when the Court granted Green a certificate of appealability."). *Lucidore v. N.Y. Div. of Parole*, 209 F.3d 107, 112 (2d Cir. 2000) ("Where a district court has found one of [28 U.S.C. § 2253(c)(3)'s] conditions

use the obligatory review approach to conserve judicial resources, because “dismissing an appeal after a certificate of appealability has already issued would be of little utility, [and] installing [the circuit court] as a gatekeeper for the gatekeeper would be redundant.”¹⁹⁶ The local rules for the First Circuit go so far as formalizing the *Nowakowski* holding by now specifying that, once a district court certifies issues for appeal, the “appeal shall go forward.”¹⁹⁷ The

exists, and accordingly has granted a certificate of appealability, or COA, we have held that the COA is presumptively valid and may not be challenged as improvidently granted.”); *Thomas v. Greiner*, 174 F.3d 260, 261 (2d Cir. 1999) (addressing merits after district court allegedly entered an unnecessary certificate). The Eleventh Circuit likewise considers every certificate, whether properly entered or not, as conferring appellate jurisdiction. *See Thomas v. Crosby*, 371 F.3d 782, 785 (11th Cir. 2004) (citing *Young*, 124 F.3d at 799); *but see Callahan v. Campbell*, 396 F.3d 1287, 1289 (11th Cir. 2005) (dismissing a COA granted by the district court when the district court failed to rule on the merits of all the claims it certified). In *Thomas*, the Eleventh Circuit issued a COA on one issue, then withdrew that COA and issued another on a different legal argument. 371 F.3d at 784. The Eleventh Circuit rejected the government’s challenge to the second certificate because “the first COA gave [them] jurisdiction over the appeal.” *Id.* The Eleventh Circuit stated that, “[e]ven assuming that [it] did err by sua sponte issuing the second certificate, any such error was not jurisdictional.” *Id.* (citing *Young*, 124 F.3d at 799). The Tenth Circuit has held that an improvidently granted certificate does not “deprive [an appellate court] of jurisdiction to hear a certified appeal,” *United States v. Talk*, 158 F.3d 1064, 1068 (10th Cir. 1998), explicitly finding *Nowakowski* to require appellate consideration of even challenged certified issues. *See Rowe v. LeMaster*, 225 F.3d 1173, 1174 n.2 (10th Cir. 2000) (considering appeal even though the district court failed to entertain the COA question under the appropriate standard); *LaFevers v. Gibson*, 182 F.3d 705, 710 (10th Cir. 1999) (considering the merits of the appeal even when “the district court granted the certificate of appealability on an erroneous legal conclusion”). The Tenth Circuit has recently questioned, however, whether it needs to reconsider the jurisdictional effect of a COA issuance in light of *Miller-El*’s characterization of the COA as a jurisdictional requirement. *See United States v. Harms*, 371 F.3d 1208, 1210 (10th Cir. 2004) (noting that the Tenth Circuit previously viewed the COA “as non-jurisdictional” but refusing to decide “whether a merits panel has the power to dismiss an appeal based upon an improvident grant of a COA because we reject the government’s argument that the COA was improvidently granted.”).

196. *Soto*, 185 F.3d at 52. The Second Circuit places special reliance on the fact that the Supreme Court has refused to address the government’s challenge to the integrity of a certificate, an understandable result in light of *Nowakowski*’s precedent. *See id.* (citing *Peguero v. United States*, 526 U.S. 23 (1999)).

197. 1ST CIR. R. 22.1(c), available at <http://www.ca1.uscourts.gov/files/rules/rules.pdf> (last visited May 27, 2005). Thus, the First Circuit officially rejected its former practice of requiring a second certificate after the petitioner obtains one from the district court, and now accept the lower court’s certification without reconsideration. *Grant-Chase v. Comm’r.*, 145 F.3d 431, 435 (1st Cir. 1998) (“[W]e agree that 1st Cir. R. 22.1(c) should be revised to eliminate the requirement that litigants in possession of a COA from a district judge as to one or more issues apply for a second COA with respect to those issues from the court of appeals.”). The First Circuit never intended its two-step COA practice to remain permanent. *See* 1ST CIR. R. 22.1 Interim Processing Guideline I(B) (“In adopting this two-step process as an interim measure, we do not now finally determine how any ambiguity in the amendments

obligatory review circuits accept appellate jurisdiction over the merits when any certificate issues, regardless of compliance with 28 U.S.C. § 2253(c)(2).

b. Conditional Review Approach

At the polar opposite of the spectrum, the Third Circuit has adopted a conditional review approach that allows re-evaluation of the need for certification. The Third Circuit sees Rule 22 as establishing an advisory, rather than an obligatory, certification role for the district court. Under the conditional review view, a certificate compliant with 2253(c)(2) is an indispensable appellate precursor. The circuit exerts an intrinsic power to assure that appeals, whether certified below or not, only proceed on a procedurally and substantively valid COA. Because of this discretion, a district court sitting in the Third Circuit might more aptly call the COA a “certificate of potential appealability, subject to appellate court endorsement.”¹⁹⁸

After the advent of the AEDPA, the Third Circuit initially followed the court’s approach in *Young* and asserted jurisdiction over the merits of an appeal even when the government challenged the lower court’s grant of a certificate.¹⁹⁹ The *Hohn* decision, however, caused the Third Circuit to rethink the jurisdictional implications of the certification process.²⁰⁰ The Third Circuit latched onto *Young*’s

will be interpreted, but rather leave the matter for comment during the rule making process, 28 U.S.C. § 2071, or development in the course of litigation.”). The First Circuit has noted “the superfluity of 1st Cir. R. 22.1(c)’s ‘second certificate’ requirement” because 28 U.S.C. § 2253(c) “explicitly contemplates the issuance of only one certificate before an appeal to this court may be taken.” *Grant-Chase*, 145 F.3d at 435. The First Circuit thus holds that “litigants in possession of a COA as to an issue from a district judge need not apply to this court for issuance of a second certificate on that issue; they need only present this court with a copy of the district court order granting a certificate of appealability. Upon such presentation, the appeal shall proceed in this court in the ordinary course.” *Id.* at 436.

198. Of course, the acronym “CPASACE” would only be slightly more unwieldy than the use of the current term.

199. *United States v. Eyer*, 113 F.3d 470, 474 (3d Cir. 1997). In *Eyer*, the Third Circuit faced a certificate that was both defective for failing to specify which issues the district court certified and potentially improvident for failing to show a constitutional deprivation. *id.* at 472-75. The Third Circuit found it easier to address the merits of the claims, which were easily dismissed, rather than sort through the difficult procedural questions. *See id.* at 474 (“In this case, certainly at least as to the construction of section 2253(c)(2), difficult and far-reaching procedural questions potentially are presented. Nevertheless, as will be seen, we can affirm on the merits so that we will resolve the appeal in favor of the government, the party ‘to whose benefit [any] objection to jurisdiction would redound.’”).

200. *United States v. Cepero*, 224 F.3d 256, 261 (3d Cir. 2000) (“The difficulty that we

description of a COA as a “screening device”²⁰¹ and equated that language with *Hohn*’s caution against allowing the COA to become only an “administrative”²⁰² function. Reiterating *Hohn*’s insistence that “certificates of appealability . . . are judicial in nature,”²⁰³ the Third Circuit holds that a COA is “not merely an exercise of judicial gate-keeping, but rather, in the language of the [Supreme] Court, . . . ‘the judicial determination of a case or controversy, reviewable on appeal to the Court of Appeals.’”²⁰⁴ Without even mentioning *Nowakowski*, the Third Circuit views *Hohn* as requiring a circuit court to protect affirmatively its own jurisdiction by only asserting jurisdiction over the merits of an appeal with a valid COA.²⁰⁵ The Third Circuit will not consider the merits of an appeal without a certificate complying with section 2253(c)(2)’s substantial-denial-of-a-constitutional-right standard.

have with the approach of our sister courts of appeals is that they fail to recognize the precise jurisprudential nature of a certificate of appealability as defined in *Hohn v. United States*, 524 U.S. 236, 118 S. Ct. 1969, 141 L.Ed.2d 242 (1998).” The Seventh Circuit disagrees with the Third’s reading of *Hohn*. See *Buie v. McAdory*, 322 F.3d 980, 982 (7th Cir. 2003) (“We do not share the Third Circuit’s view that *Hohn* compels the conclusion that the issuance of a complying certificate of appealability is jurisdictional. That issuance is indeed a judicial act, but “judicial” is not a synonym for “jurisdictional.”).

201. *Young v. United States*, 124 F.3d 794, 799 (7th Cir. 1997).

202. *Hohn*, 524 U.S. at 245.

203. *Id.* Notwithstanding the Third Circuit’s pronouncement that COAs involve “judicial” and not “administrative” functions, the Third Circuit appellate rules assigns some duties in the certification process to the court clerk, clearly signaling an administrative action. See 3D CIR. APP. R. 22.1(c), available at <http://www.ca3.uscourts.gov/Rules/2002lar.pdf> (“In a multi-issue case if the district court grants a certificate of appealability, but does not specify on which issues the certificate is granted as required by 28 U.S.C. § 2253(c)(3), the clerk shall remand the case for specification of the issues.”). Few other circuits assign to the clerk’s office the task of determining the adequacy of a certificate. See *In re Certificates of Appealability*, 106 F.3d 1306, 1307 (6th Cir. 1997) (“If the district judge does not enumerate the issues in [accord with section 2253(c)(3)], the clerk of the court of appeals is directed to remand the case once again to the district court with instructions to comply with this procedure.”). It seems unusual that the Third Circuit would so strongly advocate a jurisdictional view of the certification process that excludes any screening function, yet delegate jurisdictional tasks to clerical employees. Cf. *Hohn*, 524 U.S. at 245-46 (“Construing the issuance of a certificate of appealability as an administrative function, moreover, would suggest an entity not wielding judicial power might review the decision of an Article III court.”).

204. *Cepero*, 224 F.3d at 262 (quoting *Hohn*, 524 U.S. at 246).

205. *Id.*; see also *Perry v. Diguglielmo*, 169 Fed. App’x 134, 136 (3d Cir. 2006). The Third Circuit has found that its approach to section 2253 does not violate the Suspension Clause. See *United States v. Brooks*, 245 F.3d 291, 292 (3d Cir. 2001).

c. Permissive Review Approach

Between the ends of the jurisdictional spectrum marked by the obligatory and conditional review schemes exists a middle ground defined primarily by judicial economy. The Sixth, Seventh, Eighth, and Ninth Circuit focus less on questions of appellate jurisdiction and more on appellate efficiency, allowing them, in some circumstances, to reconsider a district-granted certificate. These circuits vary in when and how they will reconsider an allegedly deficient certificate. The Eighth Circuit, for instance, wasted little energy after the AEDPA in deciding it could “‘unring’ this bell and revoke [an improvidently granted] certificate of appealability.”²⁰⁶ The Eighth Circuit sees in the power to “expand[] or enlarge[]” a certificate the concomitant power to “circumscrib[e], and even revok[e]” a certificate.²⁰⁷ While leaning toward the Third Circuit’s conditional review approach, the Eighth Circuit differs in that it does not emphasize the jurisdictional aspects of certification and preserves an ability to forgo reconsideration in some circumstances, distancing itself slightly from the absolute discretion end of the spectrum.²⁰⁸

The Ninth Circuit has developed an approach that falls squarely between the unqualified ends of the COA-reconsideration gamut.²⁰⁹

206. *Khaimov v. Crist*, 297 F.3d 783, 786 (8th Cir. 2002). *Khaimov* relied partially on the circuit court’s ability to dismiss an erroneously granted certificate to find that it could review an allegedly improperly granted certificate. *Id.* at 786 (citing *Tiedeman v. Benson*, 122 F.3d 518, 522 (8th Cir. 1997), which stated as follows: “[T]he certificate issued in this case is defective on its face. It does not specify any issue or issues with respect to which the applicant has made a substantial showing of the denial of a constitutional right. We therefore vacate the certificate. Under the previous law, when we were dealing with certificates of probable cause, we occasionally vacated certificates, and we believe that this power is retained under the new law.”); *see also* *Randolph v. Kemna*, 276 F.3d 401, 403 n.1 (8th Cir. 2002); *Nichols v. Bowersox*, 172 F.3d 1068, 1070 n.2 (8th Cir. 1999).

207. *Khaimov*, 297 F.3d at 786. The Eighth Circuit made no effort to reconcile its pre-AEDPA precedent which held that the circuit courts “must review” the merits after the lower court’s grant of COA. *Taylor v. Swenson*, 458 F.2d 593, 595 (8th Cir. 1972); *Walle v. Sigler*, 456 F.2d 1153, 1154 (8th Cir. 1972); *Gross v. Bishop*, 377 F.2d 492, 492 (8th Cir. 1967). The *Khaimov* court, however, drew a comparison between its consideration of a COA grant and the Supreme Court’s ability to dismiss certiorari as improvidently granted. *Khaimov*, 297 F.3d at 786 n.2.

208. *Carson v. Dir. of Iowa Dept. of Corr. Serv.*, 150 F.3d 973, 975 (8th Cir. 1998) (“Although we agree with the state that Carson has failed to demonstrate a substantial showing, we do not, as the state requests, ‘tak[e] the intermediate and wholly unnecessary step of vacating the certificate of appealability.’ *Tiedeman v. Benson*, 122 F.3d 518, at 522 (8th Cir. 1997). Instead, because the certificate is ‘regular on its face and not procedurally defective,’ we affirm the district court’s judgment.”).

209. The Ninth Circuit’s jurisprudence has developed a permissive scheme where the

The Ninth Circuit has declared that “the issuance of a COA is not entirely insulated from subsequent judicial scrutiny” because, like the Eighth Circuit, it feels that “the power to grant or expand a COA strongly implies . . . the commensurate power to vacate or to contract it.”²¹⁰ The Ninth Circuit dismisses the suggestion that efficiency alone requires the circuit court to forgo reviewing a COA, mainly because “few legal resources” had been used by that time and the certificate may be “so far off the mark” that it would be “invalid on its face.”²¹¹ Instead, the Ninth Circuit views COA reconsideration as a summary procedure that allows an appellate court to dismiss with little effort issues that otherwise would have consumed significant resources if given a full-blown appeal. Nevertheless, that same concern for judicial economy restrains over-zealous use of COA reconsideration. When the parties and the court have expended substantial resources in briefing an issue before questions arise concerning the COA’s sufficiency, the Ninth Circuit relies on judicial

circuit court maintains an ability to reconsider a district court’s certificate. The Ninth Circuit initially adopted *Young*’s view of the jurisprudence conferred by a COA, holding that “an erroneously issued COA . . . is different from the absence of one,” *Gatlin v. Madding*, 189 F.3d 882, 886-87 (9th Cir. 1999), and that the appeals courts “have jurisdiction even if the certificate was arguably ‘improvidently granted,’” *Phelps v. Alameda*, 366 F.3d 722, 726 (9th Cir. 2004). Nonetheless, the Ninth Circuit later summarily revisited a COA in contravention of its prior caselaw. *See James v. Giles*, 221 F.3d 1074, 1076 (9th Cir. 2000); *see also Phelps*, 366 F.3d at 728 (“Although a merits panel generally need not examine the propriety of a COA, it nevertheless retains the power to do so.”). Relying on its action in the *James* case, the Ninth Circuit found that “[i]f the propriety of the COA were entirely unreviewable, such action presumably would not have been appropriate” *Id.* at 728. *See also Wauls v. Roe*, 121 Fed.Appx. 179, 181, 2005 WL 44968, *1 (9th Cir. 2005) (“Because this claim was neither exhausted in the state courts nor raised in the district court, the COA as to this issue was improvidently granted.”); *Lord v. McDaniel*, 104 Fed.Appx. 676, 676 n.1, 2004 WL 1832118, *1 n.1 (9th Cir. 2004) (“We reject the government’s contention that we lack jurisdiction to consider the issue granted in the certificate of appealability.”).

210. *Phelps*, 366 F.3d at 728.

211. *Id.* Such an erroneous COA would thus be unreviewable on appeal, and using its authority to review interlocutory appeals as a comparison, found that forced jurisdiction “highly disfavored” *Id.* (citing *Batzel v. Smith*, 333 F.3d 1018, 1025 (9th Cir. 2003)). The reliance on an interlocutory appeal as a comparison to the COA contrasts sharply with pre-AEDPA Fifth Circuit precedent distinguishing the two procedures. *See Stewart v. Beto*, 454 F.2d 268, 269-70 (5th Cir. 1971) (“This right is one of substance as will be seen from the fact that Congress has vested absolute power in the district courts to allow habeas appeals by granting the certificate in the first instance. *See Nowakowski v. Maroney*, 386 U.S. 542 (1967). This is to be compared with the non-absolute power in the district courts to grant interlocutory appeals, i.e., both the district court and the court of appeals must assent to an interlocutory appeal. 28 U.S.C.A. § 1292(b). Under § 2253, a district judge, in his sole discretion, may permit an appeal if probable cause to appeal is found.”).

economy to proceed directly to the merits without turning back.²¹² Simply, “once a COA has been issued without objection . . . the procedural threshold for appellate jurisdiction has been passed and [the appeals court] need not revisit the validity of the certificate in order to reach the merits.”²¹³

Similarly, principles of judicial economy have convinced the Seventh Circuit to employ COA reconsideration as a summary means of expediting a frivolous appeal. The Third Circuit’s adoption of an absolute discretion approach convinced the Seventh Circuit to retreat slightly from *Young*’s reluctance to reconsider an already granted COA. Like the Ninth Circuit, the Seventh Circuit has moved toward a middle ground, specifically avoiding endorsement of either “end of the spectrum[.]”²¹⁴ The Seventh Circuit, however, has responded to the Third Circuit’s allegation that it fails to recognize the jurisdictional nature of a COA by reemphasizing that its reference to the COA screening function does not make certification an administrative act, but means that a *proper* COA is not the jurisdictional precursor.²¹⁵ The Seventh Circuit has not backed off

212. *Phelps*, 366 F.3d at 728 (“Of course, we must be ever mindful of the ‘gatekeeping and efficiency functions of the certificate of appealability.’ In many cases, our examination of the adequacy of a COA simply does not further these goals, and the effective deployment of substantial legal resources favors turning directly to the merits. This may be particularly true either because no one has challenged the COA, or because the parties have already fully briefed the issues it encompasses . . .”). The Ninth Circuit, however, has found that some cases require COA reconsideration regardless of any increased judicial burden when the district court “may have been so far off the mark that the certificate is simply invalid on its face.” *Id.* (“[T]here may be competing concerns involved, and in exceptional circumstances the vacatur of a COA may be appropriate regardless of the investment of time and energy into the case. For example, the issuance of a COA may have been so far off the mark that the certificate is simply invalid on its face. If we had no power to vacate COAs, we would be unable adequately to participate in the proper administration of § 2253(c). The decision to grant a COA would ‘effectively be unreviewable on appeal,’ a highly disfavored result.”).

213. *Gatlin*, 189 F.3d at 887.

214. *Buie v. McAdory*, 322 F.3d 980, 982 (7th Cir. 2003).

215. *Ramunno v. United States*, 264 F.3d 723, 725 (7th Cir. 2001) (“This circuit is among those holding that [a proper COA] is not [a jurisdictional requirement]—that although a certificate of appealability is indispensable, compliance with the substantial-constitutional-issue requirement of paragraph (c)(2) is not. . . . [T]he court is prepared to enforce § 2253(c) by dismissing an appeal if the appellee brings the defect to our attention early in the process, as the United States has done before the close of briefing by filing a motion to vacate the certificate. Vacating a certificate of appealability is an unusual step, *Marcello* emphasizes, but the possibility of review is essential if the statutory limits are to be implemented. Otherwise district judges have the authority to issue certificates of appealability for any reason at all, and as open-ended as they please.”); *United States v. Marcello*, 212 F.3d 1005, 1008 (7th Cir. 2000) (“[E]ven an unfounded [COA] gives us jurisdiction.”); *Cage v. McCaughtry*, 305 F.3d 625, 627 (7th Cir. 2002) (“[E]ven an ‘unfounded’ certificate of appealability confers

Young's holding that even an improvidently granted COA vests circuit jurisdiction over the merits.²¹⁶ This jurisdiction allows the Seventh Circuit to exert "discretion to decide the case by reviewing the validity of the [COA] or by going straight to the issues raised on the appeal."²¹⁷ Because prolonging the certification process adds unnecessary complexity and delay to the habeas process in contravention to the AEDPA's intent, the Seventh Circuit vowed to use its discretion only in "rare" or "extreme" cases.²¹⁸ The Seventh Circuit defines the exceptional cases as those "when the motion to vacate is made early enough to produce savings for the litigants" and "when issuance of the certificate was an obvious blunder, so that the court of appeals need not traverse the same ground twice[.]"²¹⁹ Simply, "quibbling over the worthiness of the [COA] itself after the case has progressed to briefing on the merits will not serve the [COA's] purpose of conserving judicial and prosecutorial resources."²²⁰ In the Seventh Circuit's view, principles of judicial

jurisdiction on us.").

216. *Owens v. Boyd*, 235 F.3d 356, 358 (7th Cir. 2000) ("*Young* holds and *Marcello* reiterates that a defect in a certificate of appealability is not a jurisdictional flaw."); see also *Ramunno*, 264 F.3d at 725 ("This circuit is among those holding that [a proper COA] is not [a jurisdictional requirement]—that although a certificate of appealability is indispensable, compliance with the substantial-constitutional-issue requirement of paragraph (c)(2) is not . . . [T]he court is prepared to enforce § 2253(c) by dismissing an appeal if the appellee brings the defect to our attention early in the process, as the United States has done before the close of briefing by filing a motion to vacate the certificate. Vacating a certificate of appealability is an unusual step, *Marcello* emphasizes, but the possibility of review is essential if the statutory limits are to be implemented. Otherwise district judges have the authority to issue certificates of appealability for any reason at all, and as open-ended as they please.").

217. *Marcello*, 212 F.3d at 1007-08.

218. *Id.* at 1008 (quoting *Young v. United States*, 124 F.3d 794, 799 (7th Cir. 1997)) ("[A]n obligation to determine whether a certificate should have been issued . . . increase[s] the complexity of appeals in collateral attacks and the judicial effort required to resolve them, the opposite of the legislative plan."). See also *Romandine v. United States*, 206 F.3d 731, 734 (7th Cir. 2000) (refusing to reconsider a certificate after the parties briefed the merits). The Seventh Circuit only uses this power in "cases in which the certificate identifies a statutory or other clearly nonconstitutional issue (or no issue at all); in other words, extreme cases." *Buie*, 322 F.3d at 982.

219. *Davis v. Borgen*, 349 F.3d 1027, 1028 (7th Cir. 2003).

220. *Marcello*, 212 F.3d at 1007-08. The court also stated that "we think the best approach is to say we have discretion to decide the case by reviewing the validity of the [COA] or by going straight to the issues raised on the appeal. We can do this, of course, because even an unfounded [COA] gives us jurisdiction. However, we will exercise our discretion to review the issuance of a [COA] only in rare cases because, as we noted in *Young*, '[a]n obligation to determine whether a certificate should have been issued . . . increase[s] the complexity of appeals in collateral attacks and the judicial effort required to resolve them, the opposite of the legislative plan.'" *Id.* (quoting *Young*, 124 F.3d at 799); see also *Lloyd v.*

economy demarcate the approach that navigates between the two extremes.²²¹

Vannatta, 296 F.3d 630, 632 n.1 (7th Cir. 2002); Dahler v. United States, 143 F.3d 1084, 1087 (7th Cir. 1998). The Seventh Circuit has strongly advised counsel to raise the issue of a improvidently granted certificate before briefing occurs. See Beyer v. Litscher, 306 F.3d 504, 506 (7th Cir. 2002) (“Appellate judges reviewing requests for certificates of appealability do not have counsel’s review of the case (review is expedited and based on a subset of the record) and the task of drafting the order’s language often is delegated to staff attorneys, who may lack appreciation of the pitfalls of collateral-review practice. Counsel could have seen at a glance that this order was problematic and called it to the issuing judge’s attention. Courts are entitled to that much assistance from members of the bar, so that remediable problems may be fixed before they cause unhappy consequences.”). In fact, the Seventh Circuit seems tired of explaining to the government that it will not reconsider a COA after briefing on the merits. See Brunt v. McDory, 65 Fed. App’x. 59, 61 n.1 (7th Cir. 2003) (“[A]s we have informed the state many times, its merits brief is not the proper place to challenge the sufficiency of a certificate of appealability—if it wishes to do so, it should file a motion before the briefing begins.”); Romandine, 206 F.3d at 734 (“If the United States had brought these matters to our attention—either by motion to dismiss the appeal for want of a proper certificate, or by motion to strike Romandine’s brief for its failure to address the only issue the district judge certified—we would have been inclined to dismiss the appeal. But the United States chose to litigate on Romandine’s terms.”).

221. See Davis v. Borgen 349 F.3d 1027, 1028 (7th Cir. 2003) (“[A] request to vacate a certificate has the potential to increase the time judges must devote to the appeal: first a motions panel will apply the standard of 28 U.S.C. § 2253(c) to the request, and then, if that motion is denied, a merits panel must give plenary review to the appeal. Only when the motion to vacate is made early enough to produce savings for the litigants—and even then only when issuance of the certificate was an obvious blunder, so that the court of appeals need not traverse the same ground twice, see Buie v. McAdory, 322 F.3d 980 (7th Cir. 2003)—does it make sense to entertain a motion to vacate a certificate.”); but see Buggs v. United States, 153 F.3d 439, 443 (7th Cir. 1998) (finding that “the issuance of a certificate of appealability was . . . inappropriate” after the parties had fully briefed the merits). The Sixth Circuit relies heavily on the Seventh Circuit’s approach, showing great concern for adding “further delay an already lengthy process.” Porterfield v. Bell, 258 F.3d 484, 485 (6th Cir. 2001). When the parties have not yet briefed the appeal, the Sixth Circuit favors a remand when a district court entirely fails to engage in the section 2253(b) analysis because “the district court is already deeply familiar with the claims raised by petitioner, it is in a far better position from an institutional perspective than [the circuit court] to determine which claims should be certified for appeal.” *Id.* at 487. Further, Sixth Circuit feels that reviewing the propriety of a possibly erroneous COA will increase judicial efficiency. See Porterfield, 258 F.3d at 485 (“Under normal circumstances, considerations of judicial economy will discourage review of certificates of appealability: the district court will have already invested substantial time in the certification process; the parties may have already briefed the merits of the claims; and review by this court would not only duplicate the district court’s efforts, in capital cases such as the case *sub judice*, it will further delay an already lengthy process. In this case, however, none of these reasons is present. The parties have not submitted merits briefs to this court and the district court has not engaged in any individualized assessment of whether, pursuant to *Slack*, ‘jurists of reason would find it debatable whether the district court was correct in its procedural ruling.’ *Slack*, 529 U.S. at 484, 120 S. Ct. 1595. Under these circumstances, we believe a review of the district court’s decision is appropriate, if only to provide guidance to district courts faced with the task of certifying claims for appeal.”); compare Frazier v. Huffman, 343 F.3d 780, 788 (6th Cir. 2003) (deciding not to reconsider the blanket grant of a COA), with

C. Reconciling *Nowakowski*

The Seventh Circuit in *Young* never addressed the permanency of the *Nowakowski* decision in light of the revised section 2253. Throughout the continuum of cases addressing COA reconsideration, circuits generally leave silent any discussion of the continued applicability of the *Nowakowski* opinion.²²² That the *Nowakowski* case is now nearly forty years old, pre-dating the AEDPA, is little reason alone to disregard its precedential effect. Supreme Court “decisions remain binding precedent until [it] see[s] fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality.”²²³ The courts that wink at *Nowakowski* risk Supreme Court correction unless post-AEDPA law justifies abandoning its principles. The circuit courts’ weakening of the districts’ COA role predicates transformation to the Friendly model of habeas appeals.

Justice Scalia has observed that three themes circumscribe the AEDPA’s effect on the antecedent habeas procedure: (1) the Supreme Court transposes all pre-AEDPA law not inconsistent with the new statutory mandates; (2) the Supreme Court fashions habeas law in a manner harmonious with congressional intent; and (3) habeas procedure must be compliant with the AEDPA’s text.²²⁴ With this guide, strong arguments support the reconsideration of a certificate that does not comply with section 2253(c)(3). Pre-AEDPA law placed few technical requirements on a certificate. When a district court granted a certificate before the AEDPA the appellate court possessed jurisdiction over the entire petition. No question existed as to what issues the appellate courts should review. A circuit court now

Murphy v. Ohio, 263 F.3d 466, 467 (6th Cir. 2001) (remanding after the blanket grant of a COA).

222. The Seventh Circuit has made the most valiant attempt at justifying its recent departure from the obligatory review established by *Nowakowski*: “while certificates of probable cause and certificates of appealability are similar in some respects, they differ in the pertinent respect that a certificate of appealability must identify a particular constitutional issue.” *Buie*, 322 F.3d at 982. In essence, the Seventh Circuit holds that section 2253(c)(3)’s issue-by-issue certification procedure gives the circuit courts sanction to reevaluate the integrity of a certificate rather than proceeding directly to the merits. *See id.*

223. *Hohn*, 524 U.S. at 252-53.

224. *See Miller-El v. Cockrell*, 537 U.S. 322, 348-54 (2003) (Scalia, J., concurring) (approving of procedures that are “consistent with [pre-AEDPA case law], in accord with the COA’s purpose of preventing meritless habeas appeals, and compatible with the text of § 2253(c)”). Of course, requiring reliance on the AEDPA’s text and Congress’ intent only acknowledges that Congress’ poor drafting did to capture its full purpose.

confronting a certificate that does not comply with section 2253(c)(3), however, faces a scenario unanticipated by the court in *Nowakowski*: the appeal does not apprise the circuit of what claims it possesses jurisdiction over and which issues merit adjudication.

Congress apparently expected the new section 2253(c)(3) to limit appeals to ascertainable issues, and allowing an appeal to proceed on an entire petition would violate the AEDPA's intent and language. An unspecific order certifying an appeal is not really a Certificate of Appealability; the district simply issued no legally sufficient certificate.²²⁵ The AEDPA's intent and section 2253(c)(3)'s requirements differ enough from both the pre-AEDPA statute and the situation the Supreme Court faced in *Nowakowski* to sustain the reconsideration or remand of a defective certificate.²²⁶

A more troubling question arises, however, when the circuit court reconsiders a certificate allegedly not complying with the more-subjective *Barefoot* standard (codified through section 2253(c)(2)).²²⁷ Unless the *Nowakowski* decision is inconsistent with the AEDPA, incongruent with congressional intent, or not compliant post-AEDPA procedure, the circuits must apply its mandates. Those circuits reconsidering an improvidently granted COA face the same questions presented before the AEDPA and traditionally governed by *Nowakowski*. That section 2253 statute now contains a specific standard for the issuance of a COA is of no moment since the AEDPA essentially adopted the pre-AEDPA *Barefoot* standard.²²⁸ Because circuit courts fail to distinguish between improvidently granted and defective certificates, they do not apprehend that *Nowakowski* still governs circuit court consideration of the former.

The Supreme Court has yet to address *Nowakowski*'s viability with respect to improvidently granted certificates. *Hohn*, though often cited in that context, provides little justification for reconsidering a COA.²²⁹ The *Hohn* Court clarified that an appeal from a district court dismissal, while a continuation of the litigation,

225. See *Tiedeman*, 122 F.3d at 522 (“[W]e will treat this case as if no certificate of appealability had been granted by the District Court.”).

226. Under this reasoning, the Fourth and Tenth Circuit's acceptance of a defective certificate cannot be justified by relying on *Nowakowski*.

227. The fact that the Supreme Court decided *Nowakowski* long before establishing the *Barefoot* standard makes little difference because the *Barefoot* court expressly reaffirmed the principles underlying *Nowakowski*.

228. See *Barefoot*, 463 U.S. at 886.

229. See generally, *Hohn*, 524 U.S. 236.

serves as a distinct step in the habeas process.²³⁰ *Hohn* stands for the proposition that an appeal begins with the filing of the COA application, thus allowing the Supreme Court to exert preliminary statutory jurisdiction over an uncertified circuit-court case.²³¹ Since *Hohn*, however, the Supreme Court has recognized limitations in the circuit's ability to adjudicate the "case" created by a petitioner's request for a COA. The mere filing of a COA application, which *Hohn* views as a case, does not give the circuit court jurisdiction over the merits. Supreme Court language seems to distinguish between the circuits' ability to "entertain" a case and its jurisdiction to "rule on the merits."²³² Addressing the merits absent a COA "is in essence deciding an appeal without jurisdiction."²³³ The Supreme Court's explicit holdings, however, have done little to explain whether a certificate must comply with sections 2253(b) or (c) to confer jurisdiction over the merits.

Much of the debate in the circuit courts over COA reconsideration centers on the opinion in *Young* that describes the COA as a "screening" device.²³⁴ The Third Circuit possibly misreads *Young* as authorization to treat the COA similar to filing requirements such as the payment of filing fees and other administrative tasks not involving judicial effort.²³⁵ In essence, the Third Circuit fears that a court clerk could be called upon to decide whether the lower court correctly found the substantial denial of a constitutional right.²³⁶ But nothing in *Hohn*, the case the Third Circuit sees in direct opposition

230. See *Hohn*, 524 U.S. at 249-50; see also *Slack*, 529 U.S. at 482.

231. *Slack*, 529 U.S. at 482 (citing *Hohn*, 524 U.S. at 241). As the commencement of a case triggers the application of the AEDPA, that statute governed any motion for a CPC filed after the AEDPA's effective date. *Id.* at 482 (referencing *Lindh*, 521 U.S. 320). Relying on *Hohn*, the Supreme Court has clarified that "an appellate case is commenced when the application for a COA is filed" in the circuit court. *Id.* at 482 (citing *Hohn*, 524 U.S. at 241).

232. See *Miller-El*, 537 U.S. at 335-36. Because of the sometimes-misguided filings of both unlearned inmates and confused counsel, circuit courts will often consider a notice of appeal as a request for a COA, if no other one is filed.

233. *Id.* at 337.

234. See, e.g., *Young*, 124 F.3d at 799.

235. See *Cepero*, 224 F.3d at 261 ("The difficulty that we have with the approach of our sister courts of appeals is that they fail to recognize the precise jurisprudential nature of a certificate of appealability as defined in [*Hohn*, 524 U.S. 236]. The centerpiece of the reasoning of those courts is that a certificate is an administrative function, described as 'a screening device, helping to conserve judicial (and prosecutorial) resources.'").

236. See *Cepero*, 224 F.3d at 261 ("Construing the issuance of a certificate of appealability as an administrative function, moreover, would suggest an entity not wielding judicial power might review the decisions of an Article III court.").

to the *Young* case, compels the circuit courts only to exert jurisdiction over proper certificates. The *Hohn* opinion emphasizes that certification is a judicial function, but does not suggest that appellate jurisdiction only flows from a certificate that complies with section 2253(c). The Third Circuit likely misapprehends the nature of appellate habeas jurisdiction. The Supreme Court states that the filing of a motion for a COA lets the circuit entertain the case,²³⁷ but makes no provision for full consideration of the merits.

The Seventh Circuit is not alone in using the screening terminology; some Supreme Court justices have likewise recognized the COA's screening function. If combining the stances taken by individual justices in dissenting opinions (insofar as that constitutes a valid measure of future Supreme Court action), a majority of the Supreme Court considers *Young* a persuasive indicator of how the COA process confers appellate jurisdiction. In *Hohn*, Justice Scalia's dissenting opinion, joined by Justice Thomas, cited *Young*'s statement that "[t]he certificate is a screening device, helping to conserve judicial (and prosecutorial) resources."²³⁸ Relying on *Young*, Justice Scalia implied that the question of a COA was not a jurisdictional one in the sense that it could be continually challenged once granted.²³⁹ Indeed, a COA request is not "analogous to a petition for habeas corpus" because it "is no 'remedy' for any harm, but a threshold procedural requirement that petitioner must meet in order to carry his [habeas] suit to the appellate stage."²⁴⁰

Four other Supreme Court justices have recently hinted that the question of whether a COA meets section 2253(c)(2)'s requirements is not one that can remain open throughout the case. In *Medellin v.*

237. See *Miller-El*, 537 U.S. at 336 (interpreting *Hohn*, 524 U.S. at 248).

238. *Hohn*, 524 U.S. at 257-58 (Scalia, J., dissenting) (quoting *Young*, 124 F.3d at 799).

239. *Id.* at 258 (Scalia, J., dissenting) ("It is this unique screening function that distinguishes a COA from the jurisdictional issues discussed by the Court: Section 102 of the AEDPA prevents petitioner's case from entering the Court of Appeals *at all* in the absence of a COA, whereas other jurisdictional determinations are made after a case is in the Court of Appeals (even if the case is later dismissed because of jurisdictional defects)."); see also *Slack*, 529 U.S. at 482 ("The [certificate of appealability] statute establishes procedural rules and requires a threshold inquiry into whether the circuit court may entertain an appeal.").

240. *Hohn*, 524 U.S. at 258. (Scalia, J., dissenting) ("It is this unique screening function that distinguishes a COA from the jurisdictional issues discussed by the Court: Section 102 of AEDPA prevents petitioner's case from entering the Court of Appeals *at all* in the absence of a COA, whereas other jurisdictional determinations are made after a case is in the Court of Appeals (even if the case is later dismissed because of jurisdictional defects), *ante*, at 1974-76. See *Rosado v. Wyman*, 397 U.S. 397, 403, n. 3, 90 S.Ct. 1207, 1213, n. 3, 25 L.Ed.2d 442 (1970) (a court always has jurisdiction to determine its jurisdiction).").

Dretke,²⁴¹ the Supreme Court had the opportunity to consider whether the International Court of Justice's consideration of the Vienna Convention on Consular Relations and Optional Protocol on Disputes²⁴² created an actionable ground for relief to a foreign national on Texas' death row. For the first time on *certiorari* review, Texas argued that international law could not suffice to create a "substantial showing of the denial of a *constitutional* right,"²⁴³ and that no court could certify an appeal based on the Vienna Convention.²⁴⁴ Texas maintained that its COA argument was a non-waivable jurisdictional objection, thus permitting its emergence at that late juncture. A majority of the Supreme Court dismissed the case as improvidently granted on other grounds.²⁴⁵ A four-justice minority, though, would have heard the case and addressed the COA argument.²⁴⁶

Writing for the dissent, Justice O'Connor cited *Young* and acknowledged that a "COA is jurisdictional in the sense that it is a 'gateway' device."²⁴⁷ Because a COA "serves an important screening function and conserves the resources of appellate courts . . . the existence of a COA is jurisdictional insofar as a prisoner cannot appeal in habeas without one."²⁴⁸ Nevertheless, Justice O'Connor differentiated between COA questions and "true jurisdictional arguments" that a court may raise *sua sponte* and without other procedural concerns.²⁴⁹ Otherwise, Justice O'Connor reasoned, appellate courts "would always be required to check that a 'substantial showing' had been made and a cognizable right asserted—even in the absence of controversy between the parties,"²⁵⁰

241. 544 U.S. 660 (2005). Justice O'Connor wrote the dissenting opinion, in which Justices Stevens, Souter, and Breyer joined. Justice O'Connor's replacement, Samuel Alito, Jr., sat on two Third Circuit panels that justified reconsidering a COA (though he did not author the opinions). See *United States v. Eyer*, 113 F.3d 470 (3d Cir. 1997); *United States v. Cepero*, 224 F.3d 256 (3d Cir. 2000). Five justices still have endorsed *Young*'s language (Scalia, Thomas, Stevens, Souter, and Breyer).

242. Apr. 24, 1963 21 U.S.T. 77, T.I.A.S. No. 6820 [hereinafter Vienna Convention on Consular Relations] (entered into force Dec 24, 1969).

243. *Medellin*, 544 U.S. at 677 (quoting 28 U.S.C. § 2253(c)(2) (2005)).

244. *Id.* at 677-78.

245. *Id.* at 661.

246. *Id.* at 672-90.

247. *Id.* at 678 (O'Connor, J., dissenting) (quoting *Miller-El*, 537 U.S. at 337).

248. *Id.*

249. *Id.* at 678.

250. *Id.* at 679 (referencing *Young*, 124 F.3d at 799).

thus “undermin[ing] the efficiency of the COA process.”²⁵¹ Accordingly, the “[p]redicate considerations for a COA . . . are not the sorts of considerations that remain open for review throughout the entire case.”²⁵² If properly presented to the Court, it is not unlikely that the Supreme Court would find that *Nowakowski* remains an active force in habeas law.

The possibility remains, however, that the Supreme Court is more willing to rewrite habeas law after the AEDPA, notwithstanding lip service to maintaining any law consistent with the statute. One striking example comes from *Miller-El* where the Supreme Court rejected the Fifth Circuit’s practice of considering the merits of an appeal and then using that analysis to determine whether a COA should issue.²⁵³ In *Garrison*, however, the Supreme Court previously held that “nothing . . . prevents the courts of appeals from considering the questions of probable cause and the merits together.”²⁵⁴ The Supreme Court reaffirmed *Garrison* in *Barefoot*.²⁵⁵ The Fifth Circuit, as well as the Eighth Circuit, relied on *Garrison* in shaping its post-AEDPA procedure.²⁵⁶ Despite the continued vitality of other portions of *Barefoot* after the AEDPA’s enactment,²⁵⁷ the court in *Miller-El* ignored *Garrison* and *Barefoot* and held that the COA’s “threshold inquiry does not require full consideration of the factual or legal bases adduced in support of the claims. In fact, the statute forbids it.”²⁵⁸ This result is intellectually unsatisfying because the Supreme Court made no effort to identify those portions of 28 U.S.C. § 2253 that the AEDPA changed in a manner that overruled *Garrison* and *Barefoot*. The relevant portions of the statute existed before the AEDPA.

Perhaps *Miller-El* and *Hohn* indicate a shift in the Supreme Court’s view of appellate habeas jurisdiction. Perhaps the circuits’

251. *Id.*

252. *Id.* at 679 (O’Connor, J., dissenting) (citing *United States v. Peguero*, 526 U.S. 23 (1999) (ignoring the government’s briefing and challenging the constitutional basis for a Cause of Action request). Also, support for this view can be found in *Slack* where the Supreme Court “remanded the case in part for the court of appeals to apply the appropriate standard, thus implying that defective leave to appeal neither dooms the appeal nor deprives the appellate courts of jurisdiction.” *Franklin v. Hightower*, 215 F.3d 1196, 1199 (11th Cir. 2000).

253. *See, e.g., Miller-El*, 537 U.S. 322.

254. *Garrison*, 391 U.S. at 466.

255. *See Barefoot*, 463 U.S. at 890-92.

256. *Cannon*, 134 F.3d at 686; *Ramsey v. Bowersox*, 149 F.3d 749, 760 (8th Cir. 1998).

257. The Supreme Court has extensively relied on *Barefoot* in cases such as *Slack v. McDaniel*, 529 U.S. 473 (2000).

258. *Miller-El*, 537 U.S. at 336.

abandonment of *Nowakowski* is only a reflection of the Supreme Court's amnesiac efforts to mold the AEDPA into a more palatable process. As it now stands, whatever logical reasons the circuits may muster for reconsidering a defective COA, the Supreme Court jurisprudence does not condone any marked change from its pre-AEDPA methodology. Insofar as reading the tea leaves of dissenting opinions can hint at how the full Court may one day rule, dissenting comments reveal a willing to following the pre-AEDPA practice honoring the integrity of a certificate once issued by the district court. Simply, the Supreme Court has not countenanced a change between the pre- and post-AEDPA application of *Nowakowski*. Those circuits that ignore *Nowakowski* do so without express or implied support from the Highest Court. At its root, the circuits' abandonment of *Nowakowski* comes from distrust of the district courts' role as the appellate habeas gatekeeper. Even the Seventh Circuit, in which vestiges of *Nowkowski* remain, fears that district judges will issue a COA "for any reason at all, and as open-ended as they please."²⁵⁹ Circuit courts protect their independent habeas authority by relying largely on policy, not jurisdictional, argument. As discussed below, policy arguments both favor and detract from permanency in the district courts' precursory appellate role.

IV. LOSING THE "E" IN THE AEDPA

As a review of the prevailing case law shows, the current procedure governing habeas appeals varies by circuit. Aside from creating disharmony, distrust, and disappointment between the judicial bodies, the current divergent COA approach, particularly in those circuits reconsidering the district court's authorization of an appeal, slows the wheels of justice, delaying both the liberation of the innocent and the final ratification of a valid judgment.²⁶⁰ Congress has repeatedly sought to streamline cumbersome habeas procedure. Constipated habeas proceedings defile the statute's intent. In that light, the current COA scheme certainly seems a worthy candidate for congressional improvement.

259. *Ramunno*, 264 F.3d at 725.

260. See Jordan Streiker, *Restructuring Post-Conviction Review of Federal Constitutional Claims Raised by State Prisoners: Confronting the New Face of Excessive Proceduralism*, 1998 U. CHI. LEGAL F. 315, 344-46 (1998) (discussing an even more drastic position, the author proposes removing the district courts from considering all record habeas claims as a means of reducing habeas inefficiency).

The advocacy of habeas reform, it should go without saying, depends on the need for reform. Absent some compelling reason for tinkering with the constitutionally mandated availability of habeas relief, it seems most inappropriate to call for a revision of the habeas statutes. Congress found a need for reform in 1908. Any judicial waste occasioned by a burdensome certification process has never raised the possibility of lynching that gave birth to the old CPC. Nonetheless, Congress for decades in the later part of the Twentieth Century kicked around the idea of habeas reform, though without making any serious headway in that direction. The sweeping revisions proposed by the AEDPA only found kinetic force after the horrific Oklahoma City bombing of April 19, 1995. Let us pray that no Timothy McVeigh impels Congress again to transform federal habeas corpus law so drastically. Yet even absent tragedy, compelling reasons exist for Congress and the courts to reconsider inefficiencies and inadequacies in the habeas corpus process.²⁶¹ Congress' recent attempt to codify the Streamlined Procedures Act,²⁶² while arguably misguided, misinformed, and misanthropic, reflected a deep concern for delay in the adjudication of habeas cases.

When evaluating the most desirable means of initiating the appellate process in habeas cases, at least three factors bear consideration. First (and if recent Supreme Court emphasis on those principles bears true, most importantly), habeas procedure must pay weighty attention to concerns of comity, federalism, and finality that drive the federal habeas process. In the spirit of the AEDPA, habeas law must, within constitutional parameters, honor the integrity of state court judgments adverse to the inmate, encourage a speedy resolution of habeas cases, and allow the States to enforce their constitutionally sound judgments.²⁶³ Second, principles of judicial economy should

261. Let's be honest, law review articles—in which neophyte law students cut their editorial teeth, law professors justify their existence, and attorneys (like the author) seek heady self-affirmation—rarely initiate serious reform. Non-legal factors more often than not force legal change. Striking exceptions exist, the articles by Judge Friendly and Professor Robbins serve as prime examples. However, this author will be eternally pleased, and genuinely surprised, if this article opens further dialog on the distribution of responsibilities in the appellate habeas process. Please give me some credit if the impossible happens and credit becomes due.

262. H.R. 3035, 109th Cong. (2005).

263. To some extent, however, comity and federalism carry little weight when discussing the reconsideration of certification. Because certification reconsideration occurs often at the behest of the government, no strong argument exists that such review prejudices the federal government's relationship with the state as the government's actions waive reliance on federalism.

shape and mold the inception of a habeas appeal. Alleviation of the heavy burdens carried by the federal courts must factor into establishing the distinct roles played by the district and circuit courts. Weighing the relative, and interdependent, roles of each tribunal forces an inquiry into each court's role in the habeas process and how the COA can compliment the assignation of responsibilities without burdening the courts. Finally, the relationship between dual sovereigns and a laudatory concern for judicial administration cannot be considered in isolation from potential infringement on an inmate's ability to receive adequate consideration of his constitutional claims, most importantly those which are not patently frivolous. Even assuming without qualification that courts possess the inherent ability to reject summarily the frivolous, the absurd, the malicious, and the insane, the Great Writ's broad swath ordains liberal presentment of not-dubious constitutional claims. Only by examining the interplay between these three paramount factors, weighing their relative merits, and allowing for the fluctuation of these factors over time, can an unimpassioned evaluation of the most effective COA procedure come into being.

A. Inefficiency in the District Court

Efficiency and economy alone sanction the COA's existence. Congress has never intended certification to be a second or third shot at habeas relief. Certification is not another bite at the habeas apple, but a system that allows an inmate's first chomp to sink a little deeper. If certification procedure fails to winnow out frivolous or meritless claims, or increases the complexity of the appellate process, then no basis exists to expose habeas law to tighter strictures than the same appellate rules and procedures that govern traditional civil litigants.²⁶⁴ Paralyzing complexity in the district or circuit court's COA review weakens certification's viability as an effective procedure.

While recognizing the potential judicial waste created by an

264. Some commentators have called for completely demolishing the certification scheme. See *Developments in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1154, 1194 (1970) (“The best solution, however, is to change the statutory scheme. State prisoners ought to be allowed to appeal as of right The appeals courts can institute summary procedures if the burden of petitions is too great. This system would eliminate the timing problems created by the certificate, and would save time spent on deciding whether to issue a certificate.”). Of course, the exploding increase in habeas litigation over the last decade challenges any proposal to remove the threshold barriers to habeas appeals.

unduly convoluted CPC procedure in the circuit courts, Judge Friendly quickly dismissed any argument that the district courts found themselves overly burdened in deciding whether or not to certify a habeas appeal. Judge Friendly correctly noted that “any judge could [tell] . . . how small [the time used by a district court to decide whether or not to certify an appeal] is as compared to the time spent in hearing an appeal.”²⁶⁵ By the time a district court reaches the question of a COA, it has already once considered the petitioner’s claims when dismissing the petition, and quite possibly done so a second time through post-judgment motions.²⁶⁶ A district court’s familiarity with the proceedings presumably expedites its certification review, at least in comparison to the judicial resources consumed by a full appeal.²⁶⁷

Two factors, however, have increased the expenditure of federal resources at the district court level since Judge Friendly wrote his article. First, the AEDPA’s new requirement that a district court consider certification on an issue-by-issue basis, and then justify its reasoning, has added some complexity to the initial COA review. The AEDPA discourages a summary grant or denial of a COA. The process now requires a thoughtful, resonant analysis by the district court.²⁶⁸ Second, as the Supreme Court’s recent emphasis on

265. Friendly, *supra* note 19, at 144 n.9.

266. No statistics measure the percentage of cases in which prisoners seek reconsideration of a habeas denial or dismissal under FRCP Rule 59(e). However, litigiously minded prisoners seem to file such motions frequently.

267. It would not be fair to presume that federal courts exhibit no preference as to the expeditious resolution of habeas cases. Testimony before the House subcommittee considering the Streamline Procedures Act imputed a disregard for efficiency to the federal courts:

Federal habeas courts have great power, simply because they are last in line. But they have little responsibility, because they are so far removed in time and space from the circumstances of the crime and the subtleties of the state proceedings. Accordingly, they have small motive to act expeditiously or efficiently, to give credit to the judgment of their brethren in state courts, or to consider the needs of crime victims. The only way that balance can be restored is by congressional statute.

Terrorist Death Penalty Enhancement Act of 2005 and Streamlined Procedures Act: Hearing on H.R. 3060 and H.R. 3035 Before the H. Comm. on the Judiciary and the Subcomm. on Crime, Terrorism, and Homeland Security, 109th Cong. 93 (2005) (testimony of Ronald Eisnberg, Deputy District Attorney, Philadelphia, Pennsylvania). Nothing in federal review as it now exists demonstrates such opprobrium to expeditious consideration, and nothing suggests that the federal courts intentionally gum up the habeas process.

268. Additionally, the COA question arises after the presumptive finality of the district court’s entry of judgment. The district court needs not only to expend resources to review a COA application and prepare an order, the district court must maintain vigilance so that an otherwise unanticipated COA application does not fester on the docket. As no special

certification trickles down to the lower courts, district courts apply greater resources to the COA procedure, fearing reversal from a misapplication of the COA standard. District courts may not brush off the COA as an annoying procedural hurdle. If a district denies a COA, then the Supreme Court's recent emphasis on certification may cause the circuits to disagree more liberally with the district courts. Even if a district grants a COA, some circuits will inspect that decision. Where *Nowakowski* once protected district court certification, and the circuits more expansively employed their own certification power, circuits now scrutinize the certification procedure like never before, causing the district courts to expend more time and resources in its COA role. While still not tying up the same judicial resources as a full-blown appeal, the COA question still commands a significant amount of district-court attention.

Admittedly, complaints about the district court's role in the habeas process make mountains out of molehills. The judicial expenditure of resources at the district-court level by no means paralyzes the system. Any increased burden on the district courts must be weighed against the benefits of their threshold involvement in the appellate process.²⁶⁹ For instance, a district court's familiarity

procedure requires a respondent to oppose the COA application, a prisoner's certification request may easily fall below the radar screen and unnecessarily draw out the time spent in district court. Also, while other appellate deadlines apply, no time limitations constrict a petitioner's ability to seek a COA. *See Foster v. Quarterman*, 466 F.3d 359, 366 (5th Cir. 2006) ("Pursuant to AEDPA, there is no limitations period governing the filing of COA requests.").

269. Blackmun comprehensively discussed the importance of district court input on the certification question:

All this adds up, in my mind, to the conclusions that there is something definitely to be gained by having the district court, in the first instance, give very careful consideration to the question whether the state prisoner federal habeas applicant has something of substance going for him, and that there is something definitely to be lost when the district court routinely issues a certificate of probable cause without this careful consideration. If the case is legally frivolous the application ought to be denied. When the case then comes to the court of appeals, as it inevitably does, that court will take another look at it and, on occasion, might issue the certificate itself. That court, however, under *Nowakowski*, does not have this discretion if the district court has issued the certificate. If an appellate judge issues the certificate where a district judge has denied it, that should not be regarded by the district judge as a rebuff. It does mean that the appellate judge entertains some doubt. That is his problem.

All this, after all, takes us right back to the philosophy that this, as with all other matters, is an issue for decision by the court of general jurisdiction, the district judge, in the first instance. This, I think, for reasons which are obvious to all of us, is where the best considered and important decision is to be made. This is the

with the case provides a solid basis for deciding the need for appellate review. Removing the COA decision from the lower court, however, by no means abolishes the district court's ability to issue informal recommendations that the circuit grant COA or candidly note the debatability of a ruling. The district courts need not obligate circuit court jurisdiction in order to express their discomfort with a particular ruling. Informal means surely exist that will alert the circuit court to a district court's lingering concerns while maintaining the independence of the circuit. Circuit courts, which presumably read, if not defer to, lower court judgments would likely heed such unreserved suggestions, especially knowing that the district court had fully addressed the merits, a process initially denied the circuit by *Miller-El*.²⁷⁰

B. Inefficiency in the Circuit Courts

Concern for circuit court caseload is meritorious and laudatory. The number of federal habeas corpus cases filed in the district court by state inmates has "surged" 115% in the past decade.²⁷¹ Motions to vacate sentence by federal prisoners, while slightly down in the past few years, have grown 75% in the same time period.²⁷² This upward swing in prisoner cases eventually gobbles up great appellate resources. Congress' stingy hand in doling out the judicial budget has

normal situation, for in the routine case the district judge is there to decide and not to bypass the responsibility of decision. This is the dignified thing for him to do. This is the approach, I submit, which for so long was so forcefully presented and believed in by Judges Sanborn and Gardner and others of the Eighth Circuit. In *Higgins v. Steele*, supra, 195 F.2d 366, 369, a federal prisoner habeas corpus case decided in 1952, a long time ago so far as this area of the criminal law is concerned, Judge John B. Sanborn said:

* * *

"We realize that the serious consideration which this Court has given to appeals in forma pauperis in hopeless cases may have led the District Judges in this Circuit to believe that such appeals should be allowed with extreme liberality. We are now of the opinion that much greater care should be taken in screening such cases, in order to separate those which are clearly without merit from those which are meritorious or which at least present some substantial question worthy of consideration."

Blackmun, *supra* note 50, at 353-54.

270. See, e.g., *Miller-El*, 537 U.S. 322.

271. OFFICE OF JUDGES PROGRAMS, STATISTICS DIVISION, ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, JUDICIAL CASELOAD INDICATORS 12-MONTH PERIODS ENDING MARCH 31, 1994, 1999, 2002, AND 2003 (2003), <http://www.uscourts.gov/caseload2003/front/Mar03Txt.pdf> (last visited Mar. 5, 2007).

272. *Id.*

forced courts to cope with exploding prisoner litigation while constrained by imploding resources. The waste of judicial resources now present in the certification process may contribute to some circuit's reconsideration of the COA. Those circuits that reevaluate the need for a COA share Judge Friendly's concern that district courts obligate appellate review of certified issues; they merely actuate their concern by disregarding, rather than removing, the district court's role. However, removing the COA determination from the district court instead would reduce duplicity in process, avoid circuit court consideration of appeals that they otherwise would not certify, and remove a confusing and contorted hurdle to finality.

Habeas appeals proceed along three tracks: (1) both the district and circuit courts deny certification; (2) the district court denies certification but the circuit grants a COA; and (3) the district certifies an appeal and the circuit either then assumes jurisdiction or reconsiders the COA. In the first two categories of cases, which likely represent the bulk of habeas appeals, removal of the certification power from the district court would extinguish duplicative judicial consideration. In both scenarios, regardless of the district action, the circuit now still has to consider the COA question.²⁷³ While the district's COA analysis theoretically may be helpful to the circuits, the circuit court's reactionary emphasis on certification probably means that placing the COA inquiry in the circuit court alone would not meaningfully change the expenditure of circuit resources. The Friendly approach would only significantly alter circuit review in the third category of cases, specifically those that the districts now certify, but where the appellate courts would not certify themselves. Judge Friendly correctly noted that the circuit courts will not always agree with the district court's mandate and, if they felt authorized to reconsider the COA, would not waste judicial resources on a full appeal. Though no numbers account for the number of certified appeals that the circuits themselves would not allow to proceed, the removal of the district court from the appellate equation would unfetter circuit courts from the forced consideration of unwanted appeals, particularly in those circuits now operating under the obligatory review approach. In those circuits following the conditional and permissive review approach, enacting Judge Friendly's reforms would only solidify the circuit court's usurped

273. There is no indication that a district court's denial of COA significantly deters petitioners from seeking a certificate in the circuit court.

authority over all certification issues.

Professor Robbins, in identifying problems with the Friendly approach, objected to the “eliminat[ion of] one level of review for the certificate now open to the state prisoner.”²⁷⁴ Empowering only the circuit court with the threshold appellate determination would surely “reduce the opportunities of a state prisoner who appeals the denial of habeas corpus to obtain the certificate . . . needed to pursue his appeal.”²⁷⁵ Nevertheless, removing district-level consideration of the certificate is not necessarily an effort “generally to restrict all prisoners’ access to the federal courts,” made only by “ardent opponent[s] of habeas corpus relief.”²⁷⁶ Revising the COA procedure creates no barrier to or prejudice in the preliminary consideration of a habeas petition. After that review concludes, an inmate has no unfettered constitutional or statutory right to circuit-court redress. Many procedural barriers already impede a prisoner’s efforts at appellate review, including time limitations, filing fees, briefing requirements, and jurisdictional rules. The existence of those procedures does not signal a bias against inmates or a predilection toward denying habeas relief. Those procedures properly exhibit one conclusion drawn from weighing a prisoner’s interest in habeas review against the lofty goals of federalism, comity, and finality, tempered also by judicial economy.

Professor Robbins strongly argued that the Friendly approach misapprehends that “the certificate was designed to free the appellate courts from reviewing frivolous habeas petitions,”²⁷⁷ and thus anomalously assigning the certification question in the circuit courts alone would “place[] them at the center of the decision regarding frivolousness and require[] them to delve into the merits of the claims.”²⁷⁸ While Professor Robbins properly observed the apparent abnormality of having the circuit court certify a question to itself, especially in a context designed to lighten the appellate caseload, “funnel[ing] all certificates requested through the appellate courts”

274. Robbins, *supra* note 69, at 330.

275. *Id.*

276. *Id.* at 331-32. To his credit, Professor Robbins used these harsh words in reference to Senator Strom Thurmon of South Carolina, sponsor of a bill favoring the Friendly approach, and his proposals to reform certification. Professor Robbins’ words in context, however, seem intended to apply to all those who support habeas reform unfavorable to petitioners.

277. *Id.* at 330.

278. *Id.*

would not create such an onerous burden.²⁷⁹ True, the circuit courts would serve as the first, and often only, forum to evaluate whether a case meets the certification requirements. The current procedure, however, does little to prevent the circuits from carrying a heavy COA burden. The district court's initial COA determination, a process in which most petitioners are not successful, likely does little to deter inmates from seeking a COA from the circuit court; removing the COA procedure from the district court would insignificantly increase the number of cases to be considered by the circuit courts. By and large, the potentially dual certification review currently in place wastefully forces both the district and the circuit court to consider whether a claim does not merit appellate consideration.

Even to the extent that the shifting of preliminary focus to the circuit courts would require additional expenditure of circuit resources, Supreme Court precedent since Professor Robbins' article has clarified that the COA determination does not require the circuits to expend exorbitant resources, but expressly avoids a full consideration of the merits. The current COA standard with its threshold substantive-denial-of-a-constitutional-right standard ferrets out those claims needing additional review without forcing the federal courts to engage in extensive review of the entire petition, unless the circuit courts duplicate the district court's review. In the end, it seems difficult to quantify the habeas efficiency upon the removal of the district court from the COA process in all cases, but it would certainly increase efficiency in those circuits allowing for some reconsideration of the district-granted certificate.

C. Relationship Between the Courts

Circuit courts oversee the district courts, as the Supreme Court oversees the circuits. The present COA procedure can create needless tension as the higher tribunal engages in an unforgiving review of the lower's certification analysis. What attitude should a district court take toward granting a COA with an awareness that the circuit feels at liberty to reconsider that presumably well-considered issue?²⁸⁰

279. *Id.*

280. Even in obligatory review jurisdictions where the circuit court will not revisit a lower court's certification, circuit courts have "reversed" the lower court's *denial* of a COA—a needless overturning of a district court action. *See, e.g.,* *Cole v. Dretke*, 418 F.3d 494, 496 (5th Cir. 2005) ("We reverse the district court's denial of a COA, grant Cole a COA on his *Penry* claim, but ultimately affirm the district court's denial of habeas relief."); *Bigby v. Dretke*, 402 F.3d 551, 556 (5th Cir. 2005) ("[W]e affirm the conviction, reverse the district

Circuit and district judges are smart people. Nothing about the hierarchy of the federal bench inherently makes circuit judges more intelligent than their trial-level counterparts, or vice versa. Nonetheless, the fact that circuit courts often differ on the question of whether a claim merits certification suggests that something other than mere mental acumen drives the divergent results. One district judge's view of the appellate process is especially pertinent:

What is the purpose of an appeal? The reason for an appeal "is not because the appellate judges necessarily have more wisdom about the case than the trial judge (on the contrary they may have less); it is instead that a second look by someone else is always to the good. The Bible says, 'in the multitude of counselors there is wisdom.' So the idea is that it is good to have a panel of three judges examine what one judge has done."²⁸¹

Even with that context, it seems somewhat surprising that the issue of COA reconsideration should be as lively as it currently is in some circuits. The Supreme Court presumably created an objective standard, now codified in the AEDPA, and some consensus should exist among the judicial bodies that would result in uniform application.²⁸² Stepping aside from the district court's substantial investment in its judgment to decide whether reasonable jurists would agree with its ultimate conclusion may be difficult, but routine application of the COA procedure should inject great objectivity into

court's denial of a COA on Bigby's *Perry* claim, grant the COA, vacate Bigby's sentence, and remand to the district court with instructions." As a general rule, circuit courts forgo overturning a district court when an alternative course of action exists. The circuit court possesses statutory authority and ability to issue a COA, regardless of the disposition of that issue by the lower court. Unless the circuit court intends to use the reversal of a COA to send a strong message to the districts (similar to the course-correction approach that defines the Supreme Court's recent COA jurisprudence), such action creates unnecessary disharmony. Likely, the circuit courts reverse a district court's certification decision out of sloppiness or a less-than-full understanding of their independent ability to grant COA. Whatever the reason for which an appellate court chooses reversal, rather than acting on its own authority, the overturning of a district court determination is no insignificant act, and professionalism and respect suggest that appellate courts avoid such action whenever possible.

281. *Solomon v. Kemp*, 572 F. Supp. 233, 234 (N.D. Ga. 1983) (quoting *Atlanta Coca-Cola Bottling Co. v. Jones*, 224 S.E.2d 25, 28 (1976) (Hall, J., dissenting)).

282. *Slack v. McDaniel*, 529 U.S. 473 (2000). The Supreme Court, in *Slack*, faced the question of how to interpret the "substantial showing of the denial of a constitutional right" language from 28 U.S.C. § 2253(c). *Id.* at 483. The State in *Slack* argued that the AEDPA only permitted a habeas petitioner to appeal substantive, constitutional issues rather than procedural adjudications. The Supreme Court dismissed that interpretation of the COA standard out-of-hand. Noting the "vital role in protecting constitutional rights" served by habeas review, the Supreme Court found that "Congress expressed no intention to allow trial court procedural error to bar vindication of substantial constitutional rights on appeal." *Id.*

the process. As noted by Justice Blackmun, forcing a district court to evaluate the debatability of its own ruling may not be an easy exercise: “Although no district judge likes to pass upon the correctness of his own decisions, it is his duty”²⁸³ Judges can presumably look at their judgments objectively and determine whether their result is debatable or whether an appeal should proceed. Nevertheless, case law demonstrates that the federal courts occasionally, if not often, disagree about the application of the objective COA standards.

Various factors may explain why circuit and district courts differ on the question of certification. When the Supreme Court abandoned the broad powers flowing from common-law certiorari and began emphasizing the certification analysis, lower courts may have sensed a shift in not only what vehicle provides Supreme Court habeas review and the breadth of the review, but also in its interpretation of the *Barefoot* standards. Language in *Miller-El* especially could be read to suggest that courts should not hesitate to certify appeals frequently.²⁸⁴ Recent precedent has caused circuit courts to pause in tying section 2253’s noose too tightly, swaying the circuits to restrain any Draconian certification review. A circuit court could certainly feel it easier to grant a COA in a difficult case rather than risk a Supreme Court remand, particularly when a full merits review is uncomplicated or obviously unfavorable to the petitioner. The Fifth Circuit particularly, as the subject of recent COA smack-downs, shows a greater willingness to issue a COA. The district courts, only feeling the secondary effects of that hesitant, less-demanding COA review, may not yet have adjusted to a liberalizing of the COA review. In the end, all this means that unless the district courts’ COA review tracks appellate trends, the circuit courts will more frequently take issue with the lower court’s certification review. Until the courts are all on one page about how often to apply the COA’s objective standards, dissonance will exist between the judicial bodies.

Beyond differences in the frequency of COA bestowal, the courts sometimes misapply section 2253(c)(2)’s standards. For instance, one circuit frequently refuses to consider a COA in light of

283. Blackmun, *supra* note 50, at 353 (quoting *Higgins v. Steele*, 195 F.2d 366, 369 (8th Cir. 1952)). Blackmun was still a judge for the Eight Circuit Court of Appeals at the time he drafted this article.

284. *Miller-El*, 537 U.S. at 337 (“Our holding should not be misconstrued as directing that a COA always must issue.”).

the AEDPA's deferential standards,²⁸⁵ in direct contravention of *Miller-El*'s mandates.²⁸⁶ A district court, well-apprized of a claim's merits in light of the AEDPA's deferential standard, may properly refuse to certify an appeal that a circuit, ignoring that highly forgiving review, would not. District courts may also err in applying the COA standards. District courts, fearing reversal, may glom onto *Barefoot*'s "deserve encouragement to proceed further" language to certify claims that trouble the court, but still fail to meet section 2253(c)(2)'s explicit standards. Particularly, a district court may temper a harsh application of section 2254(d)'s deferential standards by allowing an appeal, placating petitioners whose otherwise-compelling claims fall victim to the AEDPA's demanding requirements. District courts, uncomfortable with a harsh application of the AEDPA or troubled by a difficult factual scenario, may use the COA to ameliorate their denial of relief, regardless of the statutory requirements. In other cases, the district court may just grant a COA out of fear that he may have decided an issue wrongly.²⁸⁷ On the other hand, a district in an

285. See *Smith v. Dretke*, 422 F.3d 269, 273 (5th Cir. 2005) ("At the COA stage, we do not apply the deferential AEDPA standard of review to examine the merits of the habeas petition."); *Mathis v. Dretke*, 124 Fed. App'x. 865, 870 (5th Cir. 2005) ("At the COA stage, we do not apply the deferential AEDPA standard of review, found in 28 U.S.C. § 2254, for the merits of the habeas petition."); *Green v. Dretke*, 82 Fed. App'x. 333, 336 (5th Cir. 2003) ("At the COA stage, we do not apply the deferential AEDPA standard of review, found in 28 U.S.C. § 2254, for the merits of the habeas petition."); but see *Sosa v. Dretke*, 133 Fed. App'x. 114, 118 (5th Cir. 2005) ("We look to the District Court's application of AEDPA to petitioner's constitutional claims and ask whether that resolution was debatable amongst jurists of reason."); *Howard v. Dretke*, 125 Fed. App'x. 560, 563 (5th Cir. 2005) ("In determining whether the district court's denial of Howard's petition was debatable, we must keep in mind the deferential standard of review that AEDPA requires a district court to apply when considering a petition for habeas relief."); *Morris v. Dretke*, 90 Fed. App'x. 62, 66 (5th Cir. 2004) ("In a case such as this, a court of appeals must look at the district court's application of AEDPA to the petitioner's constitutional claims and ask whether the district court's resolution was debatable amongst jurors of reason.").

286. *Miller-El*, 537 U.S. at 336 ("We look to the District Court's application of AEDPA to petitioner's constitutional claims and ask whether that resolution was debatable amongst jurists of reason.").

287. For instance, one district court described its discomfort as follows:

Until such time as such precedent is submitted to me, and, is shown to be applicable to a case at hand, I expect that I shall, as I did in this case, grant certificates of appealability in capital habeas cases as a matter of routine. Others may view this as an abdication of responsibility; it is, rather, a manifestation of the possibility of my own fallibility, and concern that I may have erred. I do not believe that I have erred—but doubt that I have, no matter how strongly felt, is not certainty that I have not.

Bradley v. Birkett, 156 Fed App'x 771, 774 (6th Cir. 2005) (quoting *Frazier v. Huffman*, 343 F.3d 780, 788 (6th Cir. 2003)). The Sixth Circuit quickly vacated the district judge's COA and

obligatory review jurisdiction may refuse to certify an issue so that the appellate courts may maintain discretion over their own docket.²⁸⁸ Any misapplication of the COA standards creates friction in the threshold appellate context.

Beyond the idiosyncratic views of individual judges²⁸⁹ and their flawed application of statutory authority, systemic elements of the habeas process force divergent application of COA standards. Courts generally interpret Congress' intent in creating a certification requirement as an effort to curb frivolous appeals.²⁹⁰ Nevertheless, the *Barefoot* standard does not just filter out the manifestly frivolous, it allows an appeal of those that involve a "substantial showing of the denial of a constitutional right," manifested as "showing that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further."²⁹¹ Presumably, there exists a category of claims that are not patently flippant, but still not worthy of a COA; ostensibly the

required him to "make a reasoned assessment of each of [the petitioner's] claims as required by 28 U.S.C. § 2253, *Slack*, [and] *Miller-El* . . ." *Id.* at 775.

288. Before the institution of "objective" standard judges often differed on whether a petitioner met the certification requirements. As one commentator noted well before the establishment of the *Barefoot* standard:

A district judge, recognizing that a certificate will bind the court of appeals to hear the claim on the merits may prefer to deny the certificate and leave flexibility in the appeals court. But since practice varies, the appeals court cannot know how much weight to place on the district judge's denial. As a result, it will either have to ignore the denial and scrutinize each application for a certificate (thereby losing the efficiency benefit which the requirement might otherwise contain) or rely on the district judge's determination and risk denying an appeal to a prisoner raising an important question.

Developments in the Law—Federal Habeas Corpus, 83 HARV. L. REV. 1038, 1194 (1970).

289. One district judge lamented:

Has the petitioner made a substantial showing of the denial of a federal right? It is the opinion of this court that he has not. However, can this court say that some judges in the appellate process will not hold a contrary view on the merits of this case? It is well known that there are district judges, circuit judges and Supreme Court justices who have never denied a habeas petition in a death penalty case. Since there is no way for this court to know which three judges will review this case, this court cannot say that there are not at least two judges who would resolve these issues other than how this court has.

Solomon v. Kemp, 572 F. Supp. 233, 235-36 (N.D. Ga. 1983).

290. HERTZ & LIEBMAN, *supra* note 20.

291. 463 U.S. 880, 893 (quoting *Gordon v. Willis*, 516 F. Supp. 911, 913 (N.D. Ga. 1980)).

cases making an insubstantial showing of a constitutional deprivation without outrageously wasting judicial resources. Yet the certification process can be seen either as squelching irrational claims or as encouraging meritorious ones, operating as a system of rejection or one of election. Section 2253(c)(3)'s specification requirement encourages an election approach to certification. The difference between these two systems seems subtle, yet unless both the circuits and the districts approach certification similarly, the courts will differ in the frequency of COA bestowal. Differing perspectives inherent in the process itself may cause different results, especially in considering those not flippant but not sure-fire-winner claims. *Miller-El*'s apparent loosening of the COA standard may cause confusion in this regard as district courts rigorously attempt to apply the *Barefoot* standard.²⁹²

292. The Supreme Court's *Miller-El* opinion amplifies differences between original design and modern application. A district court, well-apprized of a claim's true nature, may refuse to certify a claim that lacks frivolity but nevertheless exhibits fatal flaws that would otherwise evade a less-thorough review. The circuit court, however, may more liberally grant a COA than the district court because it makes the COA evaluation under a less-deep and only sketchily informed manner. To be sure, the substantive inquiry employed by the two courts, at least officially, varies little on its face. However, differences exist in what the COA standard applies to, and how that standard works, resulting in inevitably conflicting opinions on the certification question. The Supreme Court in *Hohn v. United States* found that even an uncertified appeal was a "case"—inferentially "in" the Court of Appeals. 524 U.S. 236, 242 (1998). *Miller-El v. Cockrell*, 537 U.S. 322 (2003), however, defied the argument that an uncertified case created jurisdiction over an appeal's merits. Viewing the COA as an indispensable appellate precursor, the Supreme Court rejected any merits review antecedent to the resolution of the certification question. In *Miller-El*, the Court molded the tautological method by which a circuit employs the COA requirement. The Fifth Circuit in *Miller-El* had engaged in what had become a routine practice in that circuit: reviewing the merits of a petitioner's uncertified claims and then denying COA once having determined that relief was unavailable. 537 U.S. 322, 300-31. The Supreme Court had previously endorsed the procedure. See *Garrison v. Patterson*, 391 U.S. 464, 466 (1967) ("[N]othing we say here prevents the courts of appeals from considering the questions of probable cause and the merits together . . ."); see also *Barefoot v. Estelle*, 463 U.S. 880, 889 (1982) (relying on *Garrison*). Nevertheless, the Supreme Court in *Miller-El* severely criticized the Fifth Circuit's foray into the merits before considering the threshold COA decision. 537 U.S. at 342. As a circuit court possesses no inherent jurisdiction over a habeas appeal, and jurisdiction only vests when a court certifies a question for appeal, the Supreme Court clarified that the COA determination only "requires an overview of the claims in the habeas petition and a general assessment of their merits." *Id.* at 336. "The question is the debatability of the underlying constitutional claim, not the resolution of that debate." *Id.* at 342. The COA statute confines the depth to which the reviewing court can review a habeas petitioner's claims in making the COA determination. The habeas statute "forbids" a "full [consideration] of the factual or legal bases adduced in support of the claims." *Id.* at 336. Simply, "a COA ruling is not the occasion for a ruling on the merit of a petitioner's claim . . ." *Id.* at 331. Congress originally inserted the district court into the appellate process because, having resolved the merits, the district court

When Professor Robbins identified inadequacies in the habeas procedure as it existed in 1983, he faulted the Supreme Court for not providing the federal courts with a workable means of evaluating the certification issue. The *Barefoot* decision quickly followed Professor Robbins' article. In the post-AEDPA world, however, structural elements and divergence in practical application create a difference of opinion between the various federal judicial bodies. Placing the COA question in the circuits alone would ameliorate that problematic divergence of opinion.

D. Complexity in the Process Delays Finality

High-sounding references to comity, federalism, and the finality of judgments, intoned in solemn dignity and uttered declaratively, carry little meaning if the procedures protecting a prisoner's rights become so cumbersome and convoluted that no judgment ever becomes unassailably valid. Running the gauntlet of habeas should

could cull through the chaff and only allow the wheat to proceed. District courts apply *Miller-El* with difficulty because they face no jurisdiction deficiency when considering a COA. A district court not only has full jurisdiction over a claim, but when the certification issues arises, has usually found those merits to be lacking (unless other procedural factors come into play). Unlike the circuit courts, a district court has had, and continues to have, an ability to address the substance of the denied petition. In fact, the district court's familiarity with the record and the petitioner's claims has justified the preservation of the lower court's participation in the certification process. *See, e.g., Lyons v. Ohio Adult Parole Auth.*, 105 F.3d 1063, 1072 (6th Cir. 1997) ("The district judge will have an intimate knowledge of both the record and the relevant law and could simply determine whether to issue the certificate of appealability when she decides the initial petition."). The *Miller-El* court made no attempt to clarify whether the district courts could employ their intimate familiarity with the merits to consider a COA, or whether they must ignore fatal legal or factual deficiencies and make a threshold, and superficial, review of a petition's claims. District courts often justify denying a COA by referring to their review of the merits, a practice contrary to a strict reading of the *Miller-El* decision. *See Allen v. Carlton*, No. 01-2966, 2005 WL 3071872 at 2 (W.D. Tenn. 2005); *Cervantes Salazar v. Dretke*, 393 F.Supp.2d 451, 508 (W.D. Tex. 2005). A greater familiarity with the record and proceedings may sway the district court to deny certification on an issue that, on a threshold review, appears to merit consideration. In light of its unended jurisdiction over a petitioner's claims, the district court's COA review extends far beyond "an overview of the claims in the habeas petition and a general assessment of their merits." *Miller-El*, 537 U.S. at 336. The district court can weigh in fatal flaws, factual inadequacies, and legal deficiencies in a fuller manner than the circuit court can. True, "the petitioner need not show that he should prevail on the merits. He has already failed in that endeavor." *Barefoot*, 463 U.S. at 893 n.4 (quotation omitted). But the district court need not consider the COA in the same detached, reserved manner required of the circuit courts—the district court can employ a "full consideration of the factual or legal bases adduced in support of the claims." *Miller-El*, 537 U.S. at 336. The district courts may encounter difficulty because, after they consider certification in light of their intimacy with the record and proceedings, the circuit courts must apply *Miller-El*'s procedural gloss over their review.

not leave a state court judgment in legal limbo. Federal habeas should provide an efficient, yet fundamentally fair, review of meritorious claims. Unnecessary delay in habeas appeals frustrates the “E” in AEDPA. Needless hurdles slow the race. The district court’s primary consideration of a prisoner’s certification request, especially if subject to duplicative review and reconfirmation by the circuit courts, detracts from the habeas process’ productivity, inordinately drawing out an already lengthy process.

While a prisoner’s interest in adequate review of his constitutional claims surely trumps procedural niceties, the federalist principles that undergird our modern habeas procedure demand expeditious habeas review. Removing the certification process from the district court may not result in fewer appeals, just more efficient and better selected ones. Governmental actors now encourage a stronger circuit role in certification by requesting the reconsideration of a COA. The government has a compelling interest in placing the certification procedure in the circuit court alone, so long as that would speed up the habeas process.

E. Complexity in the Process Confuses, Discourages, and Prejudices Petitioners

As a decade has passed since the AEDPA’s enactment, we presume that all but the most disadvantaged inmates know of its provisions. Little excuse now exists for a prisoner’s inability to follow the statute’s mandates. While Professor Robbins lamented the possibility that losing one avenue of relief,²⁹³ prisoners could also favor the elimination of unwarranted procedural hurdles. As previously mentioned, placing the COA in the circuit court alone would only affect those cases in which the district court grants a certificate but the circuit reconsiders it. The appellate reconsideration of a COA does not favor a petitioner’s claims, but rather stimulates a summary rejection of issues that at least one jurist felt needed further review. Currently, the statute does not indicate to a petitioner that, once a district court authorizes appellate review of a habeas claim, the circuit court may remove that authorization. The statute and applicable appellate rule simply offer a petitioner no clue that he may need to defend his appeal. Insertion of this uncodified procedure thwarts an inmate’s ability to seek expedient resolution of his habeas

293. Robbins, *supra* note 20, at 327-28.

claims.²⁹⁴

Even in those circuits wherein the district court's grant of a COA actually authorizes an appeal, the district court's consideration of a COA may, at least in some cases, create unnecessary confusion for a petitioner. For instance, death-row inmates often file a last-minute pleading in the federal district court (statutory provisions placing successive petitions notwithstanding). In some cases, the petitioner has squabbled over the need for a COA as his execution looms ever closer. It seems contrary to the intent of the 1908 Congress to have the parties debate the need for a COA as the minutes to execution speed by. Even in more traditional cases, many circuit courts often treat a habeas petitioner's notice of appeal as a COA request, presumably indicating that prisoners have not yet universally comprehended section 2253's procedures. Placing the COA in the circuit court would remove one more confusing step from the already-difficult habeas dance. Placing certification in the circuit court alone removes one fork of habeas' Byzantine maze and may speed the liberation of an innocent man.

V. CONCLUSION: PROPOSED MECHANISM TO PLACE THE COA DETERMINATION SOLELY IN THE CIRCUIT COURTS

Law is not a social science that enjoys the luxury of endlessly identifying problems without offering solutions. Having recognized the conflict between section 2253 and Rule 22, the circuit courts' problematic departure from *Nowakowski's* precedent, and the uncomfortable tension brewing between the circuit and district courts, failing to advance a resolution would ring hollow. Judge Friendly recommended removing all habeas appellate authority from the district court, alleviating the complications plaguing the current COA procedure. Whether prudence suggests that Congress and the courts take this serious step or whether it requires fashioning an intermediate, ameliorative procedure, inefficiency will remain unless some corrective measure improves habeas review.

As evinced by the AEDPA, Congress tightly controls the federal courts' jurisdiction. Absent a complete suspension of the writ, Congress can delimitate the manner in which federal courts consider

294. Not all petitioners see an interest in effective, efficient habeas review. Death-row inmates without the boon of a valid habeas claim may favor any procedure that delays the execution of their sentence. However that delay may extend their life, it cannot justify the existence of an otherwise unnecessary suspension of expedient judgment.

habeas petitions, and even restrict what issues a petitioner may raise on habeas review.²⁹⁵ Conceivably, Congress could return the nation to the 1908 procedure and remove appellate habeas jurisdiction from the circuit courts. Nothing warrants such a drastic move.

Problems inherent in the current procedure demonstrate the wisdom of removing the initial COA analysis from the district court. Rule 22 should be revised to place the certification process in the circuit court alone.²⁹⁶ Simply removing the words “or a district judge,” preferably coupled with an advisory committee note clarifying the intent of that action, could effectively and realistically streamline habeas procedure. Until the completion of that amendment, federal courts could suspend the application of those conflicting portions of Rule 22 which they now construe as requiring district court involvement in the COA process.²⁹⁷ Congress can likewise amend both 28 U.S.C. § 2253 and Rule 22 to specify that only the circuit court should consider the COA issue.²⁹⁸

Until the law no longer requires district courts to make the threshold certification decision, those circuits which now reconsider a

295. For instance, 28 U.S.C. § 2254(i) provides that federal law will not recognize ineffective-assistance-of-habeas-counsel claims, whether arising from deficiencies in federal or state representation. Another example of this is the AEDPA’s removal of jurisdiction from the Supreme Court to consider a circuit court’s decision not to grant leave to proceed on a successive habeas application. 28 U.S.C. § 2244(b)(2). Congress could likewise make the decision not to grant COA unreviewable in the Supreme Court, thus depriving that court of jurisdiction. This, however, may more likely suspend the writ of habeas corpus.

296. The Federal Judiciary website provides a comprehensive description of the process entailed in amending the federal rules. See <http://www.uscourts.gov/rules/proceduresum.htm>.

297. “On its own or a party’s motion, a court of appeals may—to expedite its decision or for other good cause—suspend any provision of these rules in a particular case and order proceedings as it directs, except as otherwise provided in Rule 26(b).” FED. R. APP. PRO. Rule 2. The Seventh Circuit has opined that this appellate rule could be used to exclude the district court in cases requiring special expediency in resolution. See *Williams v. United States*, 150 F.3d 639, 640-41 (7th Cir. 1998) (“[A] court of appeals is entitled to make exceptions to its norms (see Circuit Rule 2), a power we lack when interpreting an Act of Congress. Bypassing the district judge may be essential when time is short (as in death penalty litigation) and may be prudent in other cases—such as this one, in which the issue first arose in the appellate briefs.”).

298. Earlier congressional efforts to remove the district court from the certification process recommended amendment of Rule 22. “All of those bills used the phrase ‘circuit justice or judge’ in proposed amendments to § 2253 and the phrase ‘circuit judge’ in proposed amendments to Rule 22(b).” *Hunter*, 101 F.3d at 1579, n.11 (citing numerous statutes). At the same time, Congress may be wise to remove 28 U.S.C. § 2253’s anachronistic “circuit justice” language. After the Supreme Court’s clear message in *Hohn* that it would assert jurisdiction in habeas cases, and in light of the fact that Supreme Court justices have rarely certified appeals to the circuit court in their capacity of “circuit justice,” the current language is a superfluity.

COA that allegedly does not comply with 28 U.S.C. § 2253(c)(2) should come into compliance with the holding in *Nowakowski*. The circuit courts should honor *Nowakowski* and refuse to reconsider a district court's grant of COA. Sufficient summary procedures currently exist for a circuit court to dismiss quickly an unwise certification. While this action would not remove the district court's burden to decide the COA issue in the first instance, it would remove judicially inserted delay from the current duplicative process.

Finally, district courts can use certain tactics to ameliorate delay caused by their unwieldy place in the COA process. As a stop-gap measure that would mitigate inefficiency, the lower courts could refrain from complicating the certification process by requiring needless briefing. Some circuits allow a district court to consider the COA question *sua sponte*, generally as part of the denial of habeas relief.²⁹⁹ In those circuits, the district courts address the merits of the petition and then, in the same judicial order, consider whether to certify an appeal on any issue. Thus, district courts minimize the procedural inefficiency created by the dual-forum COA procedure. While this occasionally may result in a post-judgment motion challenging the COA issue, generally most petitioners will file a notice of appeal rather than further delay the habeas process by bickering over the COA. This procedure quickly transfers jurisdiction to the circuit courts and allows them to make a timely review of the COA question, if necessary.

Habeas corpus review, the bulwark against constitutional desecration, must serve as an effective vehicle to uphold the Bill of Rights. Courts can maintain that honorable role in an efficient

299. See *Thomas v. Crosby*, 371 F.3d 782, 797 (11th Cir. 2004) ("A district court's power to grant a COA *sua sponte* seems to be implied by its power to *sua sponte* deny one."); *Castro v. United States*, 310 F.3d 900, 901 (6th Cir. 2002) ("[A] district judge may issue or deny a COA when he rules on a habeas motion [A] district judge who has just denied a habeas petition . . . will have an intimate knowledge of both the record and the relevant law and could simply determine whether to issue the certificate of appealability when she denies the initial petition."); *Alexander v. Johnson*, 211 F.3d 895, 898 (5th Cir. 2000) ("It is perfectly lawful for district court[s] to deny COA *sua sponte*. The statute does not require that a petitioner move for a COA; it merely states that an appeal may not be taken without a certificate of appealability having been issued."); *Lyons*, 105 F.3d at 1072 ("The district judge will have an intimate knowledge of both the record and the relevant law and could simply determine whether to issue the certificate of appealability when she decides the initial petition."); *Allen v. Stovall*, 156 F.Supp.2d 791, 798 (E.D. Mich., 2001) ("A district court has the power to deny a certificate of appealability *sua sponte*."); *Lookingbill v. Johnson*, 242 F.Supp.2d 424, 437 (S.D. Tex. 2000) ("Lookingbill has not requested a Certificate of Appealability ('COA'), but this Court may determine whether he is entitled to one.").

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manner. The Friendly approach will expedite appeals, preserve the balance of federalism, and not impinge on a petitioner's rights. A careful planning of the steps that habeas petitioners take by no means signifies the last dance for the Great Writ. The Friendly approach instead marks a cadenced and choreographed path by which grace and order somewhat return to the habeas process.

