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## Habeas Corpus for Convicts — Constitutional Right or Legislative Grace?

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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.

—Article I, Section 9, Clause 2 of the Constitution.

After 165 years of constitutional history one might expect that there would be few remaining areas of uncertainty as to the meaning and effect of the suspension clause. However, a quick examination of the briefs and opinion in *United States v. Hayman*,<sup>1</sup> decided in the latest term of the Supreme Court, will demonstrate that this expectation is far from the truth. The petitioner in the case seriously contended that it was an invalid suspension of the privilege of the writ of habeas corpus to require him to attack his conviction by motion in the sentencing court before availing himself of habeas corpus.

The fact that the Government won the *Hayman* case does not mean that there are no further problems. In recent years the federal courts have been flooded by thousands of habeas corpus petitions, usually groundless, by prisoners under sentence of state and federal courts. In 1948 cautious changes were made in the statutes, including the section questioned in the *Hayman* case, but the flood continues. Further changes in the scope and procedure of federal habeas corpus are inevitable. It is proposed here to re-examine unemotionally the nature of the right of habeas corpus, particularly the right of prisoners under sentence, in an endeavor to determine the extent of the constitutional powers of Congress in this field.

What did the Framers mean by the habeas corpus clause? One is first struck by the fact that it is cast in negative terms. The writ has been one of the most fought over of the Anglo-Saxon heritages. To it, in large measure, the English speaking people owe their reputation as a liberty-loving people. Why then did the Framers not positively guarantee it in clear and express terms? What did they mean by "privilege of the writ of habeas corpus"? What happens when the privilege is "suspended"? The words of the Constitution were written by scholarly men well aware that they wrote for posterity. When they used these terms, they undoubtedly knew of the

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<sup>1</sup> 342 U.S. 205 (1952). The writer was formerly associated with the Justice Department and assisted in the preparation of the Government's briefs in the *Hayman* case. However, the views expressed here are personal and should not be taken to be those of the Department.

sense in which they were used in England. The historical background may offer some clue to the meaning of the terms and the reason for the negative form of the clause.<sup>2</sup>

The origin of the writ is obscure. Traces are found in the Year Books as early as 48 Edward III. For several centuries the writ was used by the King's courts as a weapon in their battle to control the lower courts. It was probably not used against the Crown until the reign of Henry VII. Some writers find its origin in Magna Carta, others in the Roman Law *interdict de libera homine exhibendo*. Hallam states: "Whether courts of justice framed the writ of Habeas Corpus in conformity to the spirit of this clause [Article 39 of Magna Carta], or found it already in their register, it became from that era the right of every subject to demand it."<sup>3</sup> Whatever its origin, by the time of Charles I (1625-1649) the writ was fully established as the appropriate process for checking illegal imprisonment by public officials or inferior courts. However, it acquired its full and present importance by legislation.

In *Darnel's Case*,<sup>4</sup> the court held that the command of the King (*per speciale mandatum domini regis*) in the form of a warrant of arrest signed by two members of the privy council was a sufficient answer to the writ, against petitioner's objections that even the privy council had to assign a sufficient cause of commitment. (Darnel and others had been committed for refusing obedience to a forced loan demanded without authority of Parliament.) Uprow over this decision played a large part in causing the subsequent revolution which was to cost Charles I his head. Meanwhile, however, the House of Commons passed the Petition of Right,<sup>5</sup> to which the King consented in return for certain financial advantages. The Petition recited that, contrary to the Great Charter and good laws and statutes of the realm, divers of the King's subjects had "of late been imprisoned without any cause" shown, and when they were brought up on habeas corpus no cause was shown but the special command of the King, yet they were nevertheless remanded to prison. It was therefore prayed that "no freeman, in any such manner as is before-mentioned [shall] be imprisoned or detained." Subsequently an act of 1640,<sup>6</sup> abolishing the Star Chamber, specifically authorized use of the writ to test the legality of commitments by command or warrant of the King or privy council.

These statutes still proved to be inadequate protection. The subservi-

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<sup>2</sup> "This general reference to a power which we are required to exercise, without any precise definition of that power, imposes on us the necessity of making some inquiries into its use, according to that law which is in a considerable degree incorporated into our own." *Ex parte Watkins*, 3 Pet. 193, 201-202 (1830); accord, *McNally v. Hill*, Warden, 293 U.S. 131, 136 (1934).

<sup>3</sup> 2 HALLAM, *HISTORY OF THE MIDDLE AGES* 310 (2d ed. 1862). For other background material see *id.* c. 8; CHURCH, *HABEAS CORPUS* (2d ed. 1893); HURD, *HABEAS CORPUS* (2d ed. 1876); 9 HOLDSWORTH, *HISTORY OF ENGLISH LAW* 112 *et seq.* (1926); Glass, *Historical Aspects of Habeas Corpus*, 9 ST. JOHN'S L. REV. 55 (1934); Jenks, *The Story of Habeas Corpus*, 18 L. Q. REV. 64 (1902); Longsdorf, *Habeas Corpus A Protean Writ and Remedy*, 8 F.R.D. 179 (1948).

<sup>4</sup> 3 How. St. Tr. 1 (1627).

<sup>5</sup> 3 CAR. I, c. 1 (1627).

<sup>6</sup> 16 CAR. I, c. 10.

ence of the judges caused by insecurity of tenure held at the pleasure of the King, and the fact that only the chancellor and the King's Bench had the undoubted right to issue the writ, limited its value. Furthermore, the judges were either unable or unwilling to issue the writ except during the legal term, which lasted about six months of every year. For example in *Jenkes' Case*,<sup>7</sup> the chancellor refused the writ in vacation to a man committed by the King in council for making a speech advocating the calling of a new Parliament.

After the Restoration, the Habeas Corpus Act of 1679 was forced through Parliament.<sup>7a</sup> This was essentially a procedural statute which purposed to improve the legal mechanism for the issuance of the writ, by this time an acknowledged right. The lord chancellor and any of the judges of the superior courts<sup>8</sup> were required to issue the writ in vacation or in term, unless the prisoner was committed for treason or felony, or was in prison on conviction for crime or in execution.<sup>9</sup> A person indicted for treason or felony was to be tried at the next session or bailed, but if the King's witnesses could not be ready at that time, he could be committed until still another term during which he was required to be tried or freed. Times were set forth within which the return was to be made and the writ adjudicated. A judge who delayed a writ was subject to a large forfeiture to the person aggrieved.

This then was the famous Habeas Corpus Act at the time of the constitutional convention. It codified the entire law of habeas corpus in so far as it related to "criminal or supposed criminal matters."<sup>10</sup> "The effect was to leave what may be termed *civil detentions* to the vagaries of the common law procedure."<sup>11</sup>

In practice the writ was generally not granted where the party was in execution on a criminal charge after indictment according to the course of the common law.<sup>12</sup> Furthermore, one court of Westminster would not allow the validity of the warrant of commitment of another to be questioned even where the ground was illegality of sentence.<sup>13</sup> However, on rare occasions, a superior court would grant the writ to review summary convictions by an inferior court and would free a prisoner where jurisdiction was clearly

<sup>7</sup> 6 How. St. Tr. 1190 (1676).

<sup>7a</sup> 31 CAR. II, c.2.

<sup>8</sup> The Chancellor, King's Bench, Common Pleas, and Exchequer.

<sup>9</sup> Persons "convict or in execution" were excluded altogether from the benefits of the Act.

<sup>10</sup> "The common law writ of habeas corpus, as has been observed, was not taken away by the act of 31 Car. II; but was left wholly untouched by it in all cases where the detainer was not for criminal or supposed criminal matter." HURD, *op. cit. supra* note 3, at 199; accord, DICEY, *LAW OF THE CONSTITUTION* 216-219 (1939); 9 HOLDSWORTH, *HISTORY OF ENGLISH LAW* 110-125 (1926); Wilmott's Notes of Opinions and Judgments, Opinion on the Writ of Habeas Corpus, Wilm. 77, 89, 97 Eng. Rep. 29, 36 (1758).

<sup>11</sup> Cohen, *Habeas Corpus Cum Causa*, 18 CAN. B. REV. 10, 172, 186 (1940).

<sup>12</sup> *Ex parte Lees*, El. Bl. & Bl. 828, 120 Eng. Rep. 718 (1860); *Brenan's Case*, 10 Q.B. 492, 116 Eng. Rep. 188 (1847). In fact the court will refuse to look at affidavits to prove a sentence was otherwise than valid. *Ibid.*

<sup>13</sup> *In re Dunn*, 5 C.B. 215, 136 Eng. Rep. 859 (1847); *Chamber's Case*, Cro. Car. 168, 79 Eng. Rep. 746 (1629).

lacking, as where the court had imposed a sentence clearly beyond its jurisdiction.<sup>14</sup>

In summary, it may be said that in 1789 in England a person in custody for a crime had the immediate right either to be charged or released. If the crime charged was a misdemeanor there was a right to bail. Once properly charged with treason or a felony the only right was to a trial during the next session, which the Crown might delay. Once convicted of a crime there was no privilege of the writ.<sup>15</sup>

According to Dicey:<sup>16</sup>

The net result, therefore, appears to be that while the Habeas Corpus Act is in force no person committed to prison on a charge of crime can be kept long in confinement, for he has the legal means of insisting upon either being let out upon bail or else of being brought to a speedy trial.

The right to the use of the writ was always claimed by the American colonists. The colonial charters generally contained language to the effect that colonists would have all the privileges of British subjects, although none specifically mentioned habeas corpus. The writ was little used in the colonies and few instances can be found in the available reports. The denial of the writ to Rev. John Wise in 1689 became a *cause celebre*. In 1710 the New Jersey Assembly denounced a judge for refusing the writ. In 1692 the Massachusetts Assembly adopted the English Act of 1679, only to have it vetoed by the English authorities. One of the first acts of Governor Spotswood was to extend the writ to Virginia in 1710.<sup>17</sup>

Whether they enjoyed the writ or not, the colonists well comprehended its nature. The arguments in *Darnel's Case* were printed in pamphlet form and circulated. Gage in 1768 discouraged measures of oppression in a "country where every man studies law." Burke remarked in his celebrated 1774 speech on taxation: "In no country perhaps in the world is the law so general a study." The defeat in Commons in 1774 of a proposition to extend habeas corpus to Canada was denounced in general terms in the Declaration of Independence.<sup>18</sup>

State legislatures before and after the 1789 constitutional convention copied the Act of 1679 as their basic habeas corpus statute. At least Georgia, Massachusetts, New York, Pennsylvania, South Carolina and Virginia adopted it prior to the convention.<sup>19</sup> Massachusetts in 1784 authorized the

<sup>14</sup> *In re Authers*, 22 Q.B.D. 345 (1889); *Souden's Case*, 4 Bl. & Ald. 294, 106 Eng. Rep. 945 (1821); *Rex v. Collyer*, Sayer 44, 96 Eng. Rep. 797 (1752) (ask pardon of victim on his knees); *Bushel's Case*, Vaughn 135, 6 St. Tr. 999, 84 Eng. Rep. 1123 (1670); *King v. Hawkins*, Fort. 272, 92 Eng. Rep. 849 (1715); but in *In re Newton*, 16 C.B. 97, 139 Eng. Rep. 692 (1855), it was held that it would be "monstrous" to allow territorial jurisdiction to be questioned and tried over again on affidavits; the record was conclusive and could not be controverted.

<sup>15</sup> This was the common law rule. 2 COKE'S INST. 52; DICEY, *op. cit. supra* note 10, at 217-218.

<sup>16</sup> DICEY, *op. cit. supra* note 10, at 218-219.

<sup>17</sup> Little is available on the general subject. See 2 CHANNING, HISTORY OF THE UNITED STATES 221 n. 1 (1937); GOEBEL, LAW ENFORCEMENT IN COLONIAL NEW YORK 260, 288, 502-506 (1944); HURD, *op. cit. supra* note 3, at 95-104; Glass, *supra* note 3.

<sup>18</sup> HURD, *op. cit. supra* note 3, at 104.

<sup>19</sup> *Id.* at 121-128.

writ except as to "persons committed for treason or felony, or for suspicion thereof, or as accessory to the latter before the fact . . . or persons convict or in execution by legal process, criminal or civil."<sup>20</sup> Other states enacted versions of the English Act soon after the convention.<sup>21</sup> Chancellor Kent logically concluded that the Act of 1679 was "the basis of all the American statutes on the subject."<sup>22</sup>

Suspension in England meant an act of Parliament which had the effect of making the Act of 1679 temporarily inoperative, usually as to a limited class of persons such as those suspected of treason against the King. Persons in the suspect class could be held without any formal charge and without any right to habeas corpus. The Act was suspended on several occasions. Thus it was suspended because of conspiracies against the King in 1688<sup>23</sup> and again in 1696.<sup>24</sup> Activities of the Jacobites resulted in suspension in 1714, 1722, and 1744.<sup>25</sup> The American Revolution caused suspension as to persons suspected of treason or piracy.<sup>26</sup>

Suspensions occasionally amounted to bills of attainder and named specific individuals. Thus, the Act was suspended as to six named individuals arrested as conspirators in a plot to assassinate William III in 1696.<sup>27</sup> Other statutes authorized later kings to continue the detention.<sup>28</sup> The last survivor of the six died in Newgate in 1736.<sup>29</sup>

The statute 17 Geo. III, c. 9 will serve as an example of a suspension act. It provided:

That all and every person or persons who have been, or shall hereafter be seised or taken in the act of high treason committed in any of his Majesty's colonies or plantations in *America*, or on the high seas, or in the act of piracy, or who are or shall be charged with or suspected of the crime of high treason, . . . or of piracy, . . . shall and may be thereupon secured and detained in safe custody, without bail or mainprize, until the first day of *January*, one thousand seven hundred and seventy-eight; and that no judge or justice of the peace shall bail or try any such person or persons without

<sup>20</sup> Mass. Laws 1784, c. 72; Riley's Case, 19 Mass. 172 (1825).

<sup>21</sup> See e.g., Del. Laws 1797, c. 4; Md. Laws 1809, c. 125; N.H. Laws 1815, c. 45; N.Y. Laws 1787, c. 39; *id.* 1801, c. 65.

<sup>22</sup> 2 KENT \*28.

<sup>23</sup> 1 WM. & MARY I, c. 2, 7, 19.

<sup>24</sup> 7 and 8 WM. III, c. 11.

<sup>25</sup> 1 GEO. I, st. 2, c. 8, 30; 9 GEO. I, c. 1; 17 GEO. II, c. 6; see King v. Earl of Orrey, 88 Eng. Rep. 75 (1722).

<sup>26</sup> 17 GEO. III, c. 9 (1777); 18 *id.*, c. 1 (1778); 19 *id.*, c. 1 (1779); 20 *id.*, c. 5 (1780); 21 *id.*, c. 2 (1781); 22 *id.*, c. 1 (1782); see 2 WORKS OF EDMUND BURKE 190-245 (1904).

The Act was suspended on other occasions prior to 1789. 6 ANN., c. 15 (1707); 19 GEO. II, c. 1, 17 (1745). The latter act, which suspended the writ in Scotland, included the following interesting clause: "The horses of suspected persons may be seized; Mares in fole, etc. excepted." The Act was suspended during the French Revolution from 1794-1801, in 1817, and in Ireland as recently as 1867.

<sup>27</sup> 7 and 8 WM. III, c. 11.

<sup>28</sup> 8 and 9 WM. III, c. 5 (1696); 9 WM. III, c. 4 (1697); 10 and 11 WM. III, c. 13 (1698); 1 ANN., st. 1, c. 29 (1702); 1 GEO. I, st. 2, c. 7 (1704); 1 GEO. II, st. 1, c. 4 (1727); Case Against Bernardi, 13 How. St. Tr. 759 (1696).

<sup>29</sup> Where he is said to have fathered ten children by a lady he married in captivity. *Looking Back*, 91 SOL. J. 519 (1947).

order from his said Majesty's most honorable privy council . . . , any law, statute, or usage, to the contrary in any-wise notwithstanding.

In other words, suspension in England was a legislative enactment which caused the Habeas Corpus Act to cease to operate, allowing confinement without bail, indictment, or other judicial process. The end result was to deny the right to trial by jury.

There have been suspensions and near suspensions in the United States. During Shay's Rebellion in 1786-1787, the Massachusetts legislature suspended the privilege of the writ. The statute provided that "any person or persons whatsoever, whom the Governor and Council, shall deem the safety of the Commonwealth requires" would be "continued in imprisonment without Bail or Mainprize, until he shall be discharged therefrom by order of the Governor, or of the General Court."<sup>30</sup>

Suspension was proposed by Jefferson in 1807 after the exposure of the Burr conspiracy. His purpose was to prevent the Supreme Court, which Jefferson thought was dominated by his enemy Marshall, from granting the writ to Bollman and Swartwout. The following bill passed the Senate with one dissenting vote, but was promptly rejected by the more democratic House:<sup>31</sup>

. . . in all cases, where any person or persons, charged on oath with treason, misprision of treason, or other high crime or misdemeanor . . . shall be arrested or imprisoned . . . the privilege of the writ of *habeas corpus* shall be . . . suspended, for and during the term of three months . . .

Some of the comments of members of the House at that time may assist in giving meaning to the suspension clause. John Randolph felt that "a suspension of the writ of habeas corpus might have, here, the same effect as the establishment of the first Dictatorship at Rome." To James Elliot suspension would "create one great Dictator, and a multitude, an army of subaltern and petty despots" and amount to "temporary prostration of the Constitution itself." John W. Eppes said that it "suspends the personal rights of your citizens" and "places their liberty wholly under the will, not of the Executive Magistrate only, but of his inferior officers." More concretely, Roger Nelson stated that suspension means "a man is taken up, and is denied an examination before a judge or a court [and], he may, although innocent, in this case, continue to suffer confinement. . . . He may be taken up on vague suspicion, and may not have his case examined for months, or even for years."<sup>32</sup>

These historical incidents all lead to the conclusion that to suspend the privilege of habeas corpus in the constitutional sense is to deprive persons accused of crime of their right either to be speedily accused and tried or to

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<sup>30</sup> Mass. Laws 1786, c. 42.

<sup>31</sup> See 16 ANNALS OF CONG. 44, 402, *et seq.*, 527-535 (1807); 3 BEVERIDGE, LIFE OF JOHN MARSHALL 343-348 (1919).

<sup>32</sup> 16 ANNALS OF CONG. 420, 409, 413 (1807).

be set free.<sup>33</sup> Certainly nowhere is there any hint that it would be suspension to postpone the right of a convicted prisoner to habeas corpus. Suspension statutes were aimed at suspects, never at convicts. With this background, perhaps it will be easier to understand the adoption of the suspension clause by the constitutional convention and later events.

The actual convention history of the habeas corpus clause can be recounted quickly. Charles Pinkney, at least, thought it important to make express provision for the privilege. He offered the following motion:<sup>34</sup>

The privileges and benefit of the Writ of Habeas corpus shall be enjoyed in this Government in the most expeditious and ample manner; and shall not be suspended by the Legislature, except upon the most urgent and pressing occasions, and for a limited time, not exceeding ..... months.

However the draft of the "Committee of Detail" reported August 6th contained no habeas corpus provision.<sup>35</sup> Later Pinkney renewed his motion. At this point Madison's notes contain the following entries:<sup>36</sup>

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<sup>33</sup> There were later incidents in the United States. Lincoln authorized General Scott to suspend the privilege in 1861 when the border state of Maryland seemed ready to pass to rebel control. See 6 RICHARDSON, MESSAGES AND PAPERS OF THE PRESIDENTS, 16-19, 24 (1895). Maryland disunionists had severed telegraphic communications between Washington and the North and were attempting to prevent passage of union troops. The writ was suspended, all suspects arrested and troops stationed throughout the state. In 1862 Lincoln went even further, denying the privilege of the writ in the case of all persons wherever found, who sought to discourage enlistments or were guilty of any other disloyal practices. *Id.* at 98-99. Thousands were arrested on suspicion and either imprisoned without trial or sentenced by military tribunals. The privilege of the writ was also suspended in the confederacy. *In re Cain*, 60 N.C. 525 (1864); *State v. Sparks*, 27 Tex. 705 (1864).

Lincoln's actions caused considerable controversy, since many argued that only Congress could suspend the privilege of the writ. Congress in 1863 enacted the following (12 STAT. 755): "... during the present rebellion, the President of the United States, whenever, in his judgment, the public safety may require it, is authorized to suspend the privilege of the writ of habeas corpus in any case throughout the United States, or any part thereof. And whenever and wherever the said privilege shall be suspended, as aforesaid, no military or other officer shall be compelled, in answer to any writ of habeas corpus, to return the body of any person or persons detained by him by authority of the President; but upon the certificate, under oath, of the officer having charge of any one so detained that such person is detained by him as a prisoner under authority of the President, further proceedings under the writ of habeas corpus shall be suspended by the judge or court having issued the said writ, so long as said suspension by the President shall remain in force, and said rebellion continue."

There have been other such incidents. The Act of April 20, 1871, gave the President the power to suspend the writ in an attempt to combat the Ku Klux Klan. 17 STAT. 13. For a time in the fall of 1871, the privilege was denied in nine South Carolina counties. 7 Richardson, *op. cit. supra*, at 136-138, 150-151. The writ was suspended in Cavite and Batangas in 1905. *Fisher v. Baker*, 203 U.S. 174 (1906). It was suspended in Hawaii in 1941. *Duncan v. Kahana-moku*, 327 U.S. 304 (1946).

<sup>34</sup> 2 FARRAND, RECORDS OF THE FEDERAL CONVENTION 341 (1911). Pinkney's draft was apparently taken from the Massachusetts constitution of 1780 which provided (c. 6, art. 7): "The privilege and benefit of the writ of habeas corpus shall be enjoyed in this Commonwealth, in the most free, easy, cheap, expeditious, and ample manner; and shall not be suspended by the legislature, except upon the most urgent and pressing occasions, and for a limited time, not exceeding twelve months." The New Hampshire constitution of 1784 contained a similar provision with suspension limited to three months. The Georgia constitution of 1777 provided: "The principles of the habeas corpus act shall be a part of this constitution." No other constitution in force at the time of the convention referred to the writ, although some contained provisions against the suspension of statutes generally.

<sup>35</sup> 2 FARRAND, *op. cit. supra* note 34, at 176 *et seq.*

<sup>36</sup> *Id.* at 438.

Mr. Pinkney, urging the propriety of securing the benefit of the Habeas corpus in the ample manner, moved "that it should not be suspended but on the most urgent occasions, & then only for a limited time not exceeding twelve months."

Mr. Rutledge was for declaring the Habeas Corpus inviolable. He did not conceive that a suspension could ever be necessary at the same time through all the States—

Mr. Govr Morris moved that "The privilege of the writ of Habeas Corpus shall not be suspended, unless where in cases of Rebellion or invasion the public safety may require it".

Mr. Wilson doubted whether in any case a suspension could be necessary, as the discretion now exists with Judges, in most important cases to keep in Gaol or admit to Bail.

The Morris motion carried. All agreed to the part reading: "The privilege of the writ of Habeas Corpus shall not be suspended"; North Carolina, South Carolina and Georgia voted against the "unless" clause.<sup>37</sup> Subsequently the word "where" was changed by the committee on style to read "when", and the provision became part of the Constitution.

Most of the opposition to the proposed Constitution was caused by its lack of a bill of rights. But the negative form in which the habeas corpus clause was cast also drew criticism. At least four of the state conventions demanded a bill of rights which would include a guarantee of the privilege of habeas corpus. The New York Convention proposed the following:<sup>38</sup>

That every person restrained of his liberty is entitled to an inquiry into the lawfulness of such restraint, and to a removal thereof if unlawful; and that such inquiry or removal ought not to be denied or delayed, except when, on account of public danger, the Congress shall suspend the privilege of the writ of *habeas corpus*.

Virginia,<sup>39</sup> North Carolina,<sup>40</sup> and Rhode Island<sup>41</sup> suggested the following (with slight variations in punctuation):

That every freeman restrained of his liberty is entitled to a remedy, to inquire into the lawfulness thereof, and to remove the same, if unlawful, and that such remedy ought not to be denied nor delayed.

Other clues as to the meaning of the clause can be gleaned from the great debate over the adoption of the Constitution. Hamilton was willing to argue that the Constitution did establish a right to habeas corpus.<sup>42</sup> However, his argument seems half-hearted in the context of his statement that bills of rights "have no application to constitutions professedly founded upon the power of the people, and executed by their immediate representatives and servants," that in our Constitution "the people surrender nothing,"

<sup>37</sup> 2 FERRAND, *op. cit. supra* note 34, at 438.

<sup>38</sup> 1 ELLIOT'S DEBATES 328 (1836).

<sup>39</sup> 3 *id.* at 658.

<sup>40</sup> 4 *id.* at 243.

<sup>41</sup> 1 *id.* at 334.

<sup>42</sup> THE FEDERALIST, No. 84 at 534-535 (Lodge ed. 1908).



that "several of our State bills of rights . . . would sound much better in a treatise on ethics than in a constitution of government."<sup>43</sup> He went on:<sup>44</sup>

I go further, and affirm that bills of rights, in the sense and to the extent in which they are contended for, are not only unnecessary in the proposed Constitution, but would even be dangerous. They would contain various exceptions to powers not granted; and, on this very account, would afford a colorable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do? Why, for instance, should it be said that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed?

The views of Washington coincided with those of Hamilton. In a letter to his friend Lafayette in 1788 he declared:<sup>45</sup>

There was not a member of the convention, I believe, who had the least objection to what is contended for by the Advocates for a *Bill of Rights* and *Trial by Jury*. The first, where the people evidently retained every thing which they did not in express terms give up, was considered nugatory as you will find to have been more fully explained by Mr. Wilson and others: — And as to the second, it was only the difficulty of establishing a mode which should not interfere with the fixed modes of any of the States, that induced the Convention to leave it, as a matter of future adjustment.

The opponents, in answering this argument, bolstered their reasoning with the habeas corpus clause. If a bill of rights is unnecessary in a government of the people, asked William Grayson of Virginia, why does the Constitution contain the negative habeas corpus clause?<sup>46</sup> Patrick Henry made the same argument, stating: "It results clearly that, if it had not said so, they could suspend it in all cases whatsoever. . . . If the power remains with the people, how can Congress supply the want of an affirmative grant? They can do it but by implication, which destroys their doctrine."<sup>47</sup>

Luther Martin, a leading opponent of ratification, seemed to take it for granted that there was an inherent right to habeas corpus. All he was interested in was whether or not the central government could suspend the right. He feared that the power to suspend might be used arbitrarily when a state opposed the general government to "seize upon the persons of those advocates of freedom, who may have *virtue* and *resolution* enough to excite the opposition, and may *imprison* them during its pleasure."<sup>48</sup>

Others thought the constitution was defective in its lack of clear protection of habeas corpus. Thus Jefferson criticized it for not providing clearly for "the eternal & unremitting force of the habeas corpus laws."<sup>49</sup>

<sup>43</sup> *Id.* at 536.

<sup>44</sup> *Id.* at 537. One might conclude that at least some of the Framers did not realize the possibilities inherent in the "necessary and proper" clause.

<sup>45</sup> 3 FARRAND, *op. cit. supra* note 34, at 297-298.

<sup>46</sup> 3 ELLIOT'S DEBATES 449 (1836). A possible answer to this argument is that the habeas corpus clause was inserted out of an excess of caution. See 2 *id.* at 399.

<sup>47</sup> 3 *id.* at 461.

<sup>48</sup> 3 FARRAND, *op. cit. supra* note 34, at 213.

<sup>49</sup> 4 WRITINGS OF THOMAS JEFFERSON 476 (Ford ed. 1895).

In fact he wrote in a letter to Madison in 1788: "Why suspend the Hab. Corp. in insurrection & rebellions? The parties who may be arrested may be charged instantly with a well defined crime, of course the judge will remand them."<sup>50</sup> He suggested the following provision: "No person shall be held in confinement more than.....days after they shall have demanded & been refused a writ of Hab. corp. by the judge appointed by law..."<sup>51</sup>

The First Congress, supposedly in answer to demands for a Bill of Rights, offered twelve amendments of which ten were ratified. The amendments as originally proposed by Madison on June 8, 1789, included not the slightest mention of the word habeas corpus.<sup>52</sup> There was some comment in Congress to the effect that Madison's resolution did not fully cover the state recommendations, but without specific discussion of habeas corpus.<sup>53</sup> Madison sent a copy of his proposal to Jefferson who replied on August 28th, 1789: "I like it as far as it goes; but I should have been for going further." He proceeded to suggest a habeas corpus amendment.<sup>54</sup> But the amendments as adopted by Congress and as submitted to the states contained no provision for habeas corpus.

On the basis of the historical background, it is possible to come to certain tentative conclusions as to the meaning and effect of the suspension clause. It is unlikely that the Framers viewed the clause as establishing a federal right to habeas corpus.<sup>55</sup> The debates over the adoption of the Constitution make it apparent that they thought a bill of rights unnecessary. Even the meager records of the convention bear out this conclusion. Thus when Pinkney and Gerry moved for a declaration "that the liberty of the Press should be inviolably observed," Roger Sherman argued that it was unnecessary since the power of Congress would not extend to the press, and the proposal was voted down.<sup>56</sup> And as was already pointed out, the Committee of Detail's draft of the Constitution did not even contain the suspension clause.

It is far more likely that the Framers, in drafting the clause, were concerned only with limiting the powers of Congress. Madison's meager notes show that three states favored going further and totally prohibiting suspension. The suspension clause is part of Section 9, which is entirely devoted to limitations on Congress. It forbids bills of attainder, ex post facto laws, export taxes, preference of the commerce of one state over another,

<sup>50</sup> 4 WRITINGS OF THOMAS JEFFERSON 46.

<sup>51</sup> 5 *id.* at 112.

<sup>52</sup> 1 ANNALS OF CONG. 448-453.

<sup>53</sup> *Id.* at 467, 786.

<sup>54</sup> 5 WRITINGS OF THOMAS JEFFERSON 112 (Ford ed. 1895).

<sup>55</sup> "It [the habeas corpus clause] assumes the existence of the privilege, and provides against its infringement, even by the highest power in the state." HURD, HABEAS CORPUS 122 (1st ed. 1858).

<sup>56</sup> 2 FARRAND, *op. cit. supra* note 34, at 617-618. It has been suggested that the Framers "would seem to have regarded the privilege in question as too definitely implied in the idea of free government to need formal assertion or confirmation." *United States v. Williamson*, 28 Fed. Cas. No. 16,726 at 688 (E.D. Pa. 1855).

and titles of nobility. It restricts the powers of Congress to impose direct taxes and to regulate slavery. It is more than probable that the Framers, in adopting the suspension clause, had in mind the numerous occasions when Parliament had suspended the Habeas Corpus Act, especially during the Revolutionary War, and wanted to be certain that Congress could take similar measures only in cases of extreme necessity.

Why then did not the First Congress propose a habeas corpus amendment along with the other amendments which make up the Bill of Rights? The records themselves offer no clue, so one can but speculate. Perhaps it was because it was thought that the Sixth Amendment adequately protected the privilege of the writ of habeas corpus. The Sixth Amendment guarantees the right to a speedy trial and to be informed of the nature and cause of the accusation. This was everything of substance guaranteed by the English Act of 1679.

Perhaps the First Congress thought the states had sufficiently provided for the writ, that protection would be unnecessary in the new Constitution other than against arbitrary suspension. This view draws support from subsequent history. It was not until 1858 that the decision in *Ableman v. Booth*<sup>57</sup> settled that it was beyond the power of state courts to use the writ to discharge federal prisoners. No less an authority than Chancellor Kent considered that a state court had such powers.<sup>58</sup> Even after *Ableman v. Booth*, state courts obstinately claimed the right to discharge soldiers and sailors from the custody of their officers.<sup>59</sup> Finally, in 1872, it was held that state courts could not interfere with the custody of men in the armed forces.<sup>60</sup>

Certainly nothing in the historical background provides any indication that a prisoner convicted according to the course of the common law by a court of general criminal jurisdiction was ever entitled to the writ. Furthermore, nothing in that history suggests that it was ever thought to be suspension of the writ to deprive convicts of its use. It seems altogether unlikely that the First Congress viewed the habeas corpus clause as establishing an affirmative right to the privilege of the writ. If they had so viewed the clause, why did they think it necessary in the Judiciary Act of 1789<sup>61</sup> to affirmatively give the federal courts jurisdiction to issue the writ? One is driven to the conclusion that under our constitution, at least as it was understood in 1789, there was no right on the part of convicted prisoners to the privilege of habeas corpus. Such a right, if it was to exist at all, would have to come from Congress.

This summary of the historical background of the suspension clause

<sup>57</sup> 21 How. 506 (U.S. 1858). Hurd, writing in 1858, regarded it as "settled that state courts may grant the writ in all cases of illegal confinement under the authority of the United States." *HABEAS CORPUS* 166 (1st ed. 1858).

<sup>58</sup> *Matter of Stacy*, 10 Johns. 327 (N.Y. 1813) (the court upheld an order attaching the General for contempt).

<sup>59</sup> See *Ex parte Anderson*, 16 Iowa 595 (1864), distinguishing the *Booth* case, and cases cited.

<sup>60</sup> *Tarble's Case*, 13 Wall. 397.

<sup>61</sup> 1 STAT. 81.

has been brief, perhaps too brief to support even tentative conclusions. To properly research this one fascinating subject might take a lifetime, and still not make it possible to draw unequivocal conclusions. In any event, even definitive proof of what the Framers understood the clause to mean would not prevent the Supreme Court from reaching another interpretation.<sup>62</sup> Thus the meaning that Congress and the Court have attached to the clause may be more important than the historical meaning. The true significance of the clause will be found in acts of Congress and judicial decisions.

Even a superficial study of federal habeas corpus will bring to light the hard fact that the power to issue the writ, like nearly every other power of the federal courts, stems from statute rather than from the Constitution. The Constitution empowers Congress to make exceptions from and regulate the appellate jurisdiction of the Supreme Court, and to establish inferior courts. It naturally follows, in the absence of a specific guarantee of habeas corpus, that Congress has power to provide for the writ and to regulate its scope and procedure. This has been the holding of the Supreme Court practically from the beginning of the Government.

It was early decided that the appellate powers of the Supreme Court are not only limited by the Constitution, but may be further limited and regulated by Congress as well. Section 2 of Article III specifies the cases to which the judicial power of the United States extends. The second paragraph of that section gives the Court original jurisdiction in certain cases, and appellate jurisdiction in "the other Cases before mentioned . . . with such Exceptions, and under such Regulations as Congress shall make." These words make it evident that Congress is not required to confer all of the constitutional jurisdiction, and the Court has so held. Even where Congress confers jurisdiction affirmatively, a negative will be implied as to powers not granted. Thus, if Congress declares affirmatively that a writ of error will lie to the judgment of a circuit court where the matter in controversy exceeds \$2000, the Court will imply a legislative purpose to except from the appellate jurisdiction all cases where the matter in controversy is \$2000 or less. This interpretation was first expounded by Chief Justice Elsworth in *Wiscart v. D'Auchy*.<sup>63</sup> Later elaborated by Chief Justice Marshall,<sup>64</sup> it became and remains settled.<sup>65</sup>

The Supreme Court also concluded in early cases that the lower federal courts possess no jurisdiction other than that conferred by act of Congress within the limits of the Constitution. This conclusion was reached in the face of somewhat ambiguous constitutional language. Article III states that the judicial power specified in Section 2 "shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." By Section 8 of Article I, Congress is given power

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<sup>62</sup> *E.g.*, *Johnson v. Zerbst*, 304 U.S. 458 (1938).

<sup>63</sup> 3 Dall. 321, 327 (1796).

<sup>64</sup> *Durousseau v. United States*, 6 Cranch. 307, 314 (U.S. 1810).

<sup>65</sup> *Stephan v. United States*, 319 U.S. 423, 426 (1943).

"To constitute Tribunals inferior to the Supreme Court." Considering these provisions in *Turner v. Bank of North America*,<sup>66</sup> Justice Chase remarked:

The notion has frequently been entertained, that the federal Courts derive their judicial power immediately from the constitution; but the political truth is, that the disposal of the judicial power, (except in a few specified instances) belongs to congress. If congress has given the power to this Court, we possess [sic] it, not otherwise; and if congress has not given the power to us, or to any other Court, it still remains at the legislative disposal. Besides, congress is not bound, and it would, perhaps, be inexpedient, to enlarge the jurisdiction of the federal Courts, to every subject, in every form, which the constitution might warrant.

The rationale is that "having a right to prescribe, Congress may withhold from any court of its creation jurisdiction of any of the enumerated controversies. Courts created by statute can have no jurisdiction but such as the statute confers. No one of them can assert a just claim to jurisdiction exclusively conferred on another, or withheld from all."<sup>67</sup> This principle is recognized as established.<sup>68</sup>

At times Congress has utilized its power over the jurisdiction of the federal courts in startling fashion. For example, a provision of the Emergency Price Control Act of 1942 which deprived all courts but one of the power to restrain enforcement of the Act was upheld.<sup>69</sup> The logical extreme has been reached in the provisions cutting off all jurisdiction to review administrative determinations, which have been upheld in the courts.<sup>70</sup>

These familiar concepts as to the jurisdiction of the federal courts are applicable to habeas corpus. In *Ex parte Bollman*,<sup>71</sup> one issue concerned the inherent power of the Supreme Court to grant the writ. Chief Justice Marshall made it clear that any "power to award the writ by any of the courts of the United States, must be given by written law."<sup>72</sup> Referring to the Judiciary Act of 1789, he noted that Congress, acting under the influence of the suspension clause, must have felt obligated to provide "efficient means by which this great constitutional privilege should receive life and activity."<sup>73</sup> He reasoned that the only inherent powers of the federal courts would be "over their own officers, or to protect themselves, and their members, from being disturbed in the exercise of their functions."<sup>74</sup> The decision settled that the Court could not issue a writ of habeas corpus

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<sup>66</sup> 4 Dall. 8, 10 N. (U.S. 1799).

<sup>67</sup> *Sheldon v. Sill*, 8 How. 441, 449 (U.S. 1850).

<sup>68</sup> *Kline v. Burke Constr. Co.*, 260 U.S. 226, 234 (1922).

<sup>69</sup> *Lockerty v. Phillips*, 319 U.S. 182 (1943).

<sup>70</sup> E.g., *Seligman's Inc. v. United States*, 30 F. Supp. 895 (W.D.La. 1939); see *Work v. Rives*, 267 U.S. 175 (1925); DAVIS, *ADMINISTRATIVE LAW* § 239 (1951), cites numerous cases and statutes.

<sup>71</sup> 4 Cranch. 75 (U.S. 1807).

<sup>72</sup> *Id.* at 94.

<sup>73</sup> *Id.* at 95.

<sup>74</sup> *Id.* at 94.

except under its constitutional appellate jurisdiction as limited by Congress.<sup>75</sup>

The famous case of *Ex parte McCardle* provided the most dramatic illustration of the life and death power of the Congress over habeas corpus jurisdiction.<sup>76</sup> The Supreme Court was actually deprived of appellate jurisdiction in a matter which had already been argued. The Act of February 5, 1867,<sup>77</sup> had extended federal habeas corpus jurisdiction to cases where a person was restrained contrary to the Constitution, treaties or laws of the United States. It allowed appeals from the circuit courts to the Supreme Court. The statute being in force, McCardle petitioned for a writ in a circuit court, alleging unlawful restraint by military force. The writ issued, but on the return and hearing the petitioner was remanded. He appealed to the Supreme Court, and the case was argued and submitted. Congress, fearful that certain reconstruction provisions would be held unconstitutional, quickly enacted the Act of March 27, 1868,<sup>78</sup> over the President's veto, repealing so much of the 1867 statute as authorized appeals from the circuit courts to the Supreme Court. The Court held that it no longer had jurisdiction and dismissed the appeal.

The rule of the *Bollman* and *McCardle* decisions remains the law. The appellate jurisdiction of the Supreme Court in habeas corpus cases is subject to exception and regulation by Congress. No lower court can issue the writ unless such jurisdiction is conferred by statute. Thus, Congress can deny the courts of appeal jurisdiction to issue the writ.<sup>79</sup> No habeas corpus case arises in a federal court without consideration of the jurisdictional problem, since the power to issue the writ can be "appropriately confined by Congress."<sup>80</sup> In nearly every habeas corpus decision of the Supreme Court there is somewhere, perhaps with no discussion, implicit recognition of jurisdictional limitations. Thus, in *Wade v. Mayo*,<sup>81</sup> the majority opinion stated: "*Habeas corpus* is presently available for use by a district court within its recognized jurisdiction." The minority queried: "Was it proper for the district court to exercise its jurisdiction. . . ."<sup>82</sup> That Congress is the ultimate authority was shown by the fact that Section 2254 of Title 28, United States Code, enacted two days later, was given the effect of overruling *Wade v. Mayo* in *Darr v. Burford*.<sup>83</sup> The minority in *Darr v. Burford* did not con-

<sup>75</sup> There would be an exception in cases involving the original jurisdiction of the Court, that is cases affecting ambassadors, public ministers, consuls, or where a state is a party. See *Ex parte Barry*, 2 How. 65 (U.S. 1844); *Ex parte Hung Hang*, 108 U.S. 552, 553 (1883).

<sup>76</sup> 7 Wall. 506 (U.S. 1868).

<sup>77</sup> 14 STAT. 385.

<sup>78</sup> 15 STAT. 44. It was not until 1885 that provision was again made for appeal to the Supreme Court in the cases where habeas corpus was allowed by the 1867 Act. 23 STAT. 437.

<sup>79</sup> *Whitney v. Dick*, 202 U.S. 132 (1906).

<sup>80</sup> *Adams v. United States ex rel. McCann*, 317 U.S. 269, 273 (1942); see *Gusik v. Schilder*, 340 U.S. 128, 132-133 (1950).

<sup>81</sup> 334 U.S. 672, 681 (1948).

<sup>82</sup> *Id.* at 690-691.

<sup>83</sup> 339 U.S. 200, 210-214 (1950). The point at issue in the two cases was whether a petition for writ of certiorari to the United States Supreme Court was one of the state remedies to be exhausted before federal habeas corpus could be utilized. *Darr v. Burford* held that certiorari was a remedy required to be exhausted.

test the power of Congress to restrict the habeas corpus jurisdiction of district courts; they merely differed in their interpretation of Section 2254.

From the very beginning Congress has assumed that it was for it to determine the jurisdiction of the federal courts over habeas corpus proceedings. The First Congress provided for the writ in the Judiciary Act of 1789.<sup>84</sup> Concerning habeas corpus, the act read as follows:

*And be it further enacted*, That all the before-mentioned courts of the United States, shall have the power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law. And that either of the justices of the supreme court, as well as judges of the district courts, shall have power to grant writs of *habeas corpus* for the purpose of an inquiry into the cause of commitment.—*Provided*, That writs of *habeas corpus* shall in no case extend to prisoners in gaol, unless where they are in custody, under or by color of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify.

The striking thing about this short section is its failure either to define the meaning of the term habeas corpus or to detail the procedure for its granting. Chief Justice Marshall, faced with the first of these problems in *Ex parte Bollman*, stated that although the power to issue the writ had to come from statute, "for the meaning of the term *habeas corpus*, resort may unquestionably be had to the common law."<sup>85</sup> He recognized that the term as used in the Constitution and statute meant "that great writ [*habeas corpus ad subjiendum*] which is now applied for."<sup>86</sup>

A few years later the Court, in *Ex parte Kearney*,<sup>87</sup> held that a contempt conviction by a court of competent jurisdiction, in that case the circuit court for the District of Columbia, would not be reviewed on habeas corpus. The petition stated that the contempt consisted of refusal to answer a question which the petitioner deemed incriminatory. The Court recognized its authority to issue the writ where a person was in jail, but held on the basis of the common law that this was not a proper case for its granting, relying strongly on the leading English authority, *Brass Crosby's Case*.<sup>88</sup>

In 1830, in *Ex parte Watkins*,<sup>89</sup> the Supreme Court was faced with the problem of deciding whether it could or should issue the writ where it was contended that a prisoner under sentence was illegally detained. The petitioner was confined under a judgment of the circuit court for the District of Columbia. His petition alleged that the indictment charged no offense punishable by that court. A copy of the indictment was attached. Chief Justice Marshall, delivering the opinion of the Court, made this statement:<sup>90</sup>

<sup>84</sup> 1 STAT. 81.

<sup>85</sup> *Supra* note 71, at 93-94.

<sup>86</sup> *Id.* at 95.

<sup>87</sup> 7 Wheat. 38 (U.S. 1822).

<sup>88</sup> 3 Wil. 138, 95 Eng. Rep. 1005 (1771).

<sup>89</sup> 3 Pet. 193 (U.S. 1836).

<sup>90</sup> *Id.* at 201-202.

No law of the United States prescribes the cases in which the great writ shall be issued, nor the power of the court over the party brought up by it. The term is used in the Constitution, as one which was well understood; and the judicial act authorizes this Court and all of the Courts of the United States, and the judges thereof, to issue the writ "for the purpose of inquiring into the cause of commitment." This general reference to a power which we are required to exercise, without any precise definition of that power, imposes on us the necessity of making some inquiries into its use, according to that law which is in so considerable degree incorporated into our own.

He then declared that the Act of 1679 could "be referred to as describing the cases in which relief is, in England, afforded by this writ to a person detained in custody. . . . *This statute excepts from those who are entitled to its benefit, persons committed for felony or treason, plainly expressed in the warrant, as well as persons convicted or in execution.*"<sup>91</sup> Marshall concluded that the exception of persons convicted applied to the petition under consideration, and that since a judgment of a court of general criminal jurisdiction justified the imprisonment, habeas corpus ought not to be awarded.

The decision in *Ex parte Watkins* was not based on the ground that the Court lacked power to issue the writ; the Court recognized its undoubted statutory power to inquire into the cause of commitment, which had earlier been recognized in *Ex parte Bollman*. Certainly the power to issue the writ in the case of a federal prisoner under sentence could have easily been found in the broad language of the 1789 Judiciary Act. Rather, the decision was based on the ground that it would be improper to issue the writ in the case of a prisoner under sentence. It certainly would not be "agreeable to the principles and usages of law" since the commitment was justified by the judgment of a "superior" court. Furthermore, to liberate a prisoner under sentence would amount of reversal of the judgment, something the Court could not do directly, since at that time (and until 1889<sup>92</sup>) it lacked the power to review criminal convictions on writ of error. Lower federal courts were not inferior courts in a technical sense since their judgments were not subject to review and could not be disregarded. The Court therefore declined to question collaterally the judgment of the circuit court, refusing even to look into the indictments attached to the petition.

In *Ex parte Dorr*,<sup>93</sup> the Court denied even the power to issue the writ in the case of a prisoner under sentence of a state court. The Act of 1789 made it clear that the writ would in no case extend to prisoners in jail, "unless where they are in custody, under or by color of the authority of the United

<sup>91</sup> *Ex parte Kearney*, *supra* note 87 at 202 (emphasis added); *accord*, *Frank v. Mangum*, 237 U.S. 309, 330 (1915).

<sup>92</sup> 25 STAT. 656 (1889) (crimes punishable by death only); 26 STAT. 828 (1891) (general power to grant writs of certiorari). The circuit courts first received appellate powers in 1879. 20 STAT. 354.

<sup>93</sup> 3 How. 103 (U.S. 1845). The prisoner's attorney alleged that he had not been allowed to communicate with the prisoner to determine whether he desired a writ of error to the Supreme Court under § 25 of the Judiciary Act, and asked that he be brought up on habeas corpus.



States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify." The Court, relying both on the common law and on the Act, held it had no power to bring up a prisoner under sentence or execution of a state court for any purpose other than to be used as a witness.

One concludes on the basis of the *Watkins*, *Kearney*, and *Dorr* cases that at least until 1845 the rule in the federal courts was that of the English Act of 1679; a criminal convicted in a court of competent jurisdiction, such as a state court or a federal trial court, could not obtain review on habeas corpus.

The scope of the habeas corpus jurisdiction of the federal courts was expanded by statute upon several occasions. In 1833, after federal marshals had been imprisoned by state courts while enforcing a tariff, (which came to be known to history as the "Tariff of Abominations") the writ was made available to federal officers in state custody for acts done in carrying out federal laws.<sup>94</sup> In 1842, as the result of a trial of a British national for murder in a state court, the writ was extended to certain state-held foreign nationals.<sup>95</sup>

The Act of February 5, 1867<sup>96</sup> marked the first major change in the traditional limits of habeas corpus. It not only broadened application of habeas corpus to federal prisoners, but it also made it applicable to state prisoners as well. Enacted to facilitate enforcement of the Reconstruction Acts, the Act provided that federal courts and judges —

in addition to the authority already conferred by law, shall have power to grant writs of habeas corpus in all cases where any person may be restrained of his or her liberty in violation of the constitution, or any treaty or law of the United States.

The Act of 1867 also contained a major change in habeas corpus procedure. It provided that "The petitioner may deny any of the material facts set forth in the return, or may allege any fact." The effect of this change was described in *Frank v. Mangum*, as follows:<sup>97</sup>

The effect is to substitute for the bare legal review that seems to have been the limit of judicial authority under common-law practice, and under the act of 31 Car. II, c. 2 [1679], a more searching investigation, in which the applicant is put upon his oath to set forth the truth of the matter respecting the causes of his detention, and the court, upon determining the actual facts, is to "dispose of the party as law and justice require."

The Act further contained the important provision that on appeal there would be sent up the petition, return, and such "other proceedings" as might be prescribed by the Supreme Court.

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<sup>94</sup> 4 STAT. 634; see *In re Neagle*, 135 U.S. 1 (1890).

<sup>95</sup> 5 STAT. 539.

<sup>96</sup> 14 STAT. 385. The 1789, 1833, 1842 and 1867 Acts as they affected habeas corpus were codified in the Revised Statutes of 1874 and 1878, and with the exception of the addition of the Supreme Court's appellate power, remained static until 1948. See 28 U.S.C. §§ 451-466 (1946).

<sup>97</sup> 237 U.S. 309, 330-331 (1915).

It was many years before the full potentialities of the 1867 Act were realized. One reason was that Congress in 1868<sup>98</sup> repealed so much of the 1867 Act as empowered the Supreme Court to hear appeals from the denial of the writ by lower federal courts, and did not again provide for such an appeal until 1885.<sup>99</sup> But the major reason was that the Court was slow to utilize the sophistical possibilities of the "due process" clause of the Fourteenth Amendment in determining whether a person was restrained of his liberty in violation of the Constitution.

The Supreme Court, although recognizing in *Ex parte McCordle* that the 1868 Act deprived it of the appellate powers granted in the 1867 Act, was not wholly stifled. In *Ex parte Yerger*<sup>100</sup> it held that the 1868 Act took away only those appellate powers granted by the 1867 Act; it did not affect the powers granted by earlier statutes.

In *Ex parte Lange*,<sup>101</sup> the Court in effect wrote into the 1789 Act the procedural changes made in the 1867 Act. The petitioner in that case alleged that he had been convicted of misappropriating mail-bags and sentenced to imprisonment *and* a fine, that under the statute the sentence could be imprisonment *or* a fine, but not both, that he had paid his fine and started to serve his sentence, that the circuit court had vacated the sentence and resented him to one year's imprisonment.

Lange's sentence was justified by a judgment of a court of competent jurisdiction. Under earlier precedents the prisoner should have been remanded. Nothing in the judgment showed more than a legal sentence within the power of the circuit court. However the Supreme Court brought the record before it on certiorari. When the record was examined it was apparent that there had been an earlier sentence as alleged. The Court held the subsequent sentence void and ordered Lange's discharge. Justice Clifford wrote a long dissent in the course of which he pointed out that since judgment of a court of competent jurisdiction justified the conviction, the Court ought not inquire further.

This apparently was the first habeas corpus case involving a person under sentence in which the Court used certiorari to bring before it the record of a trial court.<sup>102</sup> The Court cited several decisions as authority for its action, none of which involved at the same time a prisoner under sentence of a competent court and a record brought before the Court on certiorari. The Court stated that in view of the authorities cited, its power to issue the writ and "to examine the proceedings in the inferior court, so far as may be necessary to determine whether that court has exceeded its authority, is no longer open to question."<sup>103</sup>

<sup>98</sup> 15 STAT. 44; see *Ex parte McCordle*, *supra* note 76.

<sup>99</sup> 23 STAT. 437.

<sup>100</sup> 8 WALL. 85 (U.S. 1869).

<sup>101</sup> 18 WALL. 163 (U.S. 1873).

<sup>102</sup> In *Ex parte Milligan*, 4 WALL. 2 (U.S. 1866), which involved a prisoner under sentence of a military tribunal, the limited record of that tribunal was apparently included as exhibits to the petition, and was examined by the Court.

<sup>103</sup> *Supra* note 101 at 166. Thus the Court was now calling lower federal courts "inferior" courts, although it still had no power to review their decisions in criminal matters.

Thus the *Lange* case, forecasting the eventual effect of the 1867 Act, changed federal habeas corpus in two vital respects. A court would no longer stop its inquiries when shown the judgment of a court of competent criminal jurisdiction, but would ascertain whether the court had the power to render the judgment. Furthermore, in making its determination, the court would look not only at the petition and return, but at the record as well.<sup>104</sup>

By 1915, the rule of *Ex parte Watkins*, as limited by the later cases, had been narrowed as follows: Where a prisoner "is held in custody by reason of his conviction upon a criminal charge before a court having plenary jurisdiction over the subject-matter or offense, the place where it was committed, and the person of the prisoner, it results from the nature of the writ itself that he cannot have relief on habeas corpus."<sup>105</sup> That quotation, although stated in terms of limits on relief, also shows how great a change had been made in the scope of habeas corpus as known to the Framers of the Constitution. To justify a remand of the prisoner there must be a showing of jurisdiction over offense, place and person. Thus review would now be accorded where the prisoner alleged that he had been convicted under an unconstitutional statute or city ordinance,<sup>106</sup> or where he alleged that he had been convicted twice for the same offense.<sup>107</sup> The court would now examine the entire record, or even look beyond the record where the additional evidence would not contradict the record.<sup>108</sup>

The 1867 Act eventually became the basis for a series of holdings that, where denial of constitutional rights was asserted, judgments of conviction by state and federal courts could be re-examined on habeas corpus, and evidence outside the original criminal record taken on the question of violation of constitutional rights.

*Moore v. Dempsey*<sup>109</sup> keynoted this development, the Court holding that habeas corpus would lie to attack a conviction following a mob-dominated trial. Subsequent decisions made it clear that the writ would reach

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<sup>104</sup> Although the decision viewed by itself was a considerable advance in habeas corpus principles, a statutory argument can be advanced in its support. The 1789 Act offered as the only guide to the scope of habeas corpus the notion that the writ should be granted where it was "agreeable to the principles and usages of law." The 1867 Act contained new procedures which were not expressly made applicable to the situations covered by the 1789 Act. However, to apply those new procedures to 1789 Act situations could certainly be said to be agreeable to the principles of "law" as it was in 1867. This rationale has been highly developed by recent decisions of the Court. Thus in *Price v. Johnston*, 334 U.S. 266, 282 (1948), it was used to justify a holding that a court of appeals has a discretionary power to order the presence of a habeas corpus petitioner to argue his own appeal from the denial of the writ by a district court. The same rationale was used in another context in *Wong Yang Sung v. McGrath*, 339 U.S. 33, 50 (1950), to justify a holding that Congress must have intended that the Administrative Procedure Act apply to immigration hearings.

<sup>105</sup> *Frank v. Mangum*, *supra* note 91 at 326.

<sup>106</sup> *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Ex parte Siebold*, 100 U.S. 371 (1879).

<sup>107</sup> *Hans Nielson*, Petitioner, 131 U.S. 176 (1889).

<sup>108</sup> *Cuddy*, Petitioner, 131 U.S. 280 (1889). The record could not be impeached. *Riddle v. Dyche*, 262 U.S. 333 (1923). This still seems to be the law. *Walker v. Johnston*, 312 U.S. 275 (1941).

<sup>109</sup> 261 U.S. 86 (1923).

convictions based on perjured testimony knowingly used by prosecution authorities, deprivations of counsel, tricked guilty pleas, and similar cases where convictions were obtained in disregard of constitutional rights.<sup>110</sup>

These decisions made it possible to review every criminal proceeding, whether state or federal, on a federal writ of habeas corpus. The writ could be initiated by nothing more than a verified petition and be supported by parole evidence. The only possible limit on the number of successive petitions would be a lack of willingness on the part of a petitioner to swear that he had been denied a fair trial.

Today the writ is usually a desperate gamble by a prisoner who has nothing to lose and everything to gain. It is a bid for temporary freedom—a boat ride from Alcatraz to San Francisco—a meal out—a look at the free world. The writ is usually denied, but as long as there is faint hope the flood of petitions continues. It is even said that wardens encourage convicts to establish writ factories, feeling that such activities keep them out of mischief.<sup>111</sup> Convicts become authorities on the writ. Their exploits so fascinate a Dick Tracy conscious public that movies are made about them, with ex-convicts as “technical” advisers.

The problem thus engendered was well described by Mr. Justice Jackson in his dissent in *Price v. Johnston*:<sup>112</sup>

Confinement is neither enjoyable nor profitable. And it is safe to assume that it neither gives rise to new scruples nor magnifies old ones which would handicap petitioner's preparation of one *habeas corpus* application after another. . . . The number of times the Government must re-try the case depends only on the prisoner's ingenuity, industry and imagination. . . . The prisoner, of course, has nothing to lose in any event. Perjury has few terrors for a man already sentenced to 65 years' imprisonment for a crime of violence. Even such honor as exists among thieves is not too precious to be sacrificed for a chance at liberty. Consequently, his varying allegations can run the gamut of all those perpetuated in the pages of the United States Reports.

The result of *Moore v. Dempsey* and its successors was to flood the federal courts with applications for habeas corpus, usually groundless. Judicial complaint was loud and bitter. Perhaps the understatement of Justice Frankfurter in *Sunal v. Large* is the most familiar:<sup>113</sup>

I think it is fair to say that the scope of *habeas corpus* in the federal courts is an untidy area of our law that calls for more systematic consideration than it has thus far received.

<sup>110</sup> E.g., *Price v. Johnston*, 334 U.S. 266 (1948); *von Moltke v. Gillies*, 332 U.S. 708 (1948); *House v. Mayo*, 324 U.S. 42 (1945); *Adams v. United States ex rel. McCann*, 317 U.S. 269 (1942); *Waley v. Johnston*, 316 U.S. 101 (1942); *Smith v. O'Grady*, 312 U.S. 329 (1941); *Walker v. Johnston*, 312 U.S. 275 (1941); *Johnson v. Zerbst*, 304 U.S. 458 (1938); *Mooney v. Holohan*, 294 U.S. 103 (1935).

<sup>111</sup> Goodman, *Use and Abuse of the Writ of Habeas Corpus*, 7 F.R.D. 313, 316 (1947). “We also receive from Alcatraz inmates many and successive applications for the writ praying us to require the Warden to allow petitioners to receive newspapers, to send for law books, to circularize Congressmen, to keep birds, to change lavatory facilities, to cease censoring petitioner's correspondence and many others too numerous to mention.” *Ibid.*

<sup>112</sup> 334 U.S. 266, 296-297 (1948).

<sup>113</sup> 332 U.S. 174, 184 (1947).

Circuit Judge Wilbur K. Miller, in the course of a very fine analysis in *Dorsey v. Gill*,<sup>114</sup> pointed out that there is a limit to the number of judges authorized by Congress, that others than convicts demanding habeas corpus are entitled to an occasional day in court. Judge Miller gave one example of a prisoner who over a period of less than five years presented 50 petitions for the writ. Another presented 27, a third 24, a fourth 22, a fifth 20. One hundred and nineteen persons presented 597 petitions, an average of five each.<sup>115</sup> The district courts in the year ending June 30, 1948, received 803 applications for the writ by federal prisoners and 543 by others.<sup>116</sup>

Evils other than a mere increase in groundless applications developed. There was no way for the trial judge or other officials whose acts were challenged on habeas corpus to supplement the record, unless as ordinary witnesses.<sup>117</sup> Quite often it was necessary to examine the files and records of the sentencing court and to take evidence from court officials and others residing near the trial court. Of course, every case of habeas corpus by a federal prisoner brought the unseemly spectacle of one district judge trying the regularity of proceedings before another.<sup>118</sup> Where a state prisoner sought the writ in a federal court the situation was even more absurd, since a federal trial judge was examining the regularity of proceedings in a state court, often the highest state court.

Abuses of habeas corpus had become so intolerable by 1942 that the Judicial Conference of the United States appointed a committee to investigate and report. This committee's recommendations for the most part were embodied in the 1948 revisions of Title 28 of the United States Code. Most of the changes were codifications or clarifications of existing law.<sup>119</sup> Thus it was made clear that a federal judge, in considering a petition for habeas corpus, could give weight to a previous denial of the writ by a federal court or judge on a similar application.<sup>120</sup> Furthermore, the principle of exhaustion of state remedies laid down in numerous decisions was codified.<sup>121</sup> Provision was made to permit admission in evidence of the certificate of the judge who presided at the trial of petitioner setting forth the facts which occurred.<sup>122</sup>

The only major change made in the 1948 revision was the addition of Section 2255. In that section it was provided that a federal prisoner who

<sup>114</sup> 148 F.2d 857, 862 n.42 (D.C. Cir. 1945), *cert. denied*, 325 U.S. 890.

<sup>115</sup> *Id.* at 862.

<sup>116</sup> DIRECTOR OF ADMINISTRATIVE OFFICE OF UNITED STATES COURTS, ANNUAL REPORT 1948, 132-133.

<sup>117</sup> See *Walker v. Johnston*, 312 U.S. 275 (1941).

<sup>118</sup> The resulting duplication of effort is illustrated by *Howell v. United States*, 172 F.2d 213 (4th Cir. 1949), *cert. denied*, 337 U.S. 906. The district judge of the district of confinement held the sentence void because the counsel for defendant were not present at the time of sentencing. The prisoner was delivered to a marshal, returned to the sentencing court, resentenced and returned to prison.

<sup>119</sup> A good discussion of the legislative history of the 1948 amendments can be found in Holtzoff, *Collateral Review of Convictions in Federal Courts*, 25 B. U. L. REV. 26 (1945).

<sup>120</sup> 28 U.S.C. § 2244 (Supp. 1951). This section in effect codifies *Salinger v. Loisel*, 265 U.S. 224 (1924), and similar cases.

<sup>121</sup> 28 U.S.C. § 2254 (Supp. 1951); see text at note 129 *infra*.

<sup>122</sup> 28 U.S.C. § 2245 (Supp. 1951).

desires collaterally to attack his conviction must first make a motion in the sentencing court. It was further provided that a habeas corpus petition of such a prisoner should not be entertained if it appeared that he had not availed himself of the motion procedure, unless it also appeared that the motion procedure was inadequate or ineffective to test the legality of his detention. In *United States v. Hayman*,<sup>123</sup> an applicant for such a motion contended that the section was unconstitutional in that it suspended the privilege of the writ. His case was remanded for further proceedings in conformity with Section 2255. The Court, however, denied that it had reached any constitutional question.

What must not be forgotten is that all of this vastly expanded right of habeas corpus for convicts came not from the Constitution but from the Act of 1867; "the recent decisions have not arisen out of the ancient tradition nor do the causes from which they spring involve the traditional incidents of wrongful confinement."<sup>124</sup> In most of the cases where the prisoner won his freedom "Nothing done or left undone by the court and nothing in the constitution of the court led to invalidating the judgment. The collateral attack on the conviction was based on and sustained solely because of the sins of the prosecuting and law enforcement authorities, committed outside the court."<sup>125</sup> The 1867 Act decisions contain no hint of any constitutional right to habeas corpus. In fact the Court in some of them indicated that they were based on statutes. Thus it was said in *Johnson v. Zerbst*: "The scope of inquiry in habeas corpus has been broadened — not narrowed — since the adoption of the Sixth Amendment. . . . Congress has expanded the rights of a petitioner for *habeas corpus* [citing the then effective habeas corpus statutes]."<sup>126</sup> And in *Walker v. Johnston*, the Court said: "It is not a question what the ancient practice was at common law or what the practice was prior to 1867 when the statute from which R.S. 761 [the code provision before the Court] is derived was adopted by Congress. The question is what the statute requires."<sup>127</sup>

The only constitutional basis for these decisions is that the 1867 Act specifically provides for relief where a person is restrained of liberty "in violation of the constitution." And it is considered to be implicit in the due process clause that where a conviction is rendered in violation of a constitutional right a corrective process ought to be supplied, and will be supplied wherever possible. But there is nothing in any of those decisions which would require that Congress and the states supply a corrective process.

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<sup>123</sup> 342 U.S. 205 (1952).

<sup>124</sup> Goodman, *supra* note 111.

<sup>125</sup> Holtzoff, *supra* note 119, at 40.

<sup>126</sup> 304 U.S. 458, 465-466 (1938).

<sup>127</sup> 312 U.S. 275, 285 (1941). Similar expressions can be found in *Frank v. Mangum*, *supra* note 91 at 330-331, and *Price v. Johnston*, *supra* note 110 at 278-279, 282. Over half of the reported decision in *United States v. Hayman*, 342 U.S. 205 (1952), is devoted to a discussion of earlier statutes and the legislative history of the section involved. The Court states that: "In 1867, Congress changed the common-law rule" (emphasis added) by extending the writ to cases where a person might be restrained in violation of the Constitution. *Id.* at 211.

And certainly nothing in any of the decisions would require that the corrective process be habeas corpus.<sup>128</sup>

In the foregoing discussion the attempt has been to show that the right to the traditional writ of habeas corpus is a statutory rather than a constitutional right, particularly where prisoners under sentence are concerned. Congress made cautious beginnings in 1948 toward cleaning up this "untidy area of our law." It remains to be shown that Congress can go even further in this regard, to the extent of changing the traditional writ, providing a substitute or even taking it away altogether.

It is well settled that it is not unconstitutional to interpose an additional remedy to be exhausted before habeas corpus can be resorted to. This is demonstrated by decisions involving state prisoners: they must now exhaust all state remedies, including appeal, writ of error coram nobis, and even petition for writ of certiorari to the Supreme Court before they may petition for a writ of habeas corpus in a federal court.<sup>129</sup> This judicially created postponement of the writ was codified by Congress in 1948, in Section 2254 of the Judicial Code, which states:

An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner. . . .

The rule of exhaustion is also applied in the case of federal prisoners. "The usual rule is that a prisoner cannot anticipate the regular course of proceedings having for their end to determine whether he shall be held or released."<sup>130</sup> Even administrative remedies must be exhausted, since "it is one of the necessities of the administration of justice that even fundamental questions should be determined in an orderly way."<sup>131</sup>

That Congress can interpose a new remedy and require its exhaustion by a federal prisoner is apparent from the decision in *United States v. Hayman*. There the prisoner was left to his remedy under Section 2255 of the new Judicial Code which required him to test the validity of his sentence by a motion in the sentencing court before he could apply for habeas corpus, unless it appeared that the motion remedy was inadequate or ineffective. The prisoner had contended that to apply Section 2255 in his case would be an unconstitutional suspension of the privilege of the writ of habeas corpus. The implication of the decision is that at least as long as a substi-

<sup>128</sup> "... of course Illinois may choose the procedure it deems appropriate for the vindication of federal rights." *Young v. Ragen*, 337 U.S. 235, 238 (1949). In *Jennings v. Illinois*, 342 U.S. 104, 111 (1951), the Court said: "Where the state does not afford a remedy, a state prisoner may apply for a writ of habeas corpus in the United States District Court to secure protection of his federal rights," citing as primary authority the statute, 28 U.S.C. §§ 2241(c)(3), 2254 (Supp. 1951).

<sup>129</sup> *Darr v. Burford*, 339 U.S. 200 (1950); *Young v. Ragen*, 337 U.S. 235 (1949); *Ex parte Hawk*, 321 U.S. 114 (1944); *Ex parte Royall*, 117 U.S. 241 (1886).

<sup>130</sup> Mr. Justice Holmes, in *Ex parte Simon*, 208 U.S. 144, 147 (1908).

<sup>131</sup> Mr. Justice Holmes, in *United States v. Sing Tuck*, 194 U.S. 161, 168 (1904).

tute procedure is adequate and effective there will be no constitutional problem.

To delay collateral attack on a military judgment until administrative remedies are exhausted is no suspension. According to Justice Douglas:<sup>132</sup>

The policy underlying that rule [of exhaustion] is as pertinent to the collateral attack of military judgments as it is to the collateral attack of judgments rendered in state courts. If an available procedure has not been employed to rectify the alleged error which the federal court is asked to correct, any interference by the federal court may be wholly needless. The procedure established to police the errors of the tribunal whose judgment is challenged may be adequate for the occasion. If it is, any friction between the federal court and the military or state tribunal is saved. . . . Such a principle of judicial administration is in no sense a suspension of the writ of habeas corpus. It is merely a deferment of resort to the writ until other corrective procedures are shown to be futile.

These decisions have a perfectly rational basis. Habeas corpus being a remedy for illegal detention, it would be a contradiction in terms to allow it where another remedy has not been exhausted. Furthermore, postponement of the remedy is consistent with the Habeas Corpus Act of 1679, which provided that one accused of treason or felony might even have to wait until the second term following his arrest to be tried or freed. Certainly to require exhaustion of other remedies is no suspension as to a prisoner under sentence who never was entitled to the writ as it was understood when the Constitution was adopted.

It is well established that Congress can confine the availability of habeas corpus either by territorial limitations or by restricting the classes of courts which can issue it, although under the English common law application for the writ could be made to any superior court judge in the kingdom. Thus Congress has the undoubted power to refuse jurisdiction to issue the writ to courts of appeal.<sup>133</sup> In *Ahrens v. Clark*,<sup>134</sup> it was held that Congress could limit the jurisdiction of district courts to issue the writ to the district where the prisoner was confined, and that a statute which permitted district courts to issue the writ "within their respective jurisdictions" referred to territorial jurisdictions. The dissenting minority raised no question as to the power of Congress to impose jurisdictional limitations. It was only concerned with whether the particular statute should be construed so as to result in "such a serious contraction of the availability of the writ."<sup>135</sup>

Even application of res judicata principles to habeas corpus should not be beyond the powers of Congress. The Supreme Court, in a unanimous decision in *Salinger v. Loisel*,<sup>136</sup> determined that a court in its discretion

<sup>132</sup> *Gusik v. Schilder*, 340 U.S. 128, 131-132 (1950).

<sup>133</sup> *Whitney v. Dick*, 202 U.S. 132 (1906).

<sup>134</sup> 335 U.S. 188 (1948); accord, *Ex parte Graham*, 4 Wash. C. C. 211 (1818). *Burrall v. Johnston*, 146 F.2d 231 (9th Cir. 1944), cert. denied, 325 U.S. 887, upheld a local practice whereby the clerk assigned petitions to judges in rotation instead of to the named judges to whom they were addressed.

<sup>135</sup> *Supra* note 134 at 194.



can give weight to decisions on prior petitions, although as a matter of practice *res judicata* is not applicable to habeas corpus decisions. The policy behind this decision was aptly stated by Judge Learned Hand as follows: "Even this great writ can be abused, and when the question has once been decided upon full consideration, there must be an end, else the court becomes the puppet of any pertinacious convict."<sup>137</sup>

Congress has codified the principles of *Salinger v. Loisel* into Section 2244 of the Judicial Code, which provides:

No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States, or of any State, if it appears that the legality of such detention has been determined by a judge of court of the United States on a prior application for a writ of habeas corpus and the petition presents no new ground not theretofore presented and determined, and the judge or court is satisfied that the ends of justice will not be served by such inquiry.

Once it is admitted that there is no constitutional requirement that a petitioner be permitted to file successive petitions for similar relief at such intervals as suit his fancy, the question becomes one of drawing a line. Congress, codifying judicial decisions, has now made it clear that the courts may draw the line and refuse to entertain a petition where no new grounds are presented, even after the first hearing on a petition. It follows that even strict *res judicata* should not be beyond the power of Congress. Certainly nothing in the decisions holding *res judicata* inapplicable to habeas corpus indicate that this is a rule based on the Constitution;<sup>138</sup> rather they indicate that it is a rule of practice established by judicial decision and point out that the same rule was followed in England, and in the American states in the absence of statutes.<sup>139</sup> Congress has provided review in criminal cases which was unavailable in 1789; it has expanded the scope of the inquiry on habeas corpus; it has provided the Section 2255 motion procedure; it has even provided for appeal in habeas corpus cases. Surely this is ample provision for relief from unconstitutional convictions even if *res judicata* is made applicable. When the right to an appellate review was given, the reason for the refusal to apply *res judicata* ceased.<sup>140</sup> Finally, one must not be unmindful of the fact that there was *res judicata* of a harsh sort in the 1789 procedure; once convicted, habeas corpus was no longer available.

Seemingly there is no constitutional objection in failing to make provision for habeas corpus, or even in abrogating it altogether as to particular persons or classes of persons. Thus a federal prisoner can lose all right to the use of the habeas corpus procedure to test a contention of illegality by failing to make timely use of his other remedies such as appeal or writ of

<sup>136</sup> 265 U.S. 224 (1924).

<sup>137</sup> *United States v. Thompson*, 144 F.2d 604, 606 (2d Cir. 1944), *cert. denied*, 323 U.S. 790.

<sup>138</sup> See, e.g., *Waley v. Johnson*, 316 U.S. 101 (1942); *Salinger v. Loisel*, *supra* note 136.

<sup>139</sup> *Salinger v. Loisel*, *supra* note 136.

<sup>140</sup> *Id.* at 231.

error,<sup>141</sup> even where the state of the law made an appeal seem futile.<sup>142</sup> It was pointed out in *Glasgow v. Moyer*, in leaving a petitioner to his expired right to a writ of error.<sup>143</sup>

. . . there was an orderly procedure prescribed by law for him to pursue, in other words, to set up his defense of fact and law, whether they attacked the indictment for insufficiency or the invalidity of the law under which it was found, and, if the decision was against him, test its correctness through the proper appellate tribunals.

The Supreme Court, over suspension arguments, has held that the findings of an administrative officer can be conclusive so that one claiming citizenship and denied admission to this country cannot avail himself of the writ. Thus it is no suspension of habeas corpus to deprive a possible citizen of the writ altogether.<sup>144</sup> Similarly there is no vice in the denial of the writ to a non-resident enemy alien.<sup>145</sup>

Other decisions suggest that citizens stationed or resident in foreign territories or even in dependencies governed by military forces have no right to habeas corpus. The Supreme Court has denied that it has original jurisdiction over such petitions.<sup>146</sup> And the lower courts cannot entertain petitions from persons outside their territorial jurisdiction.<sup>147</sup> Thus a marine in Guam, at the time a naval dependency, was denied the right to the writ.<sup>148</sup>

Failure to provide the writ at all is treated as jurisdictional as was previously shown. Prior to the 1833 Act, federal officers in state custody had no right to a federal writ of habeas corpus. Prior to the 1867 Act, state prisoners had no right to a federal writ. These various extensions of the jurisdiction of the federal courts to grant the writ were not seen as corrections of previous suspensions of the writ. Rather, they were viewed in some quarters at least as "high-handed . . . invasions of State-Rights."<sup>149</sup>

The use of the writ has always been very limited in the case of court-martial prisoners. There has been no expansion of the scope as with state and federal prisoners.<sup>150</sup> Yet few will deny that the court-martial system has been at least as fertile a source of injustice as the state courts. However, there has been little complaint of this limited scope of the federal writ in the court-martial area as amounting to unconstitutional suspension.<sup>151</sup>

These illustrations make it clear that an abrogation of the writ in certain

<sup>141</sup> *Ex parte Spencer*, 228 U.S. 652 (1913).

<sup>142</sup> *Sunal v. Large*, 332 U.S. 174 (1947); see particularly the dissenting opinions.

<sup>143</sup> 225 U.S. 420, 430 (1912).

<sup>144</sup> *United States v. Ju Toy*, 198 U.S. 253 (1905).

<sup>145</sup> *Johnson v. Eisentrager*, 339 U.S. 763 (1950). Black, J. dissenting, raised constitutional objections.

<sup>146</sup> *Ex parte Betz*, 329 U.S. 672 (1947); *Ahrens v. Clark*, *supra* note 134 at 192 n.4 (1948).

<sup>147</sup> *Id.* at 188.

<sup>148</sup> *McGowan v. Moody*, 22 App. D.C. 148 (1903), seemingly cited with approval in *Ahrens v. Clark*, *supra* note 134 at 190.

<sup>149</sup> 2 WARREN, *SUPREME COURT IN UNITED STATES HISTORY* 373 (1st ed. 1922).

<sup>150</sup> *E.g.*, *Whelchel v. McDonald*, 340 U.S. 122 (1951).

<sup>151</sup> Chief Justice Chase, dissenting in *Tarble's Case*, 13 Wall. 397, 412-413 (U.S. 1872), suggested that it was a suspension of the privilege of the writ to deprive military personnel of their right to the writ in the state courts.

cases is not unconstitutional. Surely then when Congress increases the availability of the writ, only to find abuse, it can take corrective measures. Admitting that the vague contours of due process can expand as our ideas of justice change, do they expand so quickly that there is no going back to rectify mistakes?<sup>152</sup>

Congress then has full authority to legislate in the field of habeas corpus, at least where prisoners under sentence are concerned. If the traditional writ is not suited to collateral attacks by such prisoners on their convictions perhaps it can be streamlined. *Res judicata* might be made applicable where a petition presents no new ground. Hearings can be adapted to the situations of convicts. They might be conducted administratively or through commissioners or special masters, thus making it possible to reduce the risk of escape, and at the same time discourage needless writs filed for the purpose of securing a trip "outside."<sup>153</sup> Alternately, it might be determined to allow the hearings to be conducted in the absence of the petitioner, or at least to give the court hearing the petition ample discretion to determine whether his presence was required.<sup>154</sup> There would seem to be no real reason why the entire proceeding could not be conducted with depositions and affidavits.<sup>155</sup>

Habeas corpus for convicts is a statutory right. It need not be kept within the narrow confines of medieval procedures. Procedural instruments are means for achieving the rational ends of the law and should not be treated as mechanical rigidities.<sup>156</sup> The substantive right of the prisoner under sentence—the substantive privilege of the writ of habeas corpus—is the right to be free unless legally imprisoned. It is for Congress to provide the procedural implements for attaining that end. Congress has full power to protect the great privilege of the writ of habeas corpus "for those who deserve it against abuses of the privilege by those who do not deserve it and who clamor for it incessantly."<sup>157</sup>

<sup>152</sup> Apparently the Supreme Court feels that it can correct its own mistakes in this field without any due process objection. *Compare* *Wade v. Mayo*, 334 U.S. 672 (1948), *with* *Darr v. Burford*, 339 U.S. 200 (1950). See note 83 *supra*.

<sup>153</sup> In *Holiday v. Johnston*, 313 U.S. 342, 352-353 (1941), the Court held that factual issues could not be heard before a commissioner, for the reason that the statutory provision that the "court, or justice . . . determine the facts" was "too plain to be disregarded." The Court made it clear that Congress could allow such a practice, saying: "It may be that the practice is a convenient one but, if so, that consideration is for Congress."

<sup>154</sup> See *Irvin v. Zerbst*, 97 F.2d 257 (5th Cir. 1938), *cert. denied*, 305 U.S. 597; *Burgess v. King*, 13 F.2d 761 (8th Cir. 1942). The holding in *Walker v. Johnston*, 312 U.S. 275 (1941), that the prisoner's presence was required where facts outside the record were at issue was seemingly based on statutory rather than constitutional grounds.

<sup>155</sup> This was the practice in the Ninth and Tenth Circuits for a number of years until the Supreme Court disapproved of it on statutory grounds. *Walker v. Johnston*, *ibid.* 28 U.S.C. § 2246 (Supp. 1951) expressly authorizes the court to receive evidence by deposition or affidavits in habeas corpus cases.

No doubt the Court Reporter Act, 28 U.S.C. § 753, and similar statutes in the states, will have a considerable influence upon the future course of procedure governing collateral attacks on conviction, since the record will include all the testimony and all proceedings on arraignment, appeal and sentence. It will be difficult to make a false claim not rebutted by the record. The general rule on habeas corpus has been that only allegations "not consistent with the record" may be considered. *E.g.*, *Johnson v. Zerbst*, 304 U.S. 458, 466 (1938).

<sup>156</sup> *Accord*, *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

<sup>157</sup> *Longsdorf*, *supra* note 3, at 192.