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THE CONSTITUTION AND HABEAS CORPUS

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The Constitution declares:

> 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.[1]

In spite of the categorical character of this language, from the time of John Marshall's opinion in Ex parte *Bollman*[2] there has been a doctrine that Congress can suspend the privilege in the federal courts at its pleasure, whether or not there is a case of rebellion or invasion and whether or not the public safety requires it. The doctrine is derived from another: that the courts of the United States are, in respect to their power in habeas corpus cases, dependent on an Act of Congress. Marshall put the matter unequivocally: "[T]he power to award the writ by any of the courts of the United States, must be given by written law."[3] And, while conceding that Congress had an "obligation" to make the privilege available,[4] Marshall explicitly sanctioned a congressional power to deny the privilege to the most numerous class of those now in need of it—prisoners in state custody.[5]

Marshall's conclusions, I am convinced, are unsupportable. They have enjoyed an illusion of vitality[6] because they have, as a practical matter, been generally immune from challenge in the federal courts. The commonly accepted learning has it that, except perhaps for the brief period when the Judiciary Act of 1801 was in force, there have been since 1789 congressional enactments conferring on the federal

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1. U.S. CONST. art. I, § 9.
2. 8 U.S. (4 Cranch) 75 (1807).
3. *Id.* at 94. In the context it is certain that Marshall was speaking of a statute.
4. *Id.* at 95.
5. *Id.* at 99.
6. *See, e.g.*, Carbo v. United States, 364 U.S. 611, 614 (1961).

courts jurisdiction to grant the writ.[7] Accordingly, the habeas applicant has rarely been driven to challenge Marshall's view that congressional authorization is necessary before the federal courts can award the writ.[8] The supposedly necessary authorization has usually been considered to be available.

In 1968 it appeared that an occasion might develop when the Marshall views of the habeas corpus clause would be subjected to challenge in the courts. The Senate had before it a crime control bill which was said to deny federal habeas corpus to state prisoners.[9]

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7. Revised Statutes of 1874, ch. 13, §§ 751-66, 18 Stat. 142; Act of February 5, 1867, ch. 27, 14 Stat. 385; Act of August 29, 1842, ch. 257, 5 Stat. 539; Act of March 2, 1833, ch. 57, § 7, 4 Stat. 634; Judiciary Act of 1801, ch. 4, §§ 2, 30, 2 Stat. 89, 98; Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 81. For the situation prevailing during the brief period when the Judiciary Act of 1801, ch. 4, 2 Stat. 289, was in force, see the text at note 145 and note 146 *infra*. The habeas corpus provisions are currently codified in 28 U.S.C. §§ 2241-54 (1964).

8. *Cf.* Eisentrager v. Forrestal, 174 F.2d 961 (D.C. Cir. 1949).

9. For the complete text of the bill as it emerged from committee, see 114 CONG. REC. 11186 (1968). Section 702, dealing with habeas corpus, proposed to add to title 28 of the United States Code a new section 2256 reading as follows:

> The judgment of a court of a State upon a plea or verdict of guilty in a criminal action shall be conclusive with respect to all questions of law or fact which were determined, or which could have been determined, in that action until such judgment is reversed, vacated, or modified by a court having jurisdiction to review by appeal or certiorari such judgment; and neither the Supreme Court nor any inferior court ordained and established by Congress under article III of the Constitution of the United States shall have jurisdiction to reverse, vacate, or modify any such judgment of a State court except upon appeal from, or writ of certiorari granted to review, a determination made with respect to such judgment upon review thereof by the highest court of that State having jurisdiction to review such judgment. *Id.* at 11189.

It is perhaps not material that the proposed section does not in terms deprive the federal courts of *jurisdiction* to accord habeas corpus relief to state prisoners. The proposal speaks of jurisdiction "to reverse, vacate, or modify any such judgment . . . ." Of course, on habeas corpus a court does not purport to reverse, vacate, or modify a judgment. As the Court has explained:

> The jurisdictional prerequisite is not the judgment of a state court but detention *simpliciter*. The entire course of decisions in this Court . . . is wholly incompatible with the proposition that a state court *judgment* is required to confer federal habeas jurisdiction. And the broad power of the federal courts under 28 U.S.C. § 2243 summarily to hear the application and to "determine the facts, and dispose of the matter as law and justice require," is hardly characteristic of an appellate jurisdiction. Habeas lies to enforce the right of personal liberty; when that right is denied and a person confined, the federal court has the power to release him. Indeed, it has no other power; it cannot revise the state court judgment; it can only act on the body of the petitioner. Fay v. Noia, 372 U.S. 391, 430-31 (1963).

Compare id. with Peyton v. Rowe, 391 U.S. 54, 58 (1968) *and Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 101 (1807).

Debate was waged in terms of constitutionality,[10] and the Senate's decision to remove the habeas section from the bill was beyond peradventure largely the result of constitutional doubts.[11] Nevertheless, the question whether congressional authorization is a necessary predicate for habeas action by the federal courts remains. The thesis of this article is that in the case of habeas corpus congressional authorization is not essential. The thesis is broader yet. It is that the Constitution's habeas corpus clause is a directive to all superior courts of record, state as well as federal, to make the habeas privilege routinely available.

Let me be explicit in setting the limits of my thesis. I have nothing to do with any argument that article III by its own force vests in courts the entire judicial power known to the Constitution.[12] Nor am I concerned with whether article III is a mandate to Congress to vest this power in courts.[13] Similarly, I have nothing to do with any theory of a common law jurisdiction in the federal courts or elsewhere.[14] I am concerned only with habeas corpus and the habeas corpus clause of the Constitution. My thesis, once again, is that this clause is a direction to all superior courts of record, state as well as federal, to make the habeas privilege routinely available.

My principal reliance in establishing this thesis is what I believe to be the near certainty that the Congress of 1789 in enacting the

10. *See, e.g.*, 114 CONG. REC. 13990 (1968). Senator Tydings, the leader of those opposing the section, resorted to an increasingly routine tactic in Senate debate. He sought and received expressions from the faculties of the law schools. The academicians uniformly denounced the proposal, either on constitutional or policy grounds. For their comments, see 114 CONG. REC. 13850 (1968).

11. Senator Scott closed the debate by remarking: "Mr. President, it is my feeling . . . if Congress tampers with the great writ, its action would have about as much chance of being held constitutional as the celebrated celluloid dog chasing the asbestos cat through hell." 114 CONG. REC. 14183 (1968).

12. *See* Eisentrager v. Forrestal, 174 F.2d 961 (D.C. Cir. 1949); 1 W. CROSSKEY, POLITICS AND THE CONSTITUTION 610-20 (1953).

13. *See* Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816).

14. I should not like to be understood as rejecting this theory, especially as to habeas corpus. For an express recognition of a common law habeas jurisdiction in the Supreme Court of North Carolina, see *In re* Bryan, 60 N.C. 1, 44 (1863). The Supreme Court of the United States, while it has frequently disclaimed a common law jurisdiction for the federal courts, has never to my mind adequately explained why such a jurisdiction is lacking. In Ex parte *Bollman*, Marshall indicated that the lack of a common law jurisdiction in the federal courts results since these courts are created by written law. 8 U.S. (4 Cranch) at 93. But so were many other courts which do exercise a common law jurisdiction. The Supreme Court of North Carolina, for example, at the time of the *Bryan* decision, owed its existence entirely to a statute. Ch. 1, [1818] Laws of North Carolina 3.

Judiciary Act did *not*, *contra* Marshall in Ex parte *Bollman*, bother to confer on the federal courts jurisdiction to issue the Great Writ. My second reliance, although First presented, is the constitutional provision itself and the relevant history. Admittedly, I cannot here be so certain when only the bare language of the Constitution is considered or when the scanty record in the Philadelphia Convention is examined. Yet the language of the Constitution and the record of the Convention will be found to be altogether consistent with my thesis and somewhat suggestive of it. Moreover, the thesis will accommodate the known data from Philadelphia at least as well as any other. And, as the latter part of this article will explain, only a recognition of a habeas jurisdiction in the courts irrespective of statute can account for the actions of the Congress of 1789.

I

I shall not here undertake to retrace the work of others in delineating the history of habeas corpus in America before 1787.[15] For present purposes, it is sufficient to state that there is abundant evidence of an early and persisting attachment to "this darling privilege" in pre-1787 America.[16] Indeed, in the Philadelphia Convention and in the struggle for ratification, there was never the slightest objection to according a special preeminence to the Great Writ.[17] Rather, such controversy as there was centered exclusively on

15. *See* R. WALKER, THE AMERICAN RECEPTION OF THE WRIT OF LIBERTY (Okla. State U. Political Science Monograph No. 1, 1961); Collings, *Habeas Corpus for Convicts—Constitutional Right or Legislative Grace?*, 40 CALIF. L. REV. 335 (1952); Oaks, *Habeas Corpus in the States, 1776-1865*, 32 U. CHI. L. REV. 243 (1965).

16. The quoted phrase is taken from the remarks of Dr. John Taylor in the Massachusetts Convention. 2 ELLIOT'S DEBATES 108 (2d ed. 1836).

A variety of habeas corpus was used in America at least as early as 1685 in New Jersey. JOURNAL OF THE COURTS OF COMMON RIGHT AND CHANCERY OF EAST NEW JERSEY 1683-1702 206 (P. Edsall ed. 1937). Professor Edsall's incomparable volume shows frequent resort to habeas corpus for the purposes of appellate procedure. *Id.* at 264-65, 304.

17. For Madison's record of the Convention's consideration of the habeas corpus clause, see the text accompanying note 20 *infra*. The most thorough and searching examination of the genesis of the habeas corpus clause that I have seen is in the three pamphlets published by Horace Binney in support of Lincoln's Civil War suspensions. H. BINNEY, THE PRIVILEGE OF THE WRIT OF HABEAS CORPUS UNDER THE CONSTITUTION (1862); THE PRIVILEGE OF THE WRIT OF HABEAS CORPUS UNDER THE CONSTITUTION (second part) (1862); THE PRIVILEGE OF THE WRIT OF HABEAS CORPUS UNDER THE CONSTITUTION (third part (1865) [hereinafter cited as BINNEY I, BINNEY II, & BINNEY III]. While Binney was principally concerned with the "suspension member" of the clause, he indicated that he, following Marshall and Story, subscribed to the "obligation" theory. But he stated the theory in the strongest possible terms, leaving Congress no discretion whatsoever to withhold jurisdiction of a remedy for arbitrary imprisonment. "If this be constitutional, Congress may constitutionally destroy the

whether the writ was always to be available or whether, in some very restricted circumstances, some possibility of suspension should be admitted.[18] This concern with the suspension problem logically accounts for the peculiar structure of the habeas clause and particularly, the negative phraseology employed: "The privilege of the Writ of Habeas Corpus shall not be suspended, unless . . . ."[19] The Convention was chary of directly and affirmatively proclaiming a power to suspend.

This preoccupation with the suspension problem is plainly evident in Madison's abbreviated chronicle. According to Madison, the first mention of habeas corpus in the Convention came on August 20 when Charles Pinkney submitted to the Committee on Detail a proposition "securing the benefit of the writ of habeas corpus." The exact wording of Pinkney's proposal was:

> 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.[20]

The next mention of habeas corpus was on August 28 when the Convention was considering article XI of the plan presented by the Committee on Detail twenty-two days previously.[21] This article, it is important to note, was the judiciary article of the plan, and it was as

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Constitution." BINNEY II 14.

Binney's arguments are directed to supporting a view of the habeas clause as including a grant of power to the President in respect to suspension. In so far as he establishes the nature of the clause as power-granting, he helps in establishing the thesis that the clause is a grant of power to courts as well as the President. Binney's rejection of this view is clear and, I must confess, forceful. He notes that the Constitution is not concerned with the "Writ of Habeas Corpus" or a "Habeas Corpus Act" but with the "privilege." From this, he reasons that when the Constitution declares that the "privilege . . . shall not be suspended . . ." it is doing no more than making a general statement of a right of immunity from arbitrary imprisonment. "The reference to the Writ," says Binney, "was to describe the privilege intelligibly, not to bind it to a certain form." BINNEY I 40.

18. BINNEY I 24; 3 ELLIOT'S DEBATES 462 (2d ed. 1836) (Patrick Henry in the Virginia Convention); 3 M. FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787 at 213 (1911) (quoting Luther Martin in his "The Genuine Information" transmitted to the Maryland Convention).

19. U.S. CONST. art. I, § 9, cl. 2.

20. 2 M. FARRAND, *supra* note 18, at 341. I have omitted the mention of habeas corpus embodied in the Pinkney Plan allegedly presented to the Convention on May 29. *Id.* at 131. The judgment of a number of writers is that the Plan given in Madison's Notes cannot be representative of what Pinkney offered on May 29. *See* 3 I. BRANT, JAMES MADISON: FATHER OF THE CONSTITUTION 27-29 (1950) and authorities there cited.

21. *See* 5 ELLIOT'S DEBATES 376-81 (2d ed. 1836).

an amendment to this judiciary article that the habeas corpus clause was approved by the Convention in virtually its present form. On habeas corpus, Madison's complete entry for August 28 states:

> Mr. Pinkney, urging the propriety of securing the benefit of the Habeas corpus in the most 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. Rutlidge 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 first part of Mr. Govr Morris' (motion,) to the word "unless" agreed to nem: con: — on the remaining part; N.H. ay, Mas, ay, Ct. ay. Pa. ay Del. ay, Va. ay, N.C. no, S.C. no, Geo, no [Ayes—7; noes—3].[22]

The foregoing record is obviously incomplete, but it is all that we have. Some light is afforded by a comparison of Pinkney's position on August 20 and his position eight days later. In his first submission, he combined an affirmative guarantee with a qualified prohibition of suspension. In his second, while he again stated his original purpose of an affirmative guarantee, he omitted this guarantee from his formal motion, relying altogether on the qualified prohibition. Clearly, as to Pinkney, reliance on the negative phraseology did not connote any retreat. On both occasions he sought to secure the benefits of the writ in the "most ample" manner.

But Pinkney did, after eight days, offer highly significant departures from his original proposition. In his second motion, he abandoned all reference to the "legislature," and he also abandoned the limiting words, "in this Government," which had qualified his first guarantee. Still, his proposal was unacceptable to the Convention, and we are not left in doubt as to the reasons. His rigid time limitation on suspension was rejected. His dangerously vague "urgent occasions" was rejected and the sharply refined phraseology of the eventual draft substituted. All this was accomplished with only a single disagreement, and that disagreement reveals a determination

22. 2 M. FARRAND, *supra* note 18, at 438-39.

to have habeas corpus in any event. There were three states that insisted on eliminating the possibility of suspension.[23]

From this record, the Convention's overriding purpose is reasonably clear. Even as he proposed the negative phraseology, Pinkney gave voice to an affirmative purpose which all the evidence suggests was embraced by the Convention. John Rutledge was for making habeas corpus "inviolable", and three states joined him in a vote to that effect. No one dissented from the proposition that the writ should be routinely available. The negative phraseology was, it is safe to say, only a circumlocution to propose a suspending power in the least offensive way. And the changes wrought in Pinkney's original proposal were for the purpose of supplying an even stronger guarantee than he had at first in mind, the strongest guarantee consistent with a power of self-preservation.[24]

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23. In the ratifying conventions, the only serious complaint with the Convention's draft was that it admitted the possibility of suspension. See note 18 *supra*.

As to the effect of the habeas corpus clause there are cryptic, yet noteworthy, expressions in the conventions from James Wilson and Alexander Hamilton indicating their belief that the Constitution itself had provided for habeas corpus without any necessary resort to legislation. In the course of a speech of several days duration to the Pennsylvania Convention, Wilson undertook to explain why there was no bill of rights. His main point was that it was impractical:

> Enumerate all the rights of men! I am sure, sir, that no gentleman in the late Convention would have attempted such a thing. . . .
>
> . . . .
>
> . . . But this subject will be more properly discussed when we come to consider the FORM of government itself; [*i.e.*, its federal quality and the separation of powers?] and then I mean to show the reason why the right of *habeas corpus* WAS SECURED by a particular provision in its favor. 2 ELLIOT'S DEBATES 454-55 (2d ed. 1836) (original in lower case).

Unfortunately, Wilson did not keep his promise.

In *The Federalist* Hamilton evidently considered that habeas corpus had been established as surely as ex post facto laws had been nullified. He wrote: "The establishment of the writ of *habeas corpus*, the prohibition of ex post facto laws . . . are perhaps greater securities to liberty and republicanism than any [the New York Constitution] contains." THE FEDERALIST No. 84. In another place he even speaks of "the *habeas corpus* act as if the Constitution was to continue it in operation. THE FEDERALIST No. 83. He was, of course, referring to the English Act of 1679, 31 Car. 2, c. 2. See the remark of Luther Martin quoted in note 25 *infra*.

24. One commentator has suggested that the negative wording of the habeas clause implies a purpose in the Convention merely to give assuranee that Congress would not prevent state courts from making the writ available rather than a purpose to make the writ available. Collings, *supra* note 15, at 344, 351 (1952). Pondering and finally rejecting this view, the most recent commentary says that the clause "is apparently directed to federal government action somehow destructive of a judieial power neither defined nor in terms compelled." The commentary argues that the negative form was the result of the prevailing view among the framers rendering

Madison's record also supplies a justification for holding the habeas clause to be a grant of power to suspend. Without definitely identifying the grantee, the clause grants power to suspend the privilege on certain occasions. Unless the clause be so regarded, the vote of the three states against any power to suspend loses all meaning. Why vote against the suspension member of the clause if suspension were to be permitted by some other provision of the Constitution irrespective of the outcome of the vote?[25]

The Madison record is suggestive in another particular. There is perhaps more significance than has yet been indicated in the clear picture it gives of the Convention's abandonment of Pinkney's

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"superfluous positive guarantees of personal rights." This philosophy, it is said, moved the framers to "prevent the federal government from imposing severe restraints upon individuals without opportunity for collateral judicial review." Accordingly, the commentary concludes: "A purposive analysis, then, supports a constitutional requirement that there be *some* court with habeas jurisdiction over federal prisoners." *Developments in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1267 (1970) [hereinafter cited as *Developments*].

25. Edmund Randolph, in the Virginia Convention, attributed the suspension power to a power to "regulate courts." 3 ELLIOT'S DEBATES 464 (2d ed. 1836). But in Maryland, Luther Martin pointedly involved the habeas clause. "By the next paragraph, [indicating the habeas clause] the general government is to have a *power* of *suspending* the *habeas corpus act*, in cases of *rebellion* or *invasion*." 3 M. FARRAND, *supra* note 18, at 213.

Chief Justice Taney also attributed the suspending power to the babeas clause: "The clause in the Constitution which authorizes the suspension of the writ of habeas corpus, is in the 9th section of the first article." *Ex parte* Merryman, 17 F. Cas. 144, 148 (No. 9,487) (C.C.D. Md. 1861). Horace Binney argued the question exhaustively. BINNEY 11 1-38. His principal reliance, other than Martin and the point made in the text concerning a meaningful interpretation of tbe vote against suspension, was that no other clause of the Constitution was a likely source.

Without regard to the witness of Martin or the authority of Taney, it has been ventured that the source of the suspension power "might not" be the habeas clause and that it "might" be derived from some unspecified article I "war powers" and the necessary and proper clause. *Developments* 1267-68. Responding to a comparable if less timid suggestion, Horace Binney remarked:

> It is impossible to treat this argument seriously. The writer has transcribed nearly half the express powers of Congress, and left his readers a perfectly uncontrolled liberty to select one or another, or half a dozen, without the least influence from himself, or an intimation of the slightest preference on his part for one more than for another. Nay, he does not give the least hint of the nature or mode of application of the incidental or implied power, which, according to his notion, arises from any one of these express powers, to suspend the Writ of Habeas Corpus. He names eight express powers, and there are but eighteen in the Eighth Section; and it is true to the very letter, that the member of the Philadelphia Bar neither makes a choice himself, nor writes a word to influence the choice, of one rather than another of them. He contents himself with saying, "that there are such grants of power, in language amply sufficient to vest discretion on the subject-matter in Congress, we thiak may be safely asserted by any one reading the clauses conferring legislative power in the several particulars we have recited above." This is not argument, but dogmatism. BINNEY II 35.

specific reference to Congress.[26] Why was the reference to Congress abandoned? While one cannot be certain, arguably the Convention contemplated no necessary role for Congress in respect to habeas corpus. This argument gains force when the Convention's final conclusion concerning when suspension was to be permitted, "when in Cases of Rebellion or Invasion the Public Safety may require it," is compared to Pinkney's, "most urgent and pressing occasions." Pinkney's formula obviously required a very considerable, essentially legislative elaboration before it could be made effective; therefore, Congress was brought into the picture. The Convention in its formula had arguably done all that a legislature necessarily had to do, and therefore a reference to Congress was omitted. It had supplied all the detail which a legislature might supply; it had performed the essential tasks that a legislature was competent to perform. The courts could do the rest.

Beguiled by a supposed analogy to the English practice of Parliamentary suspension, some writers have insisted that the

26. This becomes all the more striking when the habeas clause is compared to its immediate predecessor in section 9: "The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the *Congress* prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person." U.S. CONST. art. 1, § 9, cl. 1 (emphasis added).

Examination of the remainder of section 9 shows that while most of its prohibitions are directed to Congress, one of the prohibitions is a restraint on the Executive: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." *Id.* cl. 7. Another is addressed to all branches of the government: "[N]o Person holding any Office of Profit or Trust . . . shall . . . accept of any present, Emolument, Office, or Title of any kind whatever, from any King, Prince, or foreign State." *Id.* cl. 8. One would think that the foregoing is sufficient to refute an argument, based merely on the position of the clause, that it is addressed only to Congress. For an expression of the position argument, see *Developments* 1264.

Of all the clauses in section 9, the habeas clause alone raises doubts as to the governmental branch immediately addressed. It could well have been the habeas clause that its author, Gouverneur Morris, had in mind when he wrote Timothy Pickering in 1814:

> But, my dear sir, what ean a history of the Constitution avail, towards interpreting its provisions? This must he done by comparing the plain import of the words with the general tenor and object of the instrument. That instrument was written by the fingers which write this letter.
>
> Having rejected redundant and equivocal terms, I believe it to be as clear as our language would permit, *excepting, nevertheless, a part of what relates to the Judiciary.* On that subject, conflicting opinions had been maintained with so much professional astuteness, that it became necessary to select phrases, which, expressing my own notions, wonld not alarm others, nor shock their self-love; and, to the best of my recollection, this was the only part which passed without cavil. *Quoted in* BINNEY III 21.

suspension power lies with Congress.[27] The analogy is inapt, as Horace Binney showed.[28] Under the English Constitution, the only thing that can halt the operation of an act of Parliament is a subsequent act of Parliament. If England's Habeas Corpus Act is to be deprived of effect, the only possible recourse is to Parliament. But our Constitution proceeds on a different principle. There is no necessity for Congress to act when the Constitution itself has precisely laid down the occasions when a suspension is permissible. All that remains to be done is to execute the power that the Constitution has granted. And for this task, Congress lacks institutional capacity. All that it could ever do, had it been granted the power, is merely to *authorize* a suspension.

Citing the Convention's rejection of an explicitly mentioned role for Congress and the marked refinement of its final draft of the habeas clause, Binney theorized that the Constitution, rather than an act of Congress, supplied the apt analogy to the English practice of utilizing an act of Parliament in suspension cases. As he put it, "the Constitution . . . stands in the place of the English Act of Parliament. It ordains the suspension in the conditioned cases . . . as Parliament does from time to time. Neither is mandatory in suspending, but only authoritative."[29]

"Authoritative" of what? Binney's response was *suspension itself,* not the intermediate power of *authorizing* a suspension by somebody else. Parliament attempted no more in suspension cases, leaving it to the Crown to determine if the exigencies of the situation required the execution of the granted power.[30] A year after Binney

27. J. BULLIT, A REVIEW OF MR. BINNEY'S PAMPHLET 47 (1862); *Developments* 1264. The latter also relies on the fact that suspension in Massachusetts during Shays' Rebellion was by legislative act, citing ch. 41, [1786]Mass. Acts & Laws 102. But this commentary neglects to explain that at that time, the Massachusetts Constitution stipulated, as the U.S. Constitution does not, that suspension was to be "by the legislature." MASS. CONST. ch. VI, art. VII (1780). 1 B. POORE, THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE UNITED STATES 972 (1877).

28. BINNEY I 1-24.

29. *Id.* at 51-52.

30. *Id.* Parliament, according to Binney, typically provided in suspension cases that "all or any persons that *are or shall* be in prison within that part of the United Kingdom called Great Britain, at or upon the day on which this Act shall receive his Majesty's Royal assent, *or after,* by warrant of his said Majesty's most honorable Privy Council . . . for high treason, suspicion of high treason, or treasonable practices . . . may be detained in safe custody without bail or mainprise . . ." BINNEY II, 17. *See, e.g.,* An Act to Empower His Majesty to Secure and detain such Persons as His Majesty shall suspect are conspiring against His Person and Government,

wrote, the Act of March 3, 1863, appeared to confirm his analysis. It declared "[t]hat, 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. . . ."[31] If one asks what this sentence added beyond what the express words of the Constitution had already accomplished, it seems that the answer can only be: an identification of the suspending power. But Congress has nowhere been authorized to make such an identification. Indeed, one could contend that such an identification could appropriately be made only by the Constitution itself.

One further item from the record of the Convention requires examination if the habeas problem is to be seen as the Convention saw it. On August 28, when the habeas clause assumed substantially its final form, the Convention had already firmly fixed on the notion that lower federal courts were to be optional with Congress. This notion had been embraced as early as June 5, affirmed on July 18, and

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57 Geo. 3, c. 3 (1817).

While I am not principally concerned with locating the suspending power, it may be useful to point out that it is fairly clear that the courts cannot be deprived of some part in the process: "The suspension of the privilege of the writ of *habeas corpus* does not suspend the writ itself." *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 130 (1866); BINNEY 111 69; *Developments* 1265. Binney explains:

> Supposing the power of suspending the privilege of the Writ of Habeas Corpus, to be what I have described it as being, and exercisable in the manner described, then it must follow, that the Judicial power cannot be altogether displaced or superseded by it, though it may be so far abridged as only to maintain the rights of persons under a limitation, which confines the Judiciary to the observation of the forms of things rather than of their substance. Nevertheless, those forms are of infinite value, as they exclude dangerous substances, though it may be uncertain what they precisely include; and they decidedly benefit the people at large, though they may not much benefit the prisoner himself. Within the more limited area, I am not able to perceive that the Judicial authorities are not as competent as in other cases, so far as to inquire if the power has been apparently pursued, and to relieve if it has not. On the contrary, I submit with some confidence, that the Judicial Department is competent to inquire into the exercise of the power, and to see that the power has *ostensibly* been exercised within its prescribed limits, it if has any; not indeed to examine into the particular grounds of the suspicion of treasonable design which may be charged, and to judge whether the imputation upon the party imprisoned be well or ill founded in fact or probability; nothing like this; but to know whether the limitations of the power have been ostensibly observed in the execution of the power. BINNEY III 69.

31. Act of March 3, 1863, ch. 81, § 1, 12 Stat. 755. This statute was considered by Congress for nearly two years. For a full review of the legislative history, see Sellery, *Lincoln's Suspension of Habeas Corpus as Viewed by Congress*, 1 U. WIS. HISTORY BULL. 213 (1907).

reaffirmed in the report of the Committee on Detail on August 6.[32] Accordingly, the interpretation of the habeas clause must take full account of the Convention's advertence to the possibility that there would be no lower federal courts. Given this possibility, the contention that the habeas clause directly commands courts to make habeas available is not weakened by the thought that the cooperation of Congress in constituting federal courts was required in any event if habeas was to be available. This cooperation was not required, nor even clearly provided for, and the Convention cannot be held to have depended on Congress for the realization of its hopes in respect to habeas corpus. The simplest view is that the Convention dealt with the possibility of no lower federal courts by directly commanding the courts, federal and state alike, to make the privilege of the writ routinely available.[33]

This view was to some extent confirmed by Edmund Randolph, the only member of the Convention who ever spoke to the point. In 1792 Randolph argued before the Supreme Court the case of *Chisholm v. Georgia*[34] which determined the amenability of a state to suit brought against it in a federal court by a citizen of another state. In urging that jurisdiction be sustained, Randolph cited the Constitution and the "various actions of *states* which are to be anulled."[35] His very first example of a *state* action to be anulled was a constitutionally impermissible suspension of the habeas privilege. Obviously considering the habeas clause as binding on the *states*, he treated it as being of the same genre as the bill of attainder clause, the

32. 5 ELLIOT'S DEBATES 159-60, 331-32, 376-81 (2d ed. 1836). The notion is reflected in the Constitution. U.S. CONST. art. 3, § 1.

33. My notion is that the "obligation" theory is demonstrably untenable if Congress is without power to impose a jurisdiction on the state courts. In the event of a congressional decision to have no lower federal courts, it could be contended by the advocates of the "obligation" theory that the Constitution then contemplates that Congress will discharge its obligation by commanding the state courts to make the writ available. Congressional authority to impose this jurisdiction on the state court could be argued to be a necessary implication of the choice left to Congress. It has also been suggested that the necessary and proper clause provides congressional power to impose jurisdiction on state courts. Sandalow, *Henry v. Mississippi and the Adequate State Ground: Proposals for a Revised Doctrine*, 1965 SUP. CT. REV. 187, 207, *See also* Testa v. Katt, 330 U.S. 386, 393 (1947). But the congressional power to impose a jurisdiction on the state courts has often been denied. *See, e.g.*, Brown v. Gerdes, 321 U.S. 178, 188-89 (1944) (Frankfurter, J., concurring); Kendall v. United States, 37 U.S. (12 Pet.) 524, 645 (1838) (Barbour, J., dissenting); Houston v. Moore, 18 U.S. (5 Wheat.) 1, 27 (1820).

34. 2 U.S. (2 Dall.) 419 (1793).

35. *Id.* at 421 (emphasis added).

ex post facto clause, the contract clause—indeed of the same genre as all the clauses in section 10 of article I, each of which is in terms directed to the states. His point was that while some impermissible state actions could be remedied without a suit against the state, others could not. His very first example of a remedy available (to the state's prisoner) not involving a suit against the state was the power of the courts, presumably state and federal alike, to issue the writ of habeas corpus.[36]

For present purposes, the argument to be drawn from the proceedings of the Philadelphia Convention comes to this: The Convention had the firm purpose of guaranteeing the routine availability of the privilege of the writ. Given such a purpose, the surest method of guaranteeing its achievement would be a recognition of a power in the only officials necessarily involved. Nothing from Philadelphia refutes the conclusion that this is exactly what the Convention did. It did so in a clause originating in the Convention's consideration of the judiciary—a clause complete in itself with reference to Congress carefully deleted. Again, the clause is in some respects a grant of power.[37] Moreover, the Convention had fully in mind the possibility that there would be no lower federal courts. Under the circumstances, a direct grant of power to whatever superior courts that might exist is the most reasonable explanation of the available data.[38]

II

My principal reliance in establishing my thesis is, as I have said, the near certainty that the Judiciary Act of 1789[39] did *not* confer on the federal courts jurisdiction to award the writ of habeas corpus *ad subjiciendum*.[40] The uncritical acceptance of Marshall's conclusion in

36. "In our solicitude for a remedy, we meet with no difficulty, where the conduct of a state can be animadverted on, through the medium of an individual. For instance, without suing a state, a person arrested may be liberated by *habeas corpus* . . . ." *Id.* at 422.

37. See note 25 *supra*.

38. That the Convention did not speak with greater clarity may perhaps be explained by the Convention's preoccupation with the suspension problem toward which opaqueness may well have been deliberate. Two other contradictory explanations might be suggested. On the one hand, commanding the state courts to respect habeas corpus may have been a matter of too great delicacy to bear explicit statement. On the other, no superior court known to the framers had ever denied a habeas jurisdiction.

39. Ch. 20, 1 Stat. 73.

40. The term "habeas corpus" normally refers to the *ad subjiciendum* variety of the writ, that is, the writ "directed to the person detaining another, and commanding him to produce the

Ex parte *Bollman* that the act did confer this jurisdiction has enfeebled inquiry in respect to the habeas clause ever since Marshall spoke.[41] But once Marshall's conclusion is abandoned, as it must be, it can be seen that after 1789 the federal courts either had no habeas jurisdiction, or they had such a jurisdiction independent of statute. A contention that the first alternative should be accepted can be dismissed as frivolous, since it is abundantly clear that the jurisdiction was assumed by Congress[42] and exercised by the courts[43] in the years before 1807 when Ex parte *Bollman* was decided. The problem is the source of that jurisdiction.

Those who contend that a statute was the jurisdictional source confidently point to the act of 1789.[44] They argue that the 1789 Congress evidently thought that legislation was necessary, and they have drawn immense comfort from Marshall's assertion that the Constitution did no more than impose on Congress an "obligation" to make habeas corpus available.[45] Believing that their case is impregnable on the basis of the specifics of the 1789 legislation and its ensuing history, they point in particular to the provisions embraced in the Judiciary Act's section 14 which reads as follows:

> *And be it further enacted,* That all the beforementioned courts of the United States, shall have 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 colour 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.[46]

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body of the prisoner . . . ." 3 W. BLACKSTONE, COMMENTARIES *131. For a discussion of the other types of the writ, see 8 U.S. (4 Cranch) at 95-97, *citing* 3 W. BLACKSTONE, COMMENTARIES *129.

41. For perhaps the most recent example, see *Developments* 1263-74.

42. Act of April 4, 1800, ch. 19, § 38, 2 Stat. 32. For a discussion of this statute, see the text at note 165 *infra*.

43. *Ex parte* Burford, 7 U.S. (3 Cranch) 448 (1806); United States v. Hamilton, 3 U.S. (3 Dall.) 17 (1795).

44. *See, e.g.*, W. CHURCH, WRIT OF HABEAS CORPUS 37 (1884); R. HURD, WRIT OF HABEAS CORPUS 149 (1858); 114 CONG. REC. 13996-97 (1968) (remarks of Senator Ervin).

45. 8 U.S. (4 Cranch) at 95.

46. Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 81. I refer to this section so often that I would urge any reader who may be interested in finding out what this article has to say to arm himself with a copy of the section.

The opponents of my thesis contend that not only did Congress legislate but also that it legislated restrictively, citing Congress' failure to provide nearly so broad a habeas jurisdiction as it might have. They argue that habeas was not to issue from either courts or judges, as a general rule, unless the prisoner was held in custody or under the authority of the United States. This was Marshall's reading of section 14 in Ex parte *Bollman*,[47] and it has scarcely been questioned since. Accordingly, those who have followed Marshall have easily argued that when Congress in 1833 wanted to make federal habeas available to federal officials entrapped by state law, new legislation was necessary.[48] A similar experience, they contend, came in 1842 when Congress desired to protect foreign nationals detained by a state in violation of a treaty. Again, there was a fresh resort to legislation.[49] And finally, as if to put the matter beyond all dispute, we are reminded that it was only in 1867 during Reconstruction that federal habeas corpus became generally available to state prisoners.[50] "But before that time," says Senator Ervin, "from the time of the morning star hanging in glory to 1867 [the federal courts] had no such jurisdiction."[51]

For all its surface plausibility, this restrictive view of habeas availability in the federal courts after 1789 must be rejected. Its central premise that section 14 is a habeas jurisdiction grant to courts is demonstrably false. All that Congress was doing in section 14 as to courts was ratifying a court's power to employ habeas corpus and other writs in aid of jurisdiction elsewhere conferred. For justices and judges acting individually the concern was different and more was done. Power to issue writs of habeas corpus was conferred on them, and then limitations applicable solely to powers of the individual justices and judges were added. And we shall see that Marshall's holding and dicta in Ex parte *Bollman* are unsupported by him, and are, indeed, unsupportable.

Whatever one's views on these problems, even a casual reading of section 14 raises at least two questions which do not today have obvious answers. First, why should there be specific mention, not only of habeas corpus, but also, and in prior position at that, of scire

47. 8 U.S. (4 Cranch) at 99.
48. Act of March 2, 1833, ch. 57, § 7, 4 Stat. 634.
49. Act of August 29, 1842, ch. 257, 5 Stat. 539.
50. Act of February 5, 1867, ch. 27, 14 Stat. 385.
51. 114 CONG. REC. 13997 (1968).

facias?[52] Neither the much-copied English Habeas Corpus Act of 1679[53] nor any one of the state acts made any mention of scire facias.[54] While the most searching modern scholarship has discovered a tangential relationship between scire facias and habeas corpus in the 15th century,[55] any affinity between the two in the 18th century is not readily apparent. Blackstone does not connect the two, nor does Alexander Hamilton, although each discusses one writ or the other in considerable detail.[56] Second, why is there separate and markedly different treatment, under any reading of section 14, of courts on the one hand and individual justices and judges on the other?

When one considers section 14 in relation to its companion sections in the Judiciary Act of 1789, other questions arise. Side by side with section 14, section 13 also deals with writs. Section 13 declares that the Supreme Court "shall have power to issue writs of prohibition . . . and writs of *mandamus*."[57] Why this split treatment of the Supreme Court's writ power? Why talk in section 13 of the Supreme Court's power to issue writs of prohibition and mandamus and in section 14 of that same Court's power to issue the "writs of *scire facias, habeas corpus* and all other writs . . . ?"

Moreover, examining the 1789 Act in its entirety, what is the significance for the interpretation of section 14 of the arrangement of the Act's thirty-five sections? What meaning can be derived from their precise ordering and sequence? The first eight sections create, staff, and organize the various courts. Then, in ascending scale, the *jurisdiction* of the various courts is stipulated in the next five sections. With section 14, there is an abrupt change in terminology, and thereafter, in sections 15, 16, and 17, prescriptions are laid down for the courts to follow in the *exercise* of the jurisdiction previously conferred.[58] Section 15 states that it will be proper for courts to

52. For a discussion of scire facias, see the text accompanying notes 114-24 *infra*.

53. The Habeas Corpus Act of 1679, 31 Car. 2, c. 2.

54. On the early colonial and state statutory development, see Oaks, *supra* note 15, at 251-55.

55. Cohen, *Habeas Corpus Cum Causa—The Emergence of the Modern Writ—I*, 18 CAN. B. REV. 10, 15 (1940).

56. 3 W. BLACKSTONE, COMMENTARIES *129-37 (habeas corpus); A. HAMILTON, PRACTICAL PROCEEDINGS IN THE SUPREME COURT OF THE STATE OF NEW YORK 99-103 [printed in 1 J. GOEBEL, THE LAW PRACTICE OF ALEXANDER HAMILTON 101-03 (1964)] (scire facias).

57. Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 80.

58. Actually, the change is first introduced in section 13 as I shall elaborate below. In provisions that are undoubtedly grants of power in the most elemental sense, the terminology employed, except in cases of removal where the meaning is unmistakable, is that specific courts

shall have "cognizance" or "jurisdiction." Thus, the district courts are to have "*cognizance*" of crimes, "exclusive original *cognizance* of all civil causes of admiralty and maritime jurisdiction," "exclusive original *cognizance* of all seizures on land," "*cognizance* . . . of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States," "*cognizance* . . . of all suits at common law where the United States sue." "And shall also have *jurisdiction* exclusively of the courts of the several States, of all suits against consuls . . . ." *Id.* § 9 (emphasis added). The circuit courts are to have "*cognizance*" of diversity cases, "*cognizance*" of certain crimes and offenses, and "appellate *jurisdiction* from the district courts" in certain instances. *Id.* § 11 (emphasis added). The Supreme Court is given "exclusive *jurisdiction*" in civil suits where a state is a party with certain exceptions; exclusive "*jurisdiction*" of suits against ambassadors and concurrent "*jurisdiction*" of suits brought by them; and "appellate jurisdiction" from the circuit courts. *Id.* § 13 (emphasis added). At this point comes the change. The terminology no longer is of "cognizance" or "jurisdiction" but of "power." And the "power" wording continues in sections where clearly the Act is speaking not of competence but of propriety. See especially § 15 reproduced at note 59 *infra*.

The use of the terms "jurisdiction," "cognizance," and "power" in the two early Judiciary Acts was the subject of inconclusive comment in all three opinions in Kendall v. United States, 37 U.S. (12 Pet.) 522 (1838). For the Court, Mr. Justice Thompson remarked:

> Some criticisms have been made at the bar, between the use of the terms power and cognizance . . . . That there is a distinction, in some respects, eannot be doubted; and, generally speaking, the word "power" is used in reference to the means employed in carrying jurisdiction into execution. But it may well be doubted, whether any marked distinction is observed and kept up in our laws; so as in any measure to affect the construction of those laws. Power must include jurisdiction, which is generally used in reference to the exercise of that power in courts of justice. . . . *Id.* at 622-23.

Dissenting, Chief Justice Taney remarked:

> Much has been said about the meaning of the words "powers" and "cognisance" as used in these acts of Congress. These words are no doubt generally used in reference to courts of justice, as meaning the same thing . . . . But it is manifest, that they are not so used in the acts of Congress establishing the judicial system of the United States, and that the word "power" is employed to denote the process, the means, the modes of proceeding, which the courts are authorized to use in exercising their jurisdiction in the cases specially enumerated in the law as committed to their "cognisance." Thus, in the act of 1789, ch. 20, the 11th section specifically enumerates the cases, or subject-matter of which the circuit courts shall have "cognisance," and subsequent sections, under the name of "powers," describe the process, the means which the courts may employ in exercising their jurisdiction in the cases specified. *Id.* at 636.

Dissenting, Mr. Justice Barbour remarked:

> Again, the act of 1789, after defining the jurisdiction of the different courts in different sections, viz., that of the district courts in the 9th, that of the circuit courts, in the 11th, and that of the supreme court, in the 13th, together with the power to issue writs of prohibition and *mandamus*, proceeds, in subsequent sections, to give certain powers to all the courts of the United States. Thus, in the 14th, to issue writs of *scire facias, habeas corpus*, &c.; in the 15th, to require the production of books and writings; in the 17th, to grant new trials, to administer oaths, punish contempts, &c. It is thus apparent, that congress used the terms, "jurisdiction," and "powers," as being of different import. The sections giving jurisdiction describe the subject-matter, and the parties of which the courts may take cognisance; the sections giving powers, import authority to issue certain writs, and do certain acts incidentally becoming necessary in, and being auxiliary to, the exercise of their jurisdiction. In regard to all the powers in the 15th and 17th sections, this

compel the production of documents;[59] section 16 explains that courts should not grant equitable relief when there is an adequate remedy at law;[60] and section 17 tells when it is proper for courts to grant new trials.[61] To use the terminology of the space age, which sectional grouping does section 14 more easily "dock" with, the jurisdictional group immediately preceding it or the prescriptive group immediately following it?

Finally, what insight can be gathered from prior and subsequent legislation, particularly the Habeas Corpus Act of 1679[62] and the Judiciary Act of 1801?[63] The prestige of the 1679 Act was so high that several states enacted almost word-for-word copies and others almost certainly regarded it as a part of their common law.[64] It was provoked

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is apparent beyond all doubt, as every power given in both those sections, necessarily presupposes that it is to be exercised in a suit actually before them, except the last in the 17th section, and that is clearly an incidental one, it being a power "to make and establish all necessary rules for the orderly conducting business in the said courts." &c. *Id.* at 648-49.

59. Judiciary Act of 1789, ch. 20, § 15, 1 Stat. 82. The section in its entirety reads:

SEC. 15. *And be it further enacted*, That all the said courts of the United States, shall have power in the trial of actions at law, on motion and due notice thereof being given, to require the parties to produce books or writings in their possession or power, which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery; and if a plaintiff shall fail to comply with such order, to produce books or writings, it shall be lawful for the courts respectively, on motion, to give the like judgment for the defendant as in cases of nonsuit; and if a defendant shall fail to comply with such order, to produce books or writings, it shall be lawful for the courts respectively on motion as aforesaid, to give judgment against him or her by default.

60. *Id.* § 16. The section in its entirety reads:

SEC. 16. *And be it further enacted*, That suits in equity shall not be sustained in either of the courts of the United States, in any case where plain, adequate and complete remedy may be had at law.

61. *Id.* § 17. The section in its entirety reads:

SEC. 17. *And be it further enacted*, That all the said courts of the United States shall have power to grant new trials, in cases where there has been a trial by jury for reasons for which new trials have usually been granted in the courts of law; and shall have power to impose and administer all necessary oaths or affirmations, and to punish by fine or imprisonment, at the discretion of said courts, all contempts of authority in any cause or hearing before the same; and to make and establish all necessary rules for the orderly conducting of business in the said courts, provided such rules are not repugnant to the laws of the United States.

62. 31 Car. 2, c. 2.

63. Ch. 4, 2 Stat. 89 (repealed by Act of April 29, 1801, ch. 31, 2 Stat. 122).

64. In respect to statutory enactment, see Act of March 16, 1785, 1 LAWS OF MASS. 1780-1800, at 236 (1801). In Georgia, art. LX of the Constitution of 1777 declared: "The principles of the *habeas-corpus* act shall be a part of this constitution." I B. POORE, *supra* note 27, at 383.

by a problem highly similar to that facing the Congress of 1789—settling the habeas power of individual justices and judges.[65] As for the Judiciary Act of 1801, its chief interest is that it treated in one section the Supreme Court's writ power and in an altogether separate section the habeas power of individual justices and judges.[66] Both of these historic enactments illumine the meaning of section 14.

III

The problems raised by section 14 did not receive anything approaching a full-scale judicial treatment until the case of Ex parte *Bollman*[67] in 1807. Eighteen eventful years had passed since its enactment. John Marshall had become Chief Justice; the political control of the Government had shifted from the Federalists to Jefferson and his Republicans; and *Marbury v. Madison*[68] had declared not only that an act of Congress unauthorized by the Court's reading of the Constitution would be treated as a nullity but also that Congress could not add to the original jurisdiction of the Supreme Court beyond the listing in article III, that is, cases involving Ambassadors and other public ministers and cases in which a state is a party.

The *Bollman* case grew out of Aaron Burr's strange doings in the West. On January 22, 1807, President Jefferson informed Congress that one of Burr's alleged conspirators had already been released on habeas corpus and that two more of his confederates were on their way to Washington in custody.[69] The Senate took the hint and the next day in secret session agreed to a bill purportedly suspending habeas corpus for a period of three months.[70] Moreover, the Senate

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The English Act was reproduced in its entirety in W. SCHLEY, A DIGEST OF THE ENGLISH STATUTES OF FORCE IN THE STATE OF GEORGIA 262 (1826). Apparently the only legislative enactment apart from the Constitution giving force to the English Act was the Act of February 25, 1784: "the common laws of England, and such of the statute laws as were usually in force in the said province (Georgia) on the fourteenth day of May, 1776 . . . shall be in force until repealed." *Id.* at xx-xxi.

65. See the text at note 151 *infra*.

66. Judiciary Act of 1801, ch. 4, §§ 2, 30, 2 Stat. 89, 98 (repealed by Act of April 29, 1801, ch. 31, 2 Stat. 122).

67. 8 U.S. (4 Cranch) 75 (1807).

68. 5 U.S. (1 Cranch) 137 (1803).

69. 3 BENTON'S ABRIDGEMENT OF THE DEBATES OF CONGRESS FROM 1789 TO 1856 AT 490 (1857).

70. *Id.* The proposed statute read:

> That in all cases, where any person or persons, charged on oath with treason, misprision

adopted the unusual expedient of asking the House to go immediately into secret session and add its concurrence with all possible speed.[71] After heated debate, the House voted overwhelmingly on January 26, to "reject" the bill, that is, to treat it as one unworthy of consideration.[72]

When the prisoners reached Washington, they sought their release in the circuit court, but that court, in a partisan division and an atmosphere of the most intense excitement, committed the prisoners for trial.[73] A writ of error from the Supreme Court to review the circuit court's action was plainly barred by the Judiciary Act. There could be no such writ in criminal cases. Accordingly, counsel for the prisoners invoked the Supreme Court's habeas corpus jurisdiction early in February. Immediately, Justices Johnson and Chase voiced doubts that the Supreme Court had any such jurisdiction.[74] As a

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of treason, or other high crime or misdemeanor, endangering the peace, safety, or neutrality of the United States, have been or shall be arrested or imprisoned, by virtue of any warrant or authority of the President of the United States, or from the Chief Executive Magistrate of any State or Territorial Government, or from any person acting under the direction or authority of the President of the United States, the privilege of the writ of *habeas corpus* shall be, and the same hereby is suspended, for and during the term of three months from and after the passage of this act, and no longer. *Id.* at 504.

At least two comments are appropriate: (1) The draftsman of this extraordinary proposal did not seek to limit its effect to only the federal courts; (2) the draftsman, in so far as he considered the Constitution at all, evidently thought that a state prisoner, one held by the authority of a state's "Chief Executive Magistrate," would have habeas protection in the absence of the proposed statute.

71. *Id.* at 504.

72. *Id.* at 515. The vote was 113 to 19. Some weeks later, after the opinion in Ex parte *Bollman* came down, there was further debate in the House of Representatives on habeas corpus. It was provoked by a resolution declaring that it was "expedient to make further provision . . . for securing the privilege of the writ of habeas corpus . . . ." 16 ANNALS OF CONGRESS 502 (1807). In the course of the debate, various theories were advanced in respect to the habeas clause. John G. Jackson, a Representative from Virginia and the brother-in-law of James Madison, advanced the thesis urged in this article. *Id.* at 558.

73. United States v. Bollman, 24 F. Cas. 1189 (No. 14622) (C.C.D.C. 1807). For full accounts, see 3 A. BEVERIDGE, THE LIFE OF JOHN MARSHALL, 274-357 (1919); Oaks, *The "Original" Writ of Habeas Corpus in the Supreme Court*, 1962 SUP. CT. REV. 153, 159-61; 1 C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 301-15 (1928).

74. Chase, J., . . . wished the motion might lay [sic] over to the next day. He was not prepared to give an opinion. He doubted the jurisdiction of this court to issue a *habeas corpus* in any case.

Johnson, J., doubted whether the power given by the act of Congress . . . of issuing the writ of *habeas corpus*, was not intended as a mere auxiliary power to enable courts to exercise some other jurisdiction given by law. He intimated an opinion, that either of the judges, at his chambers might issue the writ, although the court collectively could not. 8 U.S. (4 Cranch) at 76.

result, the jurisdiction question was set for preliminary argument and determination.[75] Interest in the argument that followed was at fever pitch, almost the whole of Congress being in attendance. The intensity of feeling was reflected in the words of counsel:[76] The justices were unblushingly reminded that they were not to yield to the prevailing "passions and prejudices" or to "external influences." They were to recall *Hamilton's* case,[77] decided in 1795 "when little progress had been made in the growth of party passions and interests," and *Burford's*[78] as well, a case "wholly unconnected with political considerations or party feelings."[79]

The Supreme Court had indeed on the two prior occasions exercised a habeas jurisdiction. In *Hamilton,*[80] the prisoner had been arrested for high treason, a crime punishable by death, and thus an offense where bail was discretionary under section 33 of the Judiciary Act.[81] He had sought admission to bail by a district judge and had been denied. In the Supreme Court, Government counsel did not argue that the Court was without power to issue the writ but were content with a reminder to the Court that it had no review power in criminal cases, and, as for habeas, the Court should deny it because the Supreme Court, it was said, had only "concurrent" authority with the district judge. The Court and the judge alike were governed by a single phrase from section 33. One habeas authority should not revise the determination of another unless "new matter" was adduced. This was all. As for the Supreme Court's power to issue the

75. *Id.*

76. *Id.* at 87. Counsel for the petitioners was Robert Goodloe Harper, assisted by Charles Lee and Luther Martin. Justice Johnson in his opinion took pointed exception to the "very unnecessary display of energy and pathos" in the argument, as well as to the "animated address calculated to enlist the passions or prejudices of an audience." *Id.* at 103, 107.

77. United States v. Hamilton, 3 U.S. (3 Dall.) 17 (1795).

78. *Ex parte* Burford, 7 U.S. (3 Cranch) 448 (1806).

79. 8 U.S. (4 Cranch) at 88.

80. 3 U.S. (3 Dall.) 17.

81. Section 33 provided in part:

> *And be it further enacted*, That for any crime or offence against the United States, the offender may, by any justice or judge of the United States . . . be arrested, and imprisoned or bailed, as the case may be, for trial before such court of the United States as by this act has cognizance of the offence. . . . And upon all arrests in criminal cases, bail shall be admitted, except where the punishment may be death, in which cases it shall not be admitted but by the supreme or a circuit court, or by a justice of the supreme court, or a judge of a district court, who shall exercise their discretion therein, regarding the nature and circumstances of the offence, and of the evidence, and the usages of law. Judiciary Act of 1789, ch. 20, § 33, 1 Stat. 91.

writ, there was an easy assumption by counsel and Court alike that it did exist.[82]

By the time of *Burford's* case[83] in 1806, *Marbury v. Madison*[84] had been decided, and there was a recognition in argument that the *Marbury* holding, that Congress could not add to the original jurisdiction beyond that stipulated in article III of the Constitution, posed an embarrassing problem.[85] Habeas jurisdiction was certainly exercised in original proceedings. After all, the district court had habeas jurisdiction, and it surely was not in any sense an appellate court. Moreover, a court in habeas could not function as a reviewing court correcting an erroneous judgment but was limited to an inquiry into the legality of commitment.[86] In *Burford,* counsel informed the Court that he was well aware of the holding in *Marbury,* but *Marbury,* he said, involved only a prerogative writ, a writ which issued at the discretion of the court. It was one thing, he continued, to say as the Court had said in *Marbury* that the Supreme Court cannot issue a prerogative writ such as mandamus in its original jurisdiction. It was quite another to say that it cannot issue a writ commanded by the Constitution. Counsel maintained that habeas corpus was not a prerogative writ but by the Constitution was *"a writ of right and cannot be refused."*[87] The *Marbury* doctrine was thus confronted with the Constitution's habeas corpus clause. In the *Buford* opinion, there was no attempt at a resolution of the problem nor was any attention paid to a suggestion of counsel that the embarrassment of *Marbury* could be removed if only the Supreme Court's jurisdiction could somehow be termed appellate.[88] A divided Court sustained the jurisdiction. All that Marshall tells us is that

> [t]here is some obscurity in the act of congress, and some doubts were entertained by the court as to the construction of the constitution. The court, however, in favor of liberty, was willing to grant the *habeas corpus*. But the case of *United States v. Hamilton*, 3 Dall. 17, is decisive. It was there determined, that this court could grant a habeas corpus . . . .[89]

The major problem facing the Court in *Bollman* can now be seen

82. 3 U.S. (3 Dall.) at 17.
83. *Ex parte* Burford, 7 U.S. (3 Cranch) 448 (1806).
84. 5 U.S. (1 Cranch) 137 (1803).
85. 7 U.S. (3 Cranch) at 448.
86. *In re* Metzger, 46 U.S. (5 How.) 176 (1847); Oaks, *supra* note 73, at 178.
87. 7 U.S. (3 Cranch) at 448.
88. *Id.* at 449.
89. *Id.*

to be the reconciliation of *Hamilton* and *Burford* on the one hand and *Marbury* on the other. *Hamilton* and *Burford* had established that the Supreme Court had jurisdiction to issue the writ. Indeed, they seemed to have established that the Court had original jurisdiction for there was for review in *Hamilton* no action by a court at all but only the ruling of a judge in chambers. Moreover, the Court had appeared to act just as any other habeas tribunal, where undeniably the jurisdiction exercised was original. But there was *Marbury,* and come what may, it must be left intact, especially in its holding that the Court could not exercise an original jurisdiction beyond that listed in article III. Marshall's opinion in *Bollman* sought a solution by characterizing the habeas jurisdiction not as original, but as appellate. He argued that the Court was being asked to revise "a decision of an inferior court, by which a citizen has been committed to gaol." "The decision," said Marshall, "that the individual shall be imprisoned, must always precede the application for a writ of *habeas corpus,* and this must always be for the purpose of revising that decision, and therefore, appellate in its nature."[90] To this, Marshall added the wholly feckless claim that "this point is also decided in *Hamilton's Case* . . . ."[91]

90. 8 U.S. (4 Cranch) at 101.

91. *Id.* In the *Hamilton* case there is, of course, not a single word indicating that the jurisdiction exercised was appellate. On the propriety of the jurisdiction in *Hamilton*, Marshall was repudiated by the Supreme Court in *In re* Metzger, 46 U.S. (5 How.) 176 (1847), where a district judge, at chambers, had committed Metzger to custody for extradition to France. The Court denied Metzger's habeas petition for want of appellate jurisdiction. *Id.* at 191. The Court in the *Metzger* case did attempt to reconcile *Bollman* and *Marbury* by pointing out that in *Bollman* a decision of the circuit court was considered for revision while in *Marbury*, there was no court decision for the Supreme Court to revise. The Court's own words show how uncomfortable it felt with Marshall's doctrine:

> It may be admitted that there is some refinement in denominating that an appellate power which is exercised through the instrumentality of a writ of *habeas corpus*. In this form nothing more can be examined into than the legality of the commitment. However erroneous the judgment of the court may be, either in a civil or a criminal case, if it had jurisdiction, and the defendant had been duly committed, under an execution or sentence, he cannot be discharged by this writ. In criminal cases, this court have no revisory power over the decisions of the Circuit Court; and yet as appears from the cases cited [Ex parte *Bollman* and its compansion case, Ex parte *Swartwout*], "the cause of commitment" in that court may be examined in this, on a writ of *habeas corpus*. And this is done by the exercise of an appellate power,—a power to inquire merely into the legality of the imprisonment, but not to correct the errors of the judgment of the Circuit Court. This does not conflict with the principles laid down in *Marbury v. Madison,* 1 Cranch, 137. In that case, the court refused to exercise an original jurisdiction by issuing a mandamus to the Secretary of State; and they held that "Congress have not power to give original jurisdiction to the Supreme Court in other cases than those described in the constitution." *Id.* at 190-91.

The other problems presented in *Bollman* were, with a single exception, disposed of in the same unargued, assertive, and summary fashion. Evidence of the haste with which the opinion was prepared is everywhere.[92] To the argument that all superior courts of record had a common law habeas jurisdiction, whether or not they had a criminal jurisdiction, Marshall curtly rejoined that there was a distinction between courts originating in the common law and courts created by statute, and that "as the reasoning has been repeatedly given by this court," the matter would not be pursued further.[93] Where this reasoning had been given Marshall was not able to say, not because he had no time to collect the citations, but because there were none to collect.[94] Marshall similarly declined to discuss the question whether one habeas court could properly revise the determination of another, saying that he could add nothing to what was said in the argument.[95] And as for the problems raised by the habeas corpus clause of the Constitution itself, quick, self-abasing deference to Congress was the style of the day. The suspending power, which later excited volumes of exegesis,[96] was handed to Congress in a single sentence.[97] Just as

92. The opinion was announced on Friday, February 13, not forty-eight hours after the conclusion of a lengthy argument on Wednesday. We know that Marshall presided at a regular session of the Court on Thursday. National Intelligencer, Feb. 13, 1807, at 3, col. 3.

93. 8 U.S. (4 Cranch) at 93.

94. The fullest statement theretofore given was that of Mr. Justice Chase speaking only for himself in Turner v. Bank of North America, 4 U.S. (4 Dall.) 8 (1799). He 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 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. *Id.* at 10 n. (a) (emphasis added).

For a case upholding a state supreme court's common law power to issue the writ, see *In re* Bryan, 60 N.C. 1 (1863).

95. 8 U.S. (4 Cranch) 98, 100. Hurd indicates that it was somewhat uncertain just what effect one habeas court would accord the decision of another. R. HURD, *supra* note 44, at 568. *See* Fay v. Noia, 372 U.S. 391, 424 (1963); *Ex parte* Lawrence, 14 Pa. (5 Binn.) 304 (1812); 28 U.S.C. § 2244 (1964).

96. *See, e.g.*, BINNEY I, II, & III; J. RANDALL, CONSTITUTIONAL PROBLEMS UNDER LINCOLN (1926); Sellery, *supra* note 31.

97. "If at any time the public safety should require the suspension of the powers vested by this act in the courts of the United States, it is for the legislature to say so." 8 U.S. (4 Cranch) at 101. Marshall knew, of course, that Congress three weeks before had refused to suspend the privilege.

swiftly, Marshall reduced the positive force of the Constitutional command that "the privilege of the writ of habeas corpus shall not be suspended," to a hortatory preachment to Congress for that body to honor as it pleased. To sustain this conclusion, all that was necessary was a few words of tribute to the Great Writ and a decisive misquotation or rather amendment of the Constitution on the spot so that it read: "the privilege of the writ of habeas corpus should [*sic*] not be suspended . . . ."[98]

The only problem with which Marshall dealt in any depth in *Bollman* was whether section 14's "necessary for the exercise of their respective jurisdictions" language was a limitation on the power of *courts* to grant habeas corpus.[99] If it was, given Marshall's ruling assumption,[100] then the Supreme Court could have a habeas jurisdiction only in the rare case of original jurisdiction exercised in a criminal proceeding involving an ambassador.[101] But Marshall concluded that the limiting language did not apply to habeas corpus. Disdaining reliance on a strict grammatical construction although it tended to support his conclusion, Marshall's first thrust was the sound observation that to read the limiting language as applicable to courts would result in the individual justices having greater power than the Court itself, as plainly this particular limiting language was not applicable to the individual justices. This, of course, would be "strange," "not consistent with the genius of our legislation, nor with the course of our judicial proceedings."[102] Moreover, since the language had equal applicability to all courts, not merely the Supreme Court, all would be affected. A district judge would be in the curious

98. *Id.* at 95. A comparable instance of the Court's decisively misquoting the Constitution with all the paraphernalia of quotation marks and citation is unknown to this writer. Perhaps the closest to it is Mr. Justice Day's interpolation of "expressly" into the 10th Amendment. Hammer v. Dagenhart, 247 U.S. 251, 275 (1918). But Mr. Justice Day did eschew quotation marks and citation to the Constitution.

99. Marshall states the problem as follows:

> The only doubt of which this section can be susceptible is, whether the restrictive words of the first sentence limit the power to the award of such writs of *habeas corpus* as are necessary to enable the courts of the United States to exercise their respective jurisdictions in some causes which they are capable of finally deciding. 8 U.S. (4 Cranch) at 95.

100. That is, that there was no habeas corpus power in courts not confirmed by statute. *Id.* at 93-94.

101. This was the limit of the power conceded to the Supreme Court by Justice Johnson in his dissent. 8 U.S. (4 Cranch) at 106.

102. *Id.* at 96.

position of having full power in the secrecy of his chambers but only a limited power once he ascended the bench. This interpretation was contrary to good sense and also contrary to the assumption of section 33 that the Supreme Court and circuit courts had jurisdiction to grant the writ. That section gave the courts discretion to admit to bail those charged with a capital crime. In the exercise of this authority, habeas corpus was the usual resort. The section, Marshall argued, obviously assumed that authority had already been granted to courts to issue the writ. Having already summarily dismissed the common law and the Constitution as possible sources for this authority, Marshall in equally summary fashion tells us that its source is section 14.[103]

Marshall did labor at some length to find a supposed absurdity in section 14 if not construed as an independent grant of habeas jurisdiction. If section 14 was merely ancillary for courts, said Marshall, then all that the section would have accomplished would have been to endow courts with the relatively trivial power of issuing that variety of the writ known as habeas corpus *ad testificandum*, the form employed when a prisoner was to be produced to give testimony. In his view, erroneous as I shall show, other ancillary uses of habeas corpus were for the federal courts impossible or irrelevant.[104]

We pass for the moment any account of how Marshall achieved this gigantic diminution in the possible ancillary uses of the writ in the federal courts to consider how he disposed of a question that he had gratuitously contrived: Even though the *ad testificandum* power is relatively trivial, might this not be all that Congress intended? Marshall's response is intricate, and here one must recall, as Marshall did, the proviso with which section 14 concludes: "That writs of *habeas corpus* shall in no case extend to prisoners in gaol, unless where they are in custody under or by colour 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*."[105] The

103. *Id.* at 99-100. For the text of section 33, see note 81 *supra*. After quoting from the section, Marshall went on to remark:

> The appropriate process of bringing up a prisoner, not committed by the court itself, to be bailed, is by the writ now applied for. Of consequence, a court possessing the power to bail prisoners, not committed by itself, may award a writ of *habeas corpus* for the exercise of that power. The clause under consideration obviously proceeds on the supposition that this power was previously given, and is explanatory of the 14th section. *Id.* at 100.

104. *Id.* at 97-100.

105. Ch. 20, § 14, 1 Stat. 81 (emphasis added).

proviso, Marshall contended, limited *the first sentence* of section 14 dealing with courts as well as the second sentence dealing with individual justices and judges. Accordingly, since an ancillary use of habeas corpus would mean for the federal courts an increment only of the *ad testificandum* power, Marshall contended that the Court was being asked to construe the first sentence of section 14 as if in substance it read: "All the courts of the United States shall have power to grant the writ of habeas corpus *in order to bring a prisoner into court to testify,* provided that writs of habeas corpus shall in no case extend to prisoners in gaol, unless they are in custody under or by colour 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.*" It could not be contemplated, he argued, that the whole power granted—the power to order a prisoner brought in to testify—could be excepted from the operation of the proviso. Thus, the tendered restrictive construction of the habeas grant must be rejected.

The trouble with this argument is Marshall's joinder of the proviso, all of it, to the first sentence of section 14 as well as the second. In justification, he argued that the *ad testificandum* power had relevance "particularly" and only for courts; therefore, to give it any effect, the proviso must be applicable to the sentence that referred to courts.[106] His premise is hardly a logical one. *Ad testificandum* was obviously "particularly" useful to the *chambers judge* as he went about planning the work of a term. Not surprisingly, the cases and the text writers unanimously state that the proper practice was an application to a judge at chambers.[107] But the significant point for our

106. Marshall's entire discussion was comprised in this paragraph:

> This proviso extends to the whole section. It limits the powers previously granted to the *courts, because it specifies a case in which it is particularly applicable to the use of power by courts*—where the person is necessary to be brought into court to testify. That construction cannot be a fair one, which would make the legislature except from the operation of a proviso, limiting the express grant of a power, the whole power intended to be granted. *Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 99 (1807) (emphasis added).

107. *See In re* Thaw, 166 F. 71 (3d Cir. 1908); People v. Willard, 92 Cal. 482, 483, 28 P. 585, 587 (1891); Geery v. Hopkins, 92 Eng. Rep. 69 (K.B. 1702) (semble); Gordon's Case, 105 Eng. Rep. 498 (K.B. 1814); Brown v. Gisborne, 2 Dowling (N.S.) 963 (Q.B. 1843); W. CHURCH, *supra* note 44, at 91.

I have been unable to find any unambiguous case authority previous to *Ex parte* Bollman. However, the preamble of an English statute of 1803 refers to the fact that *ad testificandum* writs had been "frequently awarded by the judges of his majesty's courts of record" to produce prisoners to give testimony before those courts. The statute went on to provide that the writ might be issued by these judges to produce a prisoner to give testimony before a court martial. Act of 1803, 43 Geo. 3, c. 140.

purposes is not so much that Marshall's argument was factually groundless but rather that merely by way of that specious argument he denied the right to state prisoners to federal habeas corpus. His factitious answer to an altogether factitious question can hardly be accepted as a definitive resolution of this major problem in the law of our Constitution.[108]

IV

While one cannot accept as final Marshall's casual allocation to Congress of the suspending power or his unargued dismissal of the notion of a common law habeas jurisdiction, I pass these problems by to center on his determination that the habeas jurisdiction for courts involved in section 14 was independent and unrelated to any other statutory jurisdiction and his subsidiary and argumentative conclusion that section 14's proviso applied to courts as well as to justices and judges. Surely, Marshall was wrong on both counts. Although the vindication of this assertion lies outside the bounds of Marshall's opinion, in considerations that Marshall did not discuss, the opinion itself arouses suspicions in addition to those suggested earlier when the inordinate haste attending the decision was noted.[109] This is not to deny the opinion all force. Grammatically, on the ancillary jurisdiction point, section 14 did lend itself more easily to Marshall's reading than another. And, given Marshall's assumption that the Constitution by itself does not endow the federal courts with

108. In determining the reach of the habeas corpus, Gasquet v. Lapeyre, 242 U.S. 367 (1917), can hardly be authoritative. It is true that Mr. Justice Van Devanter did say that "Section 9 of article 1, as has long been settled, is not restrictive of state, but only of national, action." *Id.* at 369. But he cited only cases dealing with the 6th clause of section 9, prohibiting a preference for the ports of one state over those of another. More decisive is the fact that the person in the *Gasquet* case who invoked the protection of the habeas clause obtained in the state court not only the writ but his discharge. *Id.* at 368-69. A judgment of "interdiction," or guardianship had been entered in the Louisiana civil trial court on the basis that Gasquet was incompetent to handle his affairs. Contemporaneously, a Louisiana criminal court had ordered Gasquet confined because of his alleged incompetency. Gasquet appealed the civil court proceeding to the supreme court of Louisiana and, before his appeal was heard, sought and won his release on habeas corpus in the court of appeal of that state on the ground that he was competent. It was merely the failure of the Louisiana Supreme Court to give collateral effect to the court of appeal's decision on competency which Gasquet protested in the Supreme Court. The Louisiana Supreme Court said: "[I]f the court of appeal had authority to set aside the commitment of the criminal district court and release Mr. Gasquet . . . the judgment of the court of appeal would nevertheless have no effect upon the judgment of interdiction . . . ." Interdiction of Gasquet, 136 La. 957, 962-63, 68 So. 89, 91 (1915).

109. See text following note 91 *supra*.

habeas power, he is persuasive when he points to the prospect of judges having more power than courts, and when he invokes the assumptions of section 33. It would indeed be a "strange" circumstance if judges were given greater power when they acted in secret rather than in open court. Section 33 clearly did premise, as Marshall said, habeas power in courts and judges alike. But these considerations can have no tendency to prove Marshall's basic assumption that a statute was necessary for the Court to exercise jurisdiction. Whatever persuasive force they may have in the interpretation of section 14 will dissolve when presently that section is examined.

Probably the most suspicious feature of Marshall's opinion is his wholly unconvincing effort to hew an ancillary habeas jurisdiction down to meaningless proportions. He takes the ancillary varieties of habeas corpus mentioned by Blackstone and holds them up as either superfluous or impossible in the federal courts. The example he gives in the latter connection is the habeas corpus *ad satisfaciendum*, "when a prisoner hath had judgment against him in an action, and the plaintiff is desirous to bring him up to some superior court to *charge him with process of execution.*" Marshall blithely asserts that "this case can *never* occur in the courts of the United States. One court never awards execution on the judgment of another. Our whole judicial system forbids it."[110] Nevertheless, section 1963 of our present Judicial Code provides for just such an award.[111] And if it be objected that this is belaboring Marshall with a weapon forged 150 years later and that all Marshall was talking about was the juridical system as it existed under the statutes of 1807, there is the Act approved by Congress on March 2, 1799.[112] Generally, this Act provided for the discharge of liability for those who had provided bail for a defendant sued in one district but later arrested and committed to jail in another district. The final section squarely contradicts

110. 8 U.S. (4 Cranch) at 98 (emphasis added).

111. A judgment in an action for the recovery of money or property now or hereafter entered in any district court which has become final by appeal or expiration of time for appeal may be registered in any other district by filing therein a certified copy of such judgment. A judgment so registered shall have the same effect as a judgment of the district court of the district where registered and may be enforced in like manner. 28 U.S.C. § 1963 (1964).

112. Ch. 32, 1 Stat. 727.

Marshall on what was possible in 1807 in respect to execution in the federal courts. It provided

> that in every case of commitment [in another district] as aforesaid, by virtue of such order as aforesaid, the person so committed shall, unless sooner discharged by law, be holden in gaol until final judgment be rendered in the suit in which he procured bail as aforesaid, and sixty days thereafter, if such judgment shall be rendered against him, that he may be *charged in execution, which may be directed to and served by the Marshal in whose custody he is* . . . .[113]

Moving outside Marshall's opinion, we immediately come on considerations compelling the conclusion that he altogether misread section 14. Whatever jurisdiction section 14 granted to courts in respect to habeas corpus, it undeniably granted the same jurisdiction in respect to scire facias. Section 14 begins: "That all the beforementioned courts of the United States shall have power to issue writs of *scire facias, habeas corpus* . . . ." Scire facias, the first, and one of only two writs specifically mentioned, was not treated at all by Marshall, and yet it cannot be altogether ignored. If scire facias should have only ancillary uses, then merely as a matter of grammar the uses contemplated for habeas corpus in this context must likewise have been only ancillary. That scire facias was wholly an ancillary writ or, as Marshall put it, a writ to be employed by courts only in "causes which they are capable of finally deciding" can very nearly be demonstrated. Scire facias was, as the cases and text writers unvaryingly tell us, "founded on some matter of record."[114] In all but one instance, which I shall presently discuss, the record involved was a judicial record—a record in a law suit—such as a judgment or a bail bond or a costs guarantee. Scire facias lay to "enforce the execution of them or to vacate or set them aside."[115] Furthermore, and this is

113. *Id.* § (emphasis added). Marshall's depreciation of the ancillary uses of habeas corpus for the courts of the United States was shortly shown to be mistaken. In United States v. French, 25 F. Cas. 1217 (No. 15,165) (C.C.D.N.H. 1812), French, on being arrested by United States authorities, was admitted to bail to appear at a later term. In the meantime, he was confined in state custody on civil process. His bail sought habeas corpus so that they might be discharged but were unsuccessful, presumably because of the force given the proviso of section 14. This attempted use of habeas corpus was extremely well-founded in precedent. *See* French's Case, 91 Eng. Rep. 308 (K.B. 1704).

114. Winder v. Caldwell, 55 U.S. (14 How.) 434, 443 (1852); Holland's Heirs v. Crow, 27 N.C. 448 (1845); 4 M. BACON, A NEW ABRIDGEMENT OF THE LAW 409 (5th ed. 1786) [hereinafter cited as BACON]; T. FOSTER, A TREATISE ON THE WRIT OF SCIRE FACIAS 2 (1851); 2 W. TIDD, THE PRACTICE OF THE COURTS OF KING'S BENCH AND COMMON PLEAS 1090 (9th ed. 1828).

115. 4 BACON 409.

decisive, it lay only in the court where the record was.[116] Thus, if one wished to enforce a bail bond, he sued out a scire facias in the court where the bond was taken. If one wished to revive a judgment, he sought scire facias in the court where the judgment was rendered. And the same was done for all the other records to be enforced or set aside. A circuit court was entirely correct in a costs bond case when, after a recital along the lines given above, it declared:

> It therefore follows that, as this particular writ cannot initiate litigation, it only marks a stage in the course of proceedings already commenced, in whatever terms that stage may be characterized. It follows, further, that proceedings by scire facias of the character which we are considering fall into the class commonly known in the language of the federal courts as ancillary.[117]

As indicated above, the matter of record on which scire facias would lie was always a judicial record, a record in a prior suit in the court issuing the scire facias, save in a single instance, that of revoking a patent. Even this exception was apparently denied by the Supreme Court in 1888 when it held that a bill in equity rather than a scire facias was the appropriate procedure to revoke either an invention or a land patent.[118] Unquestionably in pre-1789 England scire facias was the more usual method for revoking patents. It lay when "the King doth grant . . . one and the self same Thing to several Persons," or "when the King doth grant any Thing which by Law he cannot grant," or when a grant was made "upon a false suggestion."[119] Moreover, suit lay not only at the instance of the Crown but at that of the subject as well when he was prejudiced.[120]

In this country, examples of this use of scire facias are difficult to find. The reporter of an 1874 Pennsylvania case believed that it was

116. "A *scire facias* is a judicial writ, issued for the purpose of substantiating and carrying into effect an antecedent judgment; and ought therefore to issue from the court rendering such judgment, and where the records of it remain." Jarvis v. Rathburn, 1 Kirby (Conn.) 220 (1787). "These points are to be considered settled . . . That the proceedings on sci. fa. must be in the same court where the proceedings on the original action are kept of record." Grimske's Executor v. Mayrant, 2 Brev. (S.C.) 202, 209-10 (1807). "It is also a principle well settled, that a *scire facias* can issue from no court but one in possession of the record upon which it issues." Commonwealth v. Downey, 9 Mass. 520, 522 (1813). "A *scire facias* is a writ necessarily founded on some matter of record, and must issue out of the court where that record is." T. FOSTER, *supra* note 114, at 2.

117. Pullman's Palace-Car Co. v. Washburn, 66 F. 790, 793 (C.C.D. Mass. 1895). Marshall himself in 1810 declared a scire facias to be "a continuance of the original action." M'Knight v. Craig's Adm'r, 10 U.S. (6 Cranch) 183, 187 (1810).

118. United States v. American Bell Tel. Co., 128 U.S. 315 (1888).

119. 4 BACON 415-16.

120. *Id.*

one of only two where scire facias was used in the United States to repeal a land patent.[121] But such a use is reported in Maryland in 1678,[122] and Chancellor Kent, in 1813, could write:

> Letters-patent are matter of record, and the general rule is, that they can only be avoided in chancery, by a writ of *scire facias* sued out on the part of the government, or by some individual prosecuting in its name. This is the settled *English* course, sanctioned by numerous precedents; and we have no statute or precedent establishing a different course . . . .
>
> In addition to the remedy by *scire facias* which the younger patentee has in this case, there is another . . . .[123]

In addition to this recognition by Kent in 1813 of scire facias as a then existing remedy in land patent litigation, a 1798 North Carolina statute also expressly acknowledged a right to a scire facias in any person "aggrieved by any grant or patent issued."[124]

As to scire facias then, it is fair to conclude that while its predominant role in 1789 unquestionably related to a suit which the issuing court already had within its bosom, it would lie independently of any other suit in the case of a land patent. Here, there was in theory scope for the independent scire facias jurisdiction demanded by Marshall's reading of section 14. But the evidence is compelling that no such jurisdiction was contemplated by the drafters of the Judiciary Act of 1789.

That Act, when sanctioning jurisdiction, uniformly spoke in limited terms. Thus, jurisdiction was granted "of crimes and offenses that shall be cognizable under the authority of the United States;"[125] of "all civil causes of admiralty and maritime jurisdiction;"[126] of "all suits of a civil nature at common law where the United States sue;"[127]

121. Pennsylvania *ex rel.* Attorney Gen. v. Boley, 1 Weekly Notes 303 (Pa. 1874). *See also* Holland's Heirs v. Crow, 27 N.C. 448 (1845).

122. Carroll's Lessee v. Llewellin, 1 Md. 162, 165 (1750). This was an action of ejectment where one of the parties was relying on a scire facias obtained in 1678.

123. Jackson *ex dem.* Mancius v. Lawton, 10 Johns, 23, 24-25 (N.Y. 1813). Kent here dealt with the problem of whether a second patentee could sue out a seire facias as well as the first. The English rule was that he could not. Kent, in explaining the English rule, remarked: "The *English* practice of suing out a *scire facias* by the first patentee may have grown out of the rights of the prerogative, and it ceases to be applicable with us." *Id.* at 25. In the *American Bell Telephone Co.* case Mr. Justice Miller misread this remark to mean that scire facias to cancel land patents had no application in America. United States v. American Bell Tel. Co., 128 U.S. 315, 364 (1888).

124. Ch. 7, § 10, [1798] N.C. Laws.

125. Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 76.

126. *Id.*

127. *Id.*

of "all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and . . . the suit is between a citizen of the State where the suit is brought, and a citizen of another State."[128] In every instance, the jurisdiction granted is particularized with definite, if rather large, ends in view. On the other hand, if section 14 were an independent grant of scire facias jurisdiction, it was subject to no statutory bounds and was limited only by the Constitution. Thus, the farthest reaches of the "arising under" jurisdiction, of diversity jurisdiction, and of all the other provisions in article III could be exploited to gain access to the federal courts. The situation can be appreciated by the lawyer of today if he could imagine coming on a section of the United States Code that nakedly declares that "the courts of the United States shall have jurisdiction to issue the writ of certiorari." A comparable abandon cannot be attributed to the Congress of 1789. Even a casual reading of the Judiciary Act will reveal that a judicial power limited only by the restrictions of the Constitution was a result that Congress had guarded against with the most meticulous diligence. Congress was desirous in one instance, and in one instance alone, of making the federal courts available for the trial of land suits, irrespective of diversity. It therefore carefully provided, in addition to diversity jurisdiction, the right of removal, and removal only, where a land suit was begun in a state court and the parties relied on land grants from two different states, even though all the parties were of common citizenship.[129] To suppose that section 14 granted original jurisdiction as well in all federal courts whenever the requirements of scire facias and article III jurisdiction could be met borders on fantasy.

An additional circumstance further indicates that Marshall was in error in regarding section 14 as a grant of independent jurisdiction. It lies in the fact that section 14 makes no distinction in terms of original and appellate jurisdiction. Marshall holds that section 14 is a grant to the Supreme Court not only of independent jurisdiction but that it is a grant of appellate jurisdiction as well. And yet the grant to the district court, where the jurisdiction could be only original, is included in the very same words. While a highly specialized authorization for

128. *Id.* § 11, 1 Stat. 78.
129. *Id.* § 12.

appellate use of habeas corpus by the Supreme Court was divined, the possible original use of habeas corpus by that Court in a case properly within its original jurisdiction was not denied nor could it be. Thus, as Marshall saw it, section 14 by the same words dealt with both original and appellate jurisdiction in the Supreme Court, and these same few words communicated vastly different powers to the district courts. This is a greater burden than the words can comfortably bear. There is no strain when section 14 is read as altogether ancillary for the courts.

That Marshall was grievously in error in his attribution to section 14 of something more than ancillary significance for courts is also strongly suggested when section 13 is considered along with it, and the relationship of the two sections is explored. Section 13, after dealing with the Supreme Court's original jurisdiction,[130] concludes with this sentence:

> The Supreme Court shall also have appellate jurisdiction from the circuit courts and courts of the several states, in the cases herein after specially provided for; and shall have power to issue writs of prohibition to the district courts, when proceeding as courts of admiralty and maritime jurisdiction, and writs of *mandamus*, in cases warranted by the principles and usages of law, to any courts appointed or persons holding office, under the authority of the United States.[131]

Marshall assumed without discussion in *Marbury* that these words attempt to confer an original and also an independent jurisdiction on the Supreme Court. Following immediately on a grant of appellate jurisdiction to the Supreme Court and employing a change of phraseology from "jurisdiction" to "power," the words seem more likely merely to lay down rules to guide the Supreme Court in the exercise of its appellate jurisdiction. But accepting Marshall's reading in *Marbury* of section 13 as an independent grant, one must ask why

130. The preceding part of the section is:

> *And be it further enacted*, That the Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature, where a state is a party, except between a state and its citizens; and except also between a state and citizens of other states, or aliens, in which latter case it shall have original but not exclusive jurisdiction. And shall have exclusively all such jurisdiction of suits or proceedings against ambassadors, or other public ministers, or their domesties, or domestic servants, as a court of law can have or exercise, consistently with the law of nations; and original but not exclusive jurisdiction of all suits brought by ambassadors, or other public ministers, or in which a consul, or vice-counsul shall be a party. And the trial of issues of fact in the Supreme Court, in all actions at law against citizens of the United States, shall be by jury. *Id.* § 13.

131. *Id.*

when the section speaks of two writs, does it not speak of the other two writs of which the Supreme Court is to have independent jurisdiction? There is no sensible answer. But once section 14 is recognized as being for courts wholly ancillary, treatment of the Supreme Court's writ power in two sections does make sense. Section 13 concerns the independent writ power of the Supreme Court; section 14 takes care of the ancillary writ power of the Supreme Court and all other courts as well.[132]

Finally, a near airtight proof that section 14 was for courts altogether ancillary in purpose is furnished by section 2 of the short-lived Federalist Judiciary Act of 1801.[133] In that Act, the treatment of the Supreme Court's writ power was combined in a single section providing:

> *And be it further enacted*, That the said [Supreme Court] shall have power, and is hereby authorized, to issue writs of prohibition, mandamus, scire facias, habeas corpus, certiorari, procedendo, and all other writs not specially provided for by statute, which may be necessary for the exercise of its jurisdiction, and agreeable to the principles and usages of law.[134]

It will be observed that the restrictions on mandamus and prohibition contained in section 13 of the 1789 Act are abandoned. Nothing is said, as section 13 provided, about mandamus issuing only to courts or officers appointed by the authority of the United States or about prohibition issuing only to district courts when they sat as courts of admiralty.[135] But this can hardly mean that these writs will lie whenever the constitutional prerequisites to jurisdiction are satisfied. Since mandamus and prohibition are now spoken of in a section that has no other reference to the Supreme Court's jurisdiction and mention of the two writs does not immediately follow a sentence conferring jurisdiction, the new section had a feature that the old one did not. Mandamus and prohibition, as well as other writs, may be employed when "necessary for the exercise of . . . jurisdiction."[136]

Inspection of the 1801 Act will also reveal that in addition to

132. This appears to have been the view of Mr. Justice Barbour. Kendall v. United States, 37 U.S. (12 Pet.) 524, 650-51 (1838).

133. Judiciary Act of 1801, ch. 4, § 2, 2 Stat. 89 (repealed by Act of April 29, 1801, ch. 31, 2 Stat. 122).

134. *Id.*

135. See text accompanying note 131 *supra*.

136. Judiciary Act of 1801, ch. 4, § 2, 2 Stat. 89. *Compare id. with* Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 80 (reproduced in note 130 *supra*).

mandamus, prohibition, scire facias, and habeas corpus, two writs, certiorari and procedendo, are mentioned by name for the first time. Why specific mention of these six writs? What is the common nexus? If we could substitute for scire facias the writ of quo warranto, we would have the six prerogative writs of the common law.[137] But quo warranto was omitted for a very good reason. It had no ancillary function to serve but was altogether a substantive writ.[138] Scire facias, on the other hand, had an important role in 18th century appellate procedure. After a plaintiff in error had transferred a record to a reviewing court and assigned errors, he had to sue out a *scire facias ad audiendum errores* to compel his adversary to plead to the assignment. If the plaintiff in error took no action, with even-handed justice the common law supplied the defendant in error with a *scire facias quare executionem non* to effect the plaintiff's dismissal.[139] And with all the other writs mentioned, there was a similar situation. They were all important to appellate procedure as ancillary aids in disposing of cases otherwise before the court or, at least, of cases of which the court could eventually take cognizance.[140] And just as it is impossible to think that the Act of 1801, with all its careful limitations on the jurisdiction of the Supreme Court, authorized

137. These writs were characterized as "prerogative" since they always marked an extraordinary royal intervention which, with the crown, was discretionary. The term "prerogative writ" therefore is used in contradistinction to the writ "of right." There is some confusion in applying this terminology to the various writs. Bacon says, for example, that habeas corpus "is deemed a Prerogative Writ, which the King may issue to any place as he has a Right to be informed of the State and Condition of the Prisoner, and for what Reasons he is confined. It is also in regard to the Subject deemed his Writ of Right . . . ." 3 BACON 2. *See also* Goodnow, *The Writ of Certiorari*, 6 POL. SCI. Q. 493, 497 (1891).

138. A writ of quo warranto is in the nature of a writ of right for the king, against him who claims or usurps any office, franchise, or liberty, to inquire by what authority he supports his claims, in order to determine the right. It lies also in case of non-user or long neglect of a franchise, or misuser or abuse of it . . ." 3 W. BLACKSTONE, COMMENTARIES *262.

139. 2 BACON 207-09; R. POUND, APPELLATE PROCEDURE IN CIVIL CASES 54 (1941).

140. Certiorari was used by a reviewing court to supply defects in a record. 2 BACON 204. Habeas corpus was used "where a person is sued, and in Gaol, in some inferior Jurisdiction, and is willing to have the Cause determined in some superior court, which hath Jurisdiction over the Matter; in this Case the body is to be removed by *Habeas Corpus*, but the Proceedings must be removed by *Certiorari*." 3 BACON 2. Mandamus obviously had a variety of appellate uses. For example, it issued to compel a judge to sign a bill of exceptions. *Ex parte* Crane, 30 U.S. (5 Pet.) 190 (1831). Procedendo was used to remand when a case had been improvidently removed to a higher court. 3 W. BLACKSTONE, COMMENTARIES *110. Prohibition was used to provide a sort of "anticipatory review." *Ex parte* Peru, 318 U.S. 578, 591 (1943) (Frankfurter, J., dissenting). *See also* Goddard, *The Prerogative Writs*, 32 N.Z.L.J. 199 (1956).

mandamus and prohibition wherever the Constitution might permit it, it is similarly impossible to think that the 1801 Act authorized any such use of the writ of certiorari, however minimally its review potential in the 18th century is regarded.[141] The same can be said for scire facias, procedendo, and habeas corpus. And if the Act of 1801, by section 2, contemplated only ancillary uses for the writs mentioned, it is impossible to see how the Act of 1789 was any different. It has never been suggested that the Federalists in 1801 were at pains to deprive the Supreme Court of powers it had theretofore possessed.

In summary, the considerations advanced persuade me that the most sensible and most likely reading of sections 13 and 14 together is one that regards section 13 as dealing with the writ power of the Supreme Court ancillary to its *appellate* jurisdiction and section 14 as dealing with the writ power of all courts ancillary to their *original* jurisdiction. In any event, when section 14 speaks of habeas corpus and courts, it is speaking only of an ancillary use of the writ.

V

Consideration must now be given to the proviso of section 14 of the 1789 Act and Marshall's argumentative conclusion that the proviso applied to courts as well as to individual justices and judges. The proviso's effect would be rather minimal if section 14 was concerned, in respect to courts, only with the ancillary uses of habeas corpus. The proviso could not then be held to limit their independent use of habeas corpus *ad subjiciendum*. But even as to ancillary uses by *courts* of habeas corpus, it is virtually certain that the proviso, properly read, was inapplicable. Marshall's contention that it was applicable to courts rests altogether on his spurious depreciation of the ancillary uses of habeas corpus to the point where, he said, the only significant ancillary use of habeas corpus for the federal courts was the *ad testificandum* writ. But Congress, he contended, surely meant to give more than the *ad testificandum* power, a fact attested to by the exception made for *ad testificandum* in the proviso. The whole power given, he argued, would not be the subject of an exception. And did the proviso and its exception apply to the courts? Yes, he

141. Certiorari in the 18th century could not be used when a writ of error would lie. As an independent writ of review, it lay only to challenge jurisdictional errors. Goddard, *supra* note 140, at 214.

answered, because judges in chambers have no interest in *ad testificandum*.[142]

This tortuous and false reasoning would seem to carry with it its own refutation. In addition, a number of countervailing considerations can be arrayed against it and Marshall's conclusion concerning the proviso. To begin with, there is the question of grammar and the grammatical structure of section 14. The first sentence speaks of power in courts; the second sentence speaks of power in individual justices and judges. Immediately following the second sentence—perhaps attached to it, perhaps not[143]—is a proviso in which is expressed a limitation of the habeas corpus privilege to those detained by the authority of the United States. Marshall would have us extend the reach of the proviso all the way back through the "judge" sentence immediately preceding it and further back yet through a most complex sentence to modify "courts." This is not impossible grammatically, but it does more credit, stylistically, to the drafters if we attribute to them a purpose to deal separately with two discrete objects, courts on the one hand and justices and judges on the other.[144] There would be no problem of construction at all if the

142. I have here tried merely to restate the exposition given in the text following note 105 *supra*.

143. I have not been able to determine if there is any special significance in the peculiar punctuation used—a period followed by a dash.

144. In the argument in *In re* Metzger, 46 U.S. (5 How.) 176 (1847), Attorney General, later Justice, Nathan Clifford noticed the dual character of section 14. Metzger had sought habeas corpus in the Supreme Court after a district judge in chambers had remanded him for extradition to France. One of Clifford's arguments against the jurisdiction of the Supreme Court was that the only grant of the *ad subjiciendum* power in section 14 was to individual justices and judges:

> There are two clauses in the section upon this subject which should be treated separately. The seeming inconsistency, if any exists, in the cases decided, has doubtless arisen by omitting to keep clearly in view the manifest distinction in the nature and character of the power conferred by these two clauses. The first provides, that "all the before mentioned courts of the United States shall have 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 agreeably to the principles and usages of law." This clause undoubtedly authorizes the issuing of inferior writs of *habeas corpus* in aid of jurisdiction, which have been long known in the practice of courts, and are indispensable in the course of legal proceedings. Bac. Abr., *Habeas Corpus*, A; 2 Chitty's B. Com., 130. The second clause is in these words: "And that either of the justices of the Supreme Court, as well as the 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." Undoubtedly this clause authorizes the issue of the great writ of *habeas corpus ad subjiciendum*, which is of general use to examine the legality of commitments in criminal

second sentence along with the proviso had been incorporated, just as it was written, in a separate section. *This is precisely what Congress did in the Judiciary Act of 1801*,[145] a step that can only be regarded as explanatory of the Act of 1789.[146]

The second sentence, along with the proviso, yields simple, understandable results when brought singly into focus. The sentence and its proviso bear repeating:

> 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 colour 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.[147]

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cases. The power conferred by this clause is expressly delegated to either of the justices of the Supreme Court, and not to the whole, when convened for the trial of causes. If the question were one of new impression, it would seem to follow, that the authority to be derived from the law should be exercised according to the language of the act. *Id.* at 187.

145. Judiciary Act of 1801, ch. 4, § 30, 2 Stat. 98. The section reads:

> *And be it further enacted*, That every justice of the supreme court of the United States, and every judge of any circuit or district court shall be, and hereby is authorized and empowered, to grant writs of habeas corpus, for the purpose of inquiring into the cause of commitment, and thereupon to discharge from confinement, on bail or otherwise: *Provided always*, that no writ of habeas corpus, to be granted under this act, shall extend to any prisoner or prisoners in gaol, unless such prisoner or prisoners be in custody, under or by colour of the authority of the United States, or be committed for trial before some court of the same; or be necessary to be brought into court to give testimony.

146. In making this statement, I have given due allowance to the fact that the proviso makes itself applicable to writs of habeas "granted under this *act*." It is clear from the context that the only writs of habeas corpus that were referred to were those for the "purpose of inquiring into the cause of commitment," or *ad subjiciendum* writs, when issued by individual justices and judges. The Act of 1801 speaks in terms of habeas corpus in only one other place, in section 2 dealing with the writ power of the Supreme Court. See the text accompanying note 134 *supra*.

It is possible to argue that for habeas the prohibition of the proviso in the 1801 Act, ch. 4, 2 Stat. 89, applied, in addition to justices and judges, not only to the Supreme Court, but to the circuit courts; any argument that it applied to the district courts is impossible. The Act of 1801 gave to the circuits courts "all the powers heretofore granted by law to the circuit courts of the United States, unless where otherwise provided by this act." *Id.* § 10. It possibly could be contended that section 10 is a re-grant to the circuit court of the power given the circuit court by the 1789 Act's section 14. While section 2 of the 1801 Act clearly displaced section 14 as far as the Supreme Court is concerned, and while section 30 of the 1801 Act clearly displaced section 14 in respect to individual judges and the proviso, a small stub of section 14 remains—that part of its first sentence applicable to circuit and district courts. Thus, after the 1801 Act, section 14 of the 1789 Act is modified as if it read: "The circuit and district courts shall have power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute, which may be necessary in the exercise of their respective jurisdictions, and agreeable to the principles and usages of law."

147. Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 81.

First, the individual justices and judges are given "power" to grant only one *writ* and that writ only for a single purpose, that of "inquiry into the cause of commitment" or habeas corpus *ad subjiciendum*. Second, the proviso lays down a general rule for the one variety of habeas corpus then being authorized. Habeas corpus is not to issue unless the prisoner is in jail "under or by colour of the authority of the United States." Third, there is an exception to the general rule just stated; a federal judge may grant habeas corpus, even though a prisoner has not been committed under federal authority, if he is nevertheless going to be handed over to federal authority for trial. Fourth, there is what *in form* appears to be a second exception to the limitation on the power of granting habeas corpus *ad subjiciendum*. If a prisoner must be brought into court to testify, the sentence and proviso together seem to allow habeas corpus *ad subjiciendum* to issue irrespective of the character of the prisoner's custody. In one view, this produces a legal absurdity because the *ad subjiciendum* variety of habeas corpus was never used for the purpose of getting one who was merely a witness into court. The variety of writ serving that purpose was habeas corpus *ad testificandum*. But the explanation seized upon by the courts is a sensible one. The "evidence" clause is not an exception to a limitation on a power previously given but the rather inartful grant of an unencumbered second power—that of issuing a writ of habeas corpus *ad testificandum*.[148]

Perhaps more compelling than the grammatical consideration is the view of the legislative task facing the Congress of 1789 as the men

148. In another view, however, one might follow rigorously the formal organization of the sentence and proviso and adhere to the notion that only habeas corpus *ad subjiciendum* was authorized. The "evidence" clause under this view is directed to the situation where the prisoner is needed to testify in his *own* habeas corpus hearing. What may have been involved was merely a matter of habeas corpus procedure. Before 1789, the usual practice was for habeas corpus to issue; then the prisoner was produced, thereby expending the force of the writ; then, the judge made an order for discharge or bail or remand. Toward the end of the 18th century a procedure developed whereby the prisoner was not always produced but rather the gaoler was called upon to show cause why the writ should not issue. Since permissible factual disputes were few (the return was not traversable), there would not ordinarily be any need to issue the writ, but the legality of the prisoner's detention could be adjudged in his absence. If it should be found that the prisoner was illegally detained, his discharge could be ordered. Thus, all that the proviso may have been trying to accomplish was to tell federal judges to resort to this "show cause" procedure in all cases where the prisoner was not held by federal authority. Considering only the face of the statute, this view is grammatically more tenable than that given in the text, and it of course renders the proviso insignificant. On the procedure in habeas corpus, see Goddard, *supra* note 140, at 214.

of that day perceived it. In respect to habeas corpus, there were two main problems—one old and one altogether new. The old problem was the power of individual judges, out of term, to issue the writ. This problem was the immediate incitement for the most significant habeas corpus legislation ever enacted, the English Habeas Corpus Act of 1679.[149] In 1676 one Francis Jenkes was thrown into prison and charged with the offense of urging that a new Parliament be called. He sought habeas corpus from the Lord Chief Justice "but his lordship denied to grant it, alleging no other reason but that it was vacation." When the contrary authority of Coke was later pressed on his lordship, that worthy made "light of the lord Coke's opinion, saying 'The Lord Coke was not infallible.' "[150] Even the reporter notes "that this case contributed to the passing of the Habeas Corpus Act."[151]

Thus in 1789 it appeared that a statute had been necessary to settle the question of the power of individual judges out of court "in vacation." The solution adopted in 1679 had been to grant power "to the lord chancellor or lord keeper, or any one of his majesty's justices, either of the one bench or of the other, or the barons of the exchequer of the degree of the coif,"[152] that is, all the justices and judges of superior courts of record. But this grant of power had to be distinguished from the power of courts. Some things properly done in open court could not be permitted to a judge in chambers. Thus, if a prisoner neglected for two whole terms to present his petition, relief "in vacation time" was not available.[153] Or if an assize had already been proclaimed for a county, any habeas corpus must be considered by the assize judge in open court.[154] The grant to individual judges of specific powers accompanied by applicable restrictions was the pattern seen by the men of 1789 as they pondered the one overbrooding legislative precedent, the Act called by Blackstone "another *magna charta.*"[155] They could not be sure that a common law power would attach to the various judges in the federal system. A statute had

149. 31 Car. 2, c.2.

150. Jenkes Case [1676], 6 State Trials 1190, 1196 (T. Howell comp. 1816).

151. *Id.* Another relevant purpose of the English Act was to deal with the problem of judges subservient to the crown. The solution was to impose heavy penalties on judges who improperly refused the writ. Habeas Corpus Act of 1679, 31 Car. 2, c. 2, § 10. As in other respects, here too the Constitution with its provision for an independent judiciary rendered legislation unnecessary.

152. *Id.* § 3.

153. *Id.* § 4.

154. *Id.* § 18.

155. 3 W. BLACKSTONE, COMMENTARIES *135.

been necessary in England to settle the question. Perhaps a statute was necessary in America. Accordingly, Congress recognized the power in individual judges in specific terms. But just as the English Act made special regulations applicable only to individual judges as contrasted to courts, so Congress one hundred and ten years later made comparable special provisions for federal judges.

The *new* problem in respect to habeas corpus facing the Congress of 1789 grew out of the Philadelphia Convention's most creative contribution, the idea of a federal union. How could the workings of habeas corpus best be arranged in a federal union pervaded in all of its branches by an almost holy regard for the writ? The answer given in 1789 clearly was mistaken by Chief Justice Taney in *Ableman v. Booth*.[156] Faced with a *state's* claim that it could by habeas corpus liberate a federal prisoner, he stated

> [T]he powers of the General Government, and of the state . . . are . . . separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. And the sphere of action appropriated to the United States, is as far beyond the reach of the judicial process issued by a State judge or a State court, as if the line of division was traced by landmarks and monuments visible to the eye.[157]

Presumably, the converse would also be valid. But the Act of 1789 made specific arrangements, at least in the instance of producing a prisoner to testify, for process reaching across Taney's "line of division." Under the Constitution as it existed in 1789, the states had nothing to fear from federal habeas corpus. The federal judicial power was for practical purposes limited to those cases arising under the Constitution, laws, and treaties of the United States. In the entire Constitution, there were few provisions *directly* conferring benefits on state prisoners. They were not to be made subject to ex post facto laws,[158] and if a prisoner was a member of Congress, he could in some instances assert a privilege from arrest.[159] There was in these

156. 62 U.S. (21 How.) 506 (1858). The sustained effort by the states in the teeth of the supremacy clause to make their habeas corpus remedies available to those in federal detention would seem proof enough that federalism does not *require* federal abstention in state prisoner habeas cases. The effort did not abate until Tarble's Case, 80 U.S. (13 Wall.) 397 (1872). Furthermore, in all the speculation spawned by the appearance of the Constitution, there is no suggestion that federal habeas corpus should be unavailable to state prisoners. Indeed, the speculation points the other way. *The Federalist* preaches the doctrine of the usefulness of a federal judicial power to protect federal interests. THE FEDERALIST NOS. 80, 81 (A. Hamilton).

157. 62 U.S. (21 How.) at 516.

158. U.S. CONST. art. I, § 10.

159. *Id.* § 6. This minimal projection of federal habeas corpus for state prisoners is not rendered invalid by the habeas corpus clause itself. Habeas corpus, of course, is preeminently

provisions certainly no portent of the massive use of federal habeas corpus by state prisoners, and these provisions furnish no provocation for nullifying as to state prisoners the commanding language of the habeas corpus clause. The occasions when federal habeas corpus could possibly lie were certain to be exceedingly rare, and the states could have had no legitimate fear.

There were reasons in 1789, and in 1787 as well, for apprehension on the part of those concerned for the national interest. The thwarting and frustrating of this interest by one state or another produced the impetus for the Constitution. And the Constitution deals with these state propensities. In particular, it sought to deny to the states opportunities to imperil the very existence of the national government.[160] But why undertake, for example, to assure attendance in Congress if no federal remedy is available for that purpose? Why leave the members of Congress altogether to the mercies of the state that arrested them? With its habeas corpus clause, the Constitution provided the federal remedy. The Congress of 1789 provided, in addition to the federal remedy, a federal tribunal where the remedy could be secured. Congress can fairly be held to have had in view another highly important objective. It knew that a state prisoner was likely to claim the benefit of federal habeas corpus, not when he was being denied some directly conferred constitutional right, but when he was responsible for or the beneficiary of a federal program. The tax collector harrassed by state arrests,[161] the foreign diplomat denied the immunity from arrest which the federal government wished to accord

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remedial. Fay v. Noia, 372 U.S. 391, 427-28 (1963).

160. *E.g.*, U.S. CONST. art. I, § 2 (providing for congressional action in respect to elections). In respect to this clause, Hamilton argued:

> Nothing can be more evident, than that an exclusive power of regulating elections for the National Government, in the hands of the State Legislatures, would leave the existence of the Union entirely at their mercy. They could at any moment annihilate it, by neglecting to provide for the choice of persons to administer its affairs. It is to little purpose to say that a neglect or omission of this kind, would not be likely to take place. The constitutional possibility of the thing, without an equivalent for the risk is an unanswerable objection. THE FEDERALIST No. 59 (A. Hamilton).

161. It was this problem, which I cannot believe that the Congress of 1789 thought that it had neglected, that inspired the habeas legislation of 1833. Act of March 2, 1833, ch. 57, § 7, 4 Stat. 634. This Act specifically vested only justices and judges with habeas power. One commentator has suggested that this represented a conscious choice by Congress to leave the *courts* out of habeas administration, and to rely altogether on the individual justices and judges. Oaks, *supra* note 73, at 176. The form of the congressional enactment, specifically empowering only justices and judges, may well have been a result of the lingering notion that for courts no legislation was necessary. The same can be said for the Act of August 29, 1842, ch. 257, 5 Stat.

him,[162] the foreign national arrested in violation of a treaty[163]—these were the typical instances where a state prisoner would seek federal habeas corpus. In the absence of habeas, damage to the federal programs could be enormous and irremediable.

This second purpose of the habeas clause as an instrument for assuring the supremacy of national law prescribed by article VI can hardly have been overlooked by the framers. It was not overlooked by Edmund Randolph in 1792[164] or by the Congress of 1800 when it enacted the Bankruptcy Act.[165] Section 38 of that Act announced that resort to habeas was proper whenever any bankrupt was detained in prison after obtaining his certificate of discharge in bankruptcy by reason of a judgment on a debt obtained before his discharge. The Act provided that

539, securing habeas protection for foreign nationals held in violation of a treaty or the law of nations. Thus I agree with Marshall in at least this regard: It is not likely that Congress intended individual justices and judges to have powers beyond those of courts.

162. This problem was presented in *Ex parte* Cabrera, 4 F. Cas. 964 (No. 2278) (C.C.D. Pa. 1805) where the State of Pennsylvania threw a Spanish consul in jail on a charge of passing bad checks. Justice Washington, speaking for the circuit court, denied habeas corpus by reading the proviso into the first sentence of section 14. He accomplished this by resort to misquotation albeit indirect: "The 14th section . . . declares that all the courts of the United States, as well as the justices thereof, shall have power to issue writs of habeas corpus provided that such writs shall in no case extend to prisoners in jail, unless where they are in custody under, or by colour of the authority of the United States . . . ." *Id.* at 966. Section 14's susceptibility to misquotation endures to the present day. *See Developments* 1045.

163. *See* Elkison v. Delisseline, 8 F. Cas. 493 (No. 4366) (C.C.D.S.C. 1823). The State of South Carolina, fearing the subversive effect of a free Negro circulating among the slave population, provided without judicial proceedings for the incarceration of Negro members of the crew of a foreign ship while the ship was in port. This was plaintly in violation of the treaty rights of British nationals. It was also in violation of the commerce clause of the Constitution. U.S. CONST. art. 1, § 8. The circuit court, speaking through Justice Johnson, deemed itself powerless to effect the release of a British sailor who happened to be black.

Justice Johnson denounced the state's action in no uncertain terms as violative of the treaty and unconstitutional as well. Further, he noted that no prospect of federal review existed even on the Supreme Court level since there was no judicial proceeding to review. 8 F. Cas. at 496. He condemned the "obvious mockery" that a party should have a right to his liberty but "no remedy to obtain it." *Id.* Nevertheless, he considered the proviso a bar to relief. But he went on to suggest that if someone brought for the prisoner the writ *de homine replegiando*, he might succeed. *Id.* at 497. *De homine replegiando*, used to "replevy a man," was "entirely antiquated" even in Blackstone's time. 3 W. BLACKSTONE, COMMENTARIES *128-29.

Johnson's denunciation of the South Carolina statute involved him in a protracted controversy in the public press. *See* Morgan, *Justice William Johnson on the Treaty-Making Power*, 22 GEO. WASH. L. REV. 187 (1953).

164. See the text at note 35 *supra*.

165. Act of April 4, 1800, ch. 19, 1 Stat. 19.

> it shall be lawful for any of the judges of the court wherein judgment was so obtained, or for any court, judge, or justice, within the district in which such bankrupt shall be detained, having powers to award or allow the writ of habeas corpus, on such bankrupt producing his certificate . . . , to order any sheriff or gaoler who shall have such bankrupt in custody, to discharge such bankrupt . . . .[166]

Congress was here attempting fully to effectuate its purposes in passing the Bankruptcy Act. It was laying down a rule of law in respect to habeas corpus directed to courts and judges, state and federal alike. It was dealing with the case of the pre-discharge judgment on a prior debt; the post-discharge judgment on a prior debt presented no problem. Although the release of *state* prisoners was clearly contemplated, there was no reference whatsoever to section 14 of the Judiciary Act of 1789, nor is there any talk of jurisdiction beyond a reference to courts or judges "having powers to award or allow the writ of habeas corpus." The plain assumption is that courts, state and federal alike, did have jurisdiction as did individual justices and judges in some circumstances.

Thus grammar, the subsequent legislation of 1801, legislative precedent, the baselessness of altogether imaginary state apprehensions, and the federal government's potential gain combine to dictate the conclusion that section 14's proviso spoke only to justices and judges in their individual capacities. The section's answer to the novel problem of habeas corpus in a federal union was not the destructive, unreasoned one that has been imagined but one eminently sensible. Essentially, what the proviso said was that before a prisoner could be taken from state authority, even in a case indubitably arising under federal law, proceedings in open *court* were necessary. Such proceedings could be depended on to preclude removal except where there was a substantial federal interest, and then removal was desirable as well as required.

VI

On Ex parte *Bollman* one final and confessedly hazardous word—hazardous because it indulges in speculation as to a man's innermost motives. What could have moved John Marshall to impose on American law such a misconception? Some may say that the consideration of supreme moment with him was to smite his old

166. *Id.* § 38, 1 Stat. 32.

adversaries, Thomas Jefferson and the Republicans, as the Jeffersonian Party was then known. Any old stick was good enough for that purpose. Some may be more fastidious and credit Marshall with a shrewd, dissembling, rear-guard action to serve a more compelling and a more noble end—avoidance of impeachment by making ingratiating bows to Congress and to the states, while at the same time preserving as much as possible of the national power. These explanations do not satisfy. The first is contradicted by Marshall's known behavior.[167] The second is based on a false premise. There is no escaping the fact that as long as Ex parte *Bollman* stands, the fundamental guarantee of American liberty is subject to total obliteration in the case of state prisoners.[168]

A sufficient answer to the conundrum posed is that Marshall was in flight from himself and his holding in the most important case ever adjudicated in the United States, *Marbury v. Madison*.[169] In

167. In Livingston v. Jefferson, 15 F. Cas. 660 (No. 8411) (C.C.D. Va. 1811), Marshall dismissed a rather substantial suit for damages against Jefferson, paying obeisance to the highly vulnerable rule that an action for trespass to realty must be brought in the district where the land lies. Marshall's opinion is still the best criticism of the rule.

168. A recent commentary suggests that the adoption of the fourteenth amendment in combination with the passage of two acts of Congress, the Judiciary Act of 1789 and the Act of February 5, 1867, "may have served to broaden the protection of the writ by the suspension clause" to the point that so long as there are lower federal courts, state prisoners have a constitutional right of access to them to press habeas claims. *Developments* 1272-73. Just how the passage of acts of Congress can modify the Constitution is not explained, and the commentary seems to admit that by itself the fourteenth amendment has no relation to habeas. *Id.* at 1273 n.56.

The authors' difficulty is entirely self-made. They vary between insisting that the habeas clause is addressed "exclusively to Congress," *id.* at 1264, or to the "federal government," *id.* at 1267, or to the state courts in the event Congress decided to have no lower federal courts. *Id.* at 1271. But they are consistent, without citing a shred of evidence, in asserting that the original purpose of the habeas corpus was merely to provide protection for federal prisoners. *Id.* at 1267, 1271-72. Certainly, the testimony of Edmund Randolph points the other way. See the text at note 35 *supra*. More central to the authors' difficulty is their apparent supposition that it was only the adoption of the fourteenth amendment that gave state prisoners significant rights under the Constitution. *Id.* at 1273. But, of course, there were rights flowing from the supremacy clause important to the prisoner and essential to the preservation of the federal government as a going proposition. See the text at notes 159 and 161-62 *supra*. A "purposive analysis" of the habeas clause would include a purpose to supply a remedy to vindicate these rights.

By resort to a "purposive analysis," the commentary finds a "constitutional requirement that there be *some* court with habeas jurisdiction over federal prisoners." *Id.* at 1267. So far as it goes, I find no difference in practical result between this approach and the one I have advocated. In the critical situation where Congress has provided federal courts but conferred no habeas jurisdiction, a habeas petition would have to be honored by the first court approached if the proposal is to have any effect.

169. 5 U.S. (1 Cranch) 137 (1803).

Marbury, Marshall had simply forgotten the habeas corpus clause, which was not directly involved. Marshall had claimed for the courts the power to nullify acts of Congress unauthorized by the Court's reading of the Constitution. The occasion for this claim was the Court's discovery that section 13 of the Judiciary Act attempted to confer on the Supreme Court original jurisdiction to issue the writ of mandamus. Holding that the Congressional Act was a nullity, the Supreme Court announced that it could take original jurisdiction only of cases mentioned in article III, those "affecting Ambassadors, other public Ministers and Consuls, and those in which a state Shall be a Party . . . ."[170] There could have been on Marshall's part no stronger commitment to the proposition that this listing in article III exhausted the possibilities of original jurisdiction. To acknowledge another original jurisdiction existing all the time was unthinkable, even though this jurisdiction was commanded by the Constitution and assumed by Congress in its first Judiciary Act.

But the exigencies of decision that produced Ex parte *Bollman* are no longer with us. We can now discard its sophistries and misrepresentations and accept Mr. Justice Black's simple statement:

> Habeas Corpus, as an instrument to protect against illegal imprisonment, is written into the Constitution. Its use by courts cannot . . . be constitutionally abridged by Executive or by Congress.[171]

170. U.S. CONST. art. III, § 2.

171. Johnson v. Eisentrager, 339 U.S. 763, 798 (1950) (Black, J., dissenting).