AMERICAN CONSTITUTIONALISM
VOLUME I: STRUCTURES OF GOVERNMENT
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Supplementary Material

Chapter 6: The Civil War/Reconstruction Era – Judicial Power and Constitutional Authority

Ex Parte Yerger, 75 U.S. 85 (1869)

Chase's last full paragraph in Ex parte McCardle *(1869), pointing out how "the act of 1868 does not except from that jurisdiction any cases but appeals from Circuit Courts under the act of 1867" and how "it does not affect the jurisdiction which was previously exercised," was a reference to the Judiciary Act of 1789, which authorized federal courts to issue writs of habeas corpus to federal prisoners. Just a few months after the decision in* McCardle*, the Supreme Court agreed to hear a challenge to Reconstruction brought by a Mississippi man who was tried in a military court after allegedly murdering an army officer. The appeal was limited to the question of whether they had the authority to hear such appeals under the Judiciary Act of 1789.*

CHIEF JUSTICE CHASE delivered the opinion of the Court.

The argument, by the direction of the court, was confined to the single point of the jurisdiction of the court to issue the writ prayed for. We have carefully considered the reasonings which have been addressed to us, and I am now to state the conclusions to which we have come.

The general question of jurisdiction in this case resolves itself necessarily into two other questions:

1. Has the court jurisdiction, in a case like the present, to inquire into the cause of detention, alleged to be unlawful, and to give relief, if the detention be found to be in fact unlawful, by the writ of habeas corpus, under the Judiciary Act of 1789?

2. If, under that act, the court possessed this jurisdiction, has it been taken away by the second section of the act of March, 27, 1868, repealing so much of the act of February 5, 1867, as authorizes appeals from Circuit Courts to the Supreme Court?

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The great writ of habeas corpus has been for centuries esteemed the best and only sufficient defense of personal freedom.

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Naturally, therefore, when the confederated colonies became united States, and the formation of a common government engaged their deliberations in convention, this great writ found prominent sanction in the Constitution. That sanction is in these words:

> "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."

The terms of this provision necessarily imply judicial action. In England, all the higher courts were open to applicants for the writ, and it is hardly supposable that, under the new government, founded on more liberal ideas and principles, any court would be, intentionally, closed to them.

We find, accordingly, that the first Congress under the Constitution, after defining, by various sections of the act of September 24, 1789, the jurisdiction of the District Courts, the Circuit Courts, and the Supreme Court in other cases, proceeded, in the 14th section, to enact, "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 by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law." In the same section, it was further provided "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 jail, unless they are in custody, under, or by color of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify."

That this court is one of the courts to which the power to issue writs of habeas corpus is expressly given by the terms of this section has never been questioned….

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We come, then, to consider the first great question made in the case now before us.

. . . [C]an this court inquire into the lawfulness of detention, and relieve from it if found unlawful, when the detention complained of is not by civil authority under a commitment made by an inferior court, but by military officers, for trial before a military tribunal, after an examination into the cause of detention by the inferior court, resulting in an order remanding the prisoner to custody?

It was insisted in argument that, "to bring a case within the appellate jurisdiction of this court in the sense requisite to enable it to award the writ of habeas corpus under the Judiciary Act, it is necessary that the commitment should appear to have been by a tribunal whose decisions are subject to revision by this court." . . . The action which we are asked to revise was that of a tribunal whose decisions are subject to revision by this court in ordinary modes.

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The great and leading intent of the Constitution and the law must be kept constantly in view upon the examination of every question of construction.

That intent, in respect to the writ of habeas corpus, is manifest. It is that every citizen may be protected by judicial action from unlawful imprisonment. To this end the act of 1789 provided that every court of the United States should have power to issue the writ. The jurisdiction thus given in law to the Circuit and District Courts is original; that given by the Constitution and the law to this court is appellate. Given in general terms, it must necessarily extend to all cases to which the judicial power of the United States extends, other than those expressly excepted from it.

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This brief statement shows how the general spirit and genius of our institutions has tended to the widening and enlarging of the habeas corpus jurisdiction of the courts and judges of the United States; and this tendency, except in one recent instance, has been constant and uniform; and it is in the light of it that we must determine the true meaning of the Constitution and the law in respect to the appellate jurisdiction of this court. We are not at liberty to except from it any cases not plainly excepted by law; and we think it sufficiently appears from what has been said that no exception to this jurisdiction embraces such a case as that now before the court. On the contrary, the case is one of those expressly declared not to be excepted from the general grant of jurisdiction. For it is a case of imprisonment alleged to be unlawful, and to be under color of authority of the United States.

It seems to be a necessary consequence that if the appellate jurisdiction of habeas corpus extends to any case, it extends to this. It is unimportant in what custody the prisoner may be, if it is a custody to which he has been remanded by the order of an inferior court of the United States. It is proper to add, that we are not aware of anything in any act of Congress, except the act of 1868, which indicates any intention to withhold appellate jurisdiction in habeas corpus cases from this court, or to abridge the jurisdiction derived from the Constitution and defined by the act of 1789. We agree that it is given subject to exception and regulation by Congress; but it is too plain for argument that the denial to this court of appellate jurisdiction in this class of cases must greatly weaken the efficacy of the writ, deprive the citizen in many cases of its benefits, and seriously hinder the establishment of that uniformity in deciding upon questions of personal rights which can only be attained through appellate jurisdiction, exercised upon the decisions of courts of original jurisdiction. In the particular class of cases, of which that before the court is an example, when the custody to which the prisoner is remanded is that of some authority other than that of the remanding court, it is evident that the imprisoned citizen, however, unlawful his imprisonment may be in fact, is wholly without remedy unless it be found in the appellate jurisdiction of this court.

These considerations forbid any construction giving to doubtful words the effect of withholding or abridging this jurisdiction. They would strongly persuade against the denial of the jurisdiction even were the reasons for affirming it less cogent that they are.

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This conclusion brings us to the inquiry whether the 2d section of the act of March 27th, 1868, takes away or affects the appellate jurisdiction of this court under the Constitution and the acts of Congress prior to 1867.

In McCardle's case, we expressed the opinion that it does not, and we have now re-examined the grounds of that opinion.

The circumstances under which the act of 1868 was passed were peculiar.

On the 5th of February, 1867, Congress passed the act to which reference has already been made, extending the original jurisdiction by habeas corpus of the District and Circuit Courts, and of the several judges of these courts, to all cases of restraint of liberty in violation of the Constitution, treaties, or laws of the United States. This act authorized appeals to this court from judgments of the Circuit Court, but did not repeal any previous act conferring jurisdiction by habeas corpus, unless by implication.

Under this act, one McCardle, alleging unlawful restraint by military force, petitioned the Circuit Court for the Southern District of Mississippi for the writ of habeas corpus. The writ was issued, and a return was made; and, upon hearing, the court decided that the restraint was lawful, and remanded him to custody. McCardle prayed an appeal, under the act, to this court, which was allowed and perfected. A motion to dismiss the appeal was made here and denied. The case was then argued at the bar, and the argument having been concluded on the 9th of March, 1869, was taken under advisement by the court. While the cause was thus held, and before the court had time to consider the decision proper to be made, the repealing act under consideration was introduced into Congress. It was carried through both houses, sent to the President, returned with his objections, repassed by the constitutional majority in each house, and became a law on the 27th of March, within eighteen days after the conclusion of the argument.

The effect of the act was to oust the court of its jurisdiction of the particular case then before it on appeal, and it is not to be doubted that such was the effect intended. Nor will it be questioned that legislation of this character is unusual and hardly to be justified except upon some imperious public exigency.

It was, doubtless, within the constitutional discretion of Congress to determine whether such an exigency existed; but it is not to be presumed that an act, passed under such circumstances, was intended to have any further effect than that plainly apparent from its terms.

It is quite clear that the words of the act reach, not only all appeals pending, but all future appeals to this court under the act of 1867; but they appear to be limited to appeals taken under that act.

The words of the repealing section are, "that so much of the act approved February 5th, 1867, as authorizes an appeal from the judgment of the Circuit Court to the Supreme Court of the United States, or the exercise of any such jurisdiction by said Supreme Court on appeals which have been, or may be hereafter taken, be, and the same is hereby repealed."

These words are not of doubtful interpretation. They repeal only so much of the act of 1867 as authorized appeals, or the exercise of appellate jurisdiction by this court. They affected only appeals and appellate jurisdiction authorized by that act. They do not purport to touch the appellate jurisdiction conferred by the Constitution, or to except from it any cases not excepted by the act of 1789. They reach no act except the act of 1867.

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Repeals by implication are not favored. They are seldom admitted except on the ground of repugnancy; and never, we think, when the former act can stand together with the new act. …

Our conclusion is, that none of the acts prior to 1867, authorizing this court to exercise appellate jurisdiction by means of the writ of habeas corpus, were repealed by the act of that year, and that the repealing section of the act of 1868 is limited in terms, and must be limited in effect to the appellate jurisdiction authorized by the act of 1867.

We could come to no other conclusion without holding that the whole appellate jurisdiction of this court, in cases of habeas corpus, conferred by the Constitution, recognized by law, and exercised from the foundation of the government hitherto, has been taken away, without the expression of such

intent, and by mere implication, through the operation of the acts of 1867 and 1868.

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The argument having been confined, by direction of the court, to the question of jurisdiction, this opinion is limited to that question. The jurisdiction of the court to issue the writ prayed for is affirmed.