HESLETINE, Thomas. Occurs as clerk 1674(S)-1696(W). Probably of York, and a North Riding J.P. *c.* 1678-81.[59]

WILKINSON, John. Occurs as clerk 1700(S).

Western Circuit

HANCOCK, Edward. Occurs as clerk 1602(W)-1603(S). S. of William H. of Combe Martin (Devon). Matric. Trinity Coll. Cambridge Lent 1577-8. Adm. Inner Temple 1580; called 1590. Recorder of Exeter. M.P. Aldborough (Yorks.) 1593, Plympton (Devon) 1597, Barnstaple (Devon) 1601.

WARR [E], Richard. Occurs as clerk 1605(S)-1617(S). Eldest s. of Roger W. of Somerset. Adm. (age 14) Balliol Coll. Oxford 1588. Adm. Middle Temple 1591, called 1598. Of Hestercombe (Soms.) J.P. Soms. *c.* 1614-15.

SPATCHURST, Simon. Clerk 1618(W)-1636(S). Adm. Middle Temple 1610; called 1620. Commissioner for sewers for Wilts. and Hants. 1629, 1630. Father appointed town clerk of Thaxted (Essex) 1589.[60]

SWANTON, Francis. Clerk 1637(W)-1656(W). s. of William S., J.P., of Wincanton (Soms.). Joined circuit staff *c.* 1629. Adm. Middle Temple 1630; called 1638. J.P. Wilts. *c.* 1647-57. M.P. Wilton (Wilts.) 1660, Salisbury (Wilts.) 1661. Died before 30 Nov. 1661.

SWANTON, William. Clerk 1656(S)-1667(S). Eldest s. of Francis S. (above). Adm. Middle Temple 1647. Recorder of Salisbury *c.* 1673-8. M.P. Salisbury 1673.

SWANTON, Lawrence. Occurs as clerk 1668(W-1686(S). 3rd. s of Francis S. (above). Magdalen Hall, Oxford B.A. 1654. Adm. Middle Temple 1654; called 1668.

SWANTON, Francis. Occurs as clerk 1694(S)-1700(S). S. of William S. (above). Matric. (age 18) Magdalen Hall, Oxford 1684. Probably M.P. Salisbury 1715 until his death in Apr. 1721.

59. There were in fact two Thomas Hesletines, father and son. The younger was of Newcastle-on-Tyne, and a Northumberland J.P. *c.* 1678-87. Since Thos. the younger was possibly dead as early as 1690 and certainly so by July 1695, when his estate was held in trust for his two surviving children by their grandfather, Thos. the elder, I have assumed that it was the elder Thos. who held the clerk's office. I am grateful to Mrs. Margaret Child for establishing this relationship from MSS. in the bishopric records in the Department of Palaeography at Durham.

60. For the Western Circuit clerks at this period see Barnes, *op. cit. supra*. note 1, p. xxxiv. The list of clerks of assize printed in *Calendar of State Papers Domestic 1648-9*, 416 and dated *temp.* Charles I was apparently drawn up between 1633 and 1636, possibly for the use of the fees commissioners.

The Reconstruction of Federal Judicial Power, 1863-1875

by WILLIAM M. WIECEK*

INTRODUCTION

In no comparable period of our nation's history have the federal courts, lower and Supreme, enjoyed as great an expansion of their jurisdiction as they did in the years of Reconstruction, 1863 to 1876. To a court, jurisdiction is power: power to decide certain types of cases, power to hear the pleas and defenses of different groups of litigants, power to settle policy questions which affect the lives, liberty, or purses of men, corporations, and governments. An increase in a court's jurisdiction allows that court to take on new powers, open its doors to new parties, and command the obedience of men formerly strangers to its writ. Thus it is that in crabbed and obscure jurisdictional statutes a hundred years old we may trace out great shifts of power, shifts that left the nation supreme over the states in 1876 and that gave the federal courts a greater control over the policies of Congress than they had before the Civil War.

The courts' jurisdiction was enlarged in five ways. First, Congress permitted many cases that had been begun in state courts to be taken out of them and tried in federal courts. This procedure, known as "removal," first gave the federal courts new responsibilities for protecting the rights of Negroes and federal officials in the South. It was later used by corporations seeking to evade the hostility of Granger juries in state courts by resorting to the more sympathetic purlieus of the federal courts. Second, Congress extended the habeas corpus powers of the federal courts and transformed the nature of the Great Writ itself. Third, Congress organized a new federal court, the United States Court of Claims, to handle claims against the federal government, and allowed appeals to go from it to the United States Supreme Court. Fourth, Congress enacted a bankruptcy law which transferred much of the individual and corporate insolvency business from the state courts to the federal courts. By creating a claims court and making federal district judges bankruptcy arbiters, Congress gave the federal courts wide powers to regulate the national economy. Finally, Congress re-

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defined the limits of federal jurisdiction over "federal questions"—broadly speaking, questions arising under the laws, Constitution, or treaties of the United States—in a way that threatened to overwhelm federal courts with appeals from state court decisions.

Not all of these jurisdictional innovations stuck. The Supreme Court strangled its new federal question jurisdiction in infancy. Congress repealed the bankruptcy statute only eleven years after its passage. Yet in the long run, all the jurisdictional statutes of the Reconstruction era laid the groundwork for the judicial self-assertiveness of the late nineteenth and early twentieth centuries. In the twentieth century, removal became a means of protecting the civil liberties of all Americans, not just of southern Negroes. Habeas jurisdiction enabled federal courts to supervise the administration of justice in state courts. Removal and habeas corpus became two of the chief procedural supports for expanding concepts of Fourteenth Amendment liberties. Congress enacted a permanent bankruptcy statute, shorn of the faults of its predecessor, in 1898. In the 1960s, the Court of Claims annually processed millions of dollars of claims.

The responsibility for this accretion of power to the courts lies primarily with Congress. Federal judges cannot confer jurisdiction on themselves, *ab initio*, because the Constitution gives to Congress alone the ability to make "exceptions and regulations" controlling the jurisdiction of any federal court.[1] The President's role in expanding or narrowing the jurisdiction of the courts is usually minimal.[2] It is Congress in the first instance that gives new powers to the courts or takes them away. When Congress expanded the jurisdiction of the federal courts during Reconstruction, it did so sometimes deliberately, sometimes absentmindedly; its intention was clear in one statute, ambiguous and vague in another. But the result by 1876 was clear: Congress had determined to expand the power of the federal courts, sometimes at its own expense, more often at the states', to make them partners in implementing national policy.

Until recently, historians have scouted the part played by the federal courts, especially the Supreme Court, in Reconstruction. Because they emphasized Congress's forceful assertion of its powers after the death of Lincoln, historians tended to see the Supreme Court as intimidated by Congress. The justices, according to this

1. Only the original jurisdiction of the Supreme Court, accounting for a small portion of the court's business, is beyond the power of Congress to enlarge or contract. U.S. Const. Art. III, §2.

2. The President can veto a jurisdictional statute, and can influence its contours before Congress passes it.

view, were so abjectly cowed by Radical threats to strip the courts of their jurisdiction that they offered no resistance to unconstitutional laws. When judges did dare to flap their robes in protest against the usurpation of power by the legislative branch, congressional Radicals maliciously lopped off this or that segment of their jurisdiction. The courts, we once read, were bullied into submission to Congress and were left impotent to deflect the subjugation of the white South.[3]

This prevalent misapprehension about the federal courts' powers is derived from two errors commonly made by historians hostile to Republican accomplishments: first, they exaggerated the importance of selected contemporary sources; and second, they failed to investigate carefully the statutes and courts' opinions of the period. The extraordinary and unrepresentative act of Congress in 1868 that withdrew recently granted jurisdictional authorization so as to prevent William McCardle from taking his habeas corpus appeal to the Supreme Court brought down the wrath of Democrats and conservative Republicans on the heads of the Radicals and the Supreme Court justices. It is from these biased observers that historians have taken their views of the courts' power just after the Civil War.[4] Contemporaries and historians alike conveniently ignored numerous statutes increasing

3. Among historians who have argued for judicial impotence in Reconstruction, see James F. Rhodes, *History of the United States*, v. 6, 11, 12, 96 (1900-1919); William A. Dunning, *Essays on the Civil War and Reconstruction*, 121-122 (1904), and *Reconstruction, Political and Economic*, ch. 16 (1907); James G. Randall, *The Civil War and Reconstruction*, 802-806 (1937); Claude Bowers, *The Tragic Era*, 153, 171, 215 (1929), to cite only some of the more influential. Specialists in constitutional development fell into the same errors, led by Charles Warren, *The Supreme Court in United States History*, vol. 3, chs. 27, 29, 30 (1923 ed.). See also, John W. Burgess, *Reconstruction and the Constitution*, intro. and 197 (1903); Robert H. Jackson, *The Struggle for Judicial Supremacy*, 326-327 (1949); Fred Rodell, *Nine Men*, ch. 5 (1955); Walter F. Murphy, *Congress and the Court*, 35-43 (1962).

4. See Justice Robert Grier's oral remarks made when the Court announced its postponement of the decision on the merits in the McCardle case, quoted in Louis B. Boudin, *Government by Judiciary*, v. 2, p. 91-92 (1932); ex-President James Buchanan to Nahum Capen, 11 June 1867, in *Works of James Buchanan* (John B. Moore, ed.), v. 11, p. 446 (1908-1911); Orville Browning, diary entry of 9 April 1868, in *Diary of Orville Hickman Browning* (Theodore C. Pease and James G. Randall, eds.), v. 2, p. 191 (1933); ex-Attorney-General Jeremiah S. Black to Howell Cobb, ? April 1868, in *The Correspondence of Robert Toombs, Alexander H. Stephens, and Howell Cobb*, 2 Am. Hist. Assn. *Annual Report 1911*, 694; Gideon Welles, diary entry of 20 March 1868,

the federal courts' jurisdiction, as well as Supreme Court opinions vigorously implementing this statutory grant. This paper reviews some of those statutes and opinions in an attempt to restore some realistic perspective to congressional-judicial relations in the Reconstruction era.

Removal

The most important source of new federal judicial power was the removal legislation of the post-war years.[5] The removal jurisdiction of the federal courts had been narrowly restricted before the Civil War. Because the constitution nowhere expressly authorized federal courts to hear suits removed from state courts,[6] it was not clear that removal was constitutionally permissible until Justice Joseph Story's opinion in *Martin v. Hunter's Lessee*.[7] Story there held that the constitution implicitly sanctioned removal, and that even cases which had gone to judgment in the state courts could be removed to federal courts. He also insisted that Congress was obliged to enact statutes vesting in the federal courts all constitutionally-authorized jurisdiction. Congress eventually did this in the Reconstruction years.

The original grant of removal jurisdiction, section 12 of the 1789 Judiciary Act, was quite limited.[8] Congress might have provided that any party could remove a suit presenting a federal question or a suit in which a party on one side lived in a state different from the residence of a party on the other.[9] Instead, it refused to permit removal of federal question cases as such. Only

in *Diary of Gideon Welles* (Howard K. Beale, ed.), v. 3, p. 320 (1960). See also Stephen J. Field, "Personal Reminiscences," in *California Alcalde* (Joseph A. Sullivan, ed.), (1950). Even historians sympathetic to the accomplishments of the Reconstruction congresses have misunderstood the effect of the McCardle repealer. See, e.g., Howard J. Graham, *Justice Field and the Fourteenth Amendment*, 52 Yale L. J. 851 (1943), reprinted in Graham, *Everyman's Constitution* (1968).

5. Reconstruction removal legislation has been recently examined in depth by Professor Stanley I. Kutler of the University of Wisconsin, *Judicial Power and Reconstruction Politics*, ch. 8 (1968).

6. U. S. Const. Art. III, sec. 2 defines the parties that may claim the Supreme Court's original jurisdiction and lists the types of subject matter which may form the grist for federal court mills.

7. 1 Wheat. 304 (U.S. 1816).

8. Ch. 20, 1 STAT. 79.

9. The jurisdiction that federal courts have over suits because the parties are residents of different states is known as "diversity jurisdiction"; the parties are said to be "diverse."

diversity suits could be removed, and then only by the defendant who was an alien or who did not reside in the forum state.[10] In addition, no suit could be removed unless the "matter" involved had a financial value of at least $500.00.[11]

The shortcomings of section 12 became apparent within 25 years after its enactment. When New England shipowners harassed federal customs officers by vexatious lawsuits during the War of 1812, Congress responded by passing the removal provisions of the Revenue Act of 4 February 1815.[12] Section 8 of this statute made removal available in actions begun "for any thing done, or omitted to be done, as an officer of the customs, or for any thing done by virtue of this act . . . ." Diversity and amount in controversy were not relevant, and removal could be had after judgment. In each of these respects, the 1815 statute was an important advance over the section 12. Congress had taken a tentative step toward permitting removal of all federal questions, irrespective of diversity.

The 1815 Act set an important precedent for subsequent removal legislation by making the federal courts partners of Congress and the President in enforcing national policy. Congress again turned to the courts for help in implementing its policies in 1833 when it passed the "Force Act" to suppress South Carolina's resistance to the enforcement of federal revenue laws.[13] Section 3 of the act permitted the removal of suits involving "any right, authority, or title" under any federal revenue statute.

10. The "forum state" is the state in which the court where suit was brought is located.

11. Removal jurisdiction was so narrowly restricted because the Judiciary Act of 1789 was a compromise measure, trimmed down considerably from the original draft by Oliver Ellsworth to placate opponents of the lower federal courts. See Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 53 (1924). The short-lived Judiciary Act of 1801 (ch. 4, 2 STAT. 89, repealed by Act of 29 April, 1802, ch. 31, 2 STAT. 156) permitted removal of all federal question cases.

12. Ch. 21, 3 STAT. 195, reenacted by Act of 3 March 1815, ch. 94, 3 STAT. 231.

13. Act of 2 March 1833, ch. 57, 4 STAT. 632. In 1855 proslavery senators supported the Toucey removal bill (so called from the name of its sponsor, the Doughface Isaac Toucey of Connecticut) which would have extended similar protection to federal officials enforcing the federal fugitive slave laws. Antislavery senators killed the bill in the Senate, condemning the "centralizing" tendencies of removal legislation. See debates in Cong. Globe, 33 Cong. 2 sess. App. 210 ff. Both groups reversed their positions within a decade. *Cui bono.*

On the eve of the Civil War, Congress had thus hesitantly groped toward a comprehensive system of removal legislation in the 1789, 1815, and 1833 statutes, but it had not come near to giving the federal courts plenary removal jurisdiction.[14] Only the recurring crises of the war and Reconstruction years could provide impetus for that. Congress conferred this plenary jurisdiction incrementally and in two ways. First, it authorized removal as an auxiliary procedural device for protecting the enforcement of substantive policies unrelated to removal; second, it enacted other removal statutes with the explicit and primary objective of expanding federal judicial power.

Many Reconstruction statutes which provided for the enforcement of federal laws or for the protection of an individual's rights under the federal constitution also included removal provisions. Such removal sections were always ancillary to some other policy objective, such as collecting revenue or protecting freedmen. They also reflected a growing Republican disenchantment with state courts. As congressmen's respect for the independence of the state benches diminished when they came to believe that local judges were trying to thwart national policy, they did not hesitate to bypass the state judicial machinery altogether in order to protect federal officers and freedmen. This can be most clearly seen by looking at four statutes in chronological order: the Habeas Corpus Act of 1863, the 1866 amendment to the 1863 Habeas Corpus Act, the Internal Revenue act of 1866, and the 1871 Voting Rights Act.

The removal provisions of the 1863 Habeas Corpus Act[15] were modelled on earlier removal legislation and were designed to protect federal officials who arrested persons from suits for false imprisonment. The act also contained a new increment to the expansion of federal removal power: its umbrella of protection was not limited to acts done under any one federal statute. It gave blanket protection to federal officers from all civil and criminal actions arising out of any official acts.

When Congress amended the 1863 Act in 1866, it included provisions that showed its increasing annoyance with state judges and prosecuting attorneys who, it believed, flouted federal removal laws. The 1866 amendment voided all proceedings in state courts after removal and made any person involved in such void proceedings liable to the removing party for damages and double costs.[16]

14. Cf. Felix Frankfurter, *Distribution of Judicial Power between United States and State Courts*, 13 CORN. L. Q. 499, 508 (1928).

15. Ch. 81, 12 STAT. 755. Similar provisions were contained in the Civil Rights Act of 1866, ch. 90, §§3, 10, 13 STAT. 507.

16. Act of 11 May 1866, ch. 80, 14 STAT. 46.

State resistance to removal was nothing new. The 1815 removal act had been denounced by Judge Isaac Parker of the Massachusetts Supreme Court in 1817,[17] and state judges and legislators had complained of removal ever since. The virulent hatred shown by many white southerners for Negroes, Union army officers, Freedmen's Bureau officials, "carpetbaggers," and southern Unionists alarmed congressmen and prompted them to pass removal laws that were perhaps more stringent than was warranted by the actual reactions of state judges.[18]

These fears, together with its perennial concern over the sources of federal revenue, prompted Congress to make it more convenient for Treasury officials to escape the jurisdiction of state courts. Section 67 of the Internal Revenue Act of 1866 provided that if the state courts withheld papers necessary to removal of an action, the action could be begun *de novo* in the federal court.[19] To protect the person of Treasury officers, Congress provided the writ of habeas corpus *cum causa*, a means of giving federal judges jurisdiction over the body of the removing party as well as the suit against him.[20]

The 1871 Voting Rights Enforcement Act made it yet easier to bypass the state courts.[21] The removing party no longer needed the assent of the state judge to remove the action; he had merely to file his petition for removal in the federal court. The court would then issue its writ of certiorari to the state court, a writ which emphasized the inferior status of the state court. Any persons taking part in state proceedings after such removal, including the judge, were made guilty of a misdemeanor and triable for contempt in the court to which the action had been removed.

The foregoing are typical of those removal statutes of the Reconstruction years which were merely procedural aids to the enforcement of some other substantive policy. The three most im-

17. Wetherby v. Johnson, 14 MASS. 412 (1817).

18. The problem of state judges' recalcitrance is reviewed in Charles Warren, *Federal and State Court Interference*, 43 HARV. L. REV. 345 (1930).

19. Ch. 184, 14 STAT. 171.

20. The rescue of officials from hostile local tribunals had an ironic precedent: before the War of the Revolution, the British had tried to transfer suits against Crown officials to a more congenial forum, partly to protect the officials against physical violence. Administration of Justice Act, 1774, 14 Geo. 3, ch. 39 (one of the "Intolerable Acts").

21. Ch. 99, 16 STAT. 433, rp. by Act of 8 Feb. 1894, ch. 25, 28 STAT. 36. For evidence of Congress' continuing concern for the safety of federal officers in southern state courts, see debates in Cong. Globe, 39 Cong. 2 sess. 729 (1867); *id.*, 41 Cong. 3 sess. 1633 ff (1871).

portant removal statutes of the period, however, were enacted specifically to expand federal jurisdiction. These are the Separable Controversies Act of 1866, the Local Prejudice Act of 1867, and the Jurisdiction and Removal Act of 1875. This last statute was the culmination of nineteenth century removal legislation, finally giving plenary removal jurisdiction to the federal courts.

Congress enacted the Separable Controversies Act of 1866[22] to get around an old decision of Chief Justice John Marshall: *Strawbridge v. Curtis*,[23] which required that all parties on one side of a suit have citizenship different from all parties on the opposite side in order for federal courts to take the suit on removal under their diversity jurisdiction. Canny resident plaintiffs in southern state courts supposedly abused the Strawbridge rule and stymied federal removal jurisdiction by joining a nominal resident party to the real and nonresident defendant. To stop this, the Separable Controversies Act permitted the nonresident defendant to remove the action against him to the federal court, leaving the remainder of the suit in the state court, if that portion of the controversy that pertained to him could be finally decided in the federal court. This statute was the first which permitted parties to split a cause of action, leaving part in the state court and bringing another part to the federal court. In the long run, this splitting greatly increased the business of the federal courts.[24]

Southern hostility to nonresident litigants was also the occasion for the Local Prejudice Act of 1867.[25] The original version of the bill, in fact, was limited in its application to "states lately in insurrection."[26] This limitation was dropped, and the act as passed permitted either party to a suit in a state court anywhere in the nation to remove by filing an affidavit "stating that he has reason to, and does believe that, from prejudice or local influence, he will not be able to obtain justice in such state court . . . ." As with the Separable Controversies Act, Congress enlarged federal jurisdiction to protect the administration of justice by providing an impartial forum to litigants when the state courts proved inadequate or obstructive.[27]

22. Ch. 288, 14 STAT. 306. 23. 3 Cranch 267 (U.S., 1806).

24. For a discussion of the importance of this innovation, see Note, *Separation of Causes in Removal Proceedings*, 41 HARV. L. REV. 1048 (1928).

25. Act of 2 March 1867, ch. 196, 14 STAT. 558.

26. See Cong. Globe, 39 Cong. 2 sess., 1865 (1867).

27. See Anthony Amsterdam, *Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial*, 113 U. PA. L. REV. 793, 818 (1965).

By 1875, congressional Republicans' humanitarian concern for the freedmen was nearly spent. The flourishing economic development of the postwar years led most Republicans to substitute sympathies for entrepreneurial interests in place of their earlier care for the freedmen. It was no accident that the most important later use of removal jurisdiction redounded to the benefit of businessmen and corporations rather than Negroes. Congress abandoned its suspicions of southern courts and concentrated its attention on the middlewestern courts and legislatures infected with Granger resentment toward eastern capitalists.[28]

The impetus for enactment of a comprehensive removal statute in 1875 was provided in a negative way by the United States Supreme Court. On 3 March 1874, the court handed down its decision in *The Sewing Machine Company Cases*, holding that under the Local Prejudice Act and the Separable Controversies Act a party could not remove an entire suit to the federal courts if one of the parties on the opposite side lacked diversity.[29] Three months later, Representative Luke Poland (R., Vt.) reported out of the House Judiciary Committee H.R. 3511, section 1 of which was meant to reverse the result of *The Sewing Machine Company Cases*. Poland stated that he was at first unsympathetic to the bill's policy of expanding removal, "but . . . conversation with gentlemen from other states and other portions of the country that are somewhat differently affected from what we are in New England, has satisfied me that this is a wise provision."[30]

Apparently the rest of the House was not as convinced as Poland of the value of removal, for it struck out the bill's removal provisions, and sent only a truncated version of H.R. 3511 to the Senate. The bill, as completely rewritten by the Senate Judiciary Committee, was passed by both houses and became the Jurisdiction and Removal Act of 1875.[31] Its removal provisions: permitted any party to remove; reversed *The Sewing Machine Company Cases* and authorized removal of the whole suit if the real controversy was between diverse parties; allowed removal of all diversity actions,

28. Felix Frankfurter and James M. Landis, *The Business of the Supreme Court*, 65 (1927).

29. 18 Wall. 553 (U.S., 1874).

30. Debates on H.R. 3511 and the Jurisdiction and Removal Act may be found at 2 Cong. Rec. 4301-4304, 4978-4986 and at 3 Cong. Rec. 2168, 2240 (1875). It is only an inference—but a reasonable one—that the "other states" Poland referred to were middlewestern states in which Granger resentment toward the eastern financial "establishment" was running high.

31. Jurisdiction and Removal Act of 1875, ch. 137, 18 STAT. 470.

whether or not one of the parties lived in the forum state; and, most important of all, permitted removal of all federal question suits. Section 1 of the act made analogous changes in the original jurisdiction of the lower federal courts. The lower federal courts were at last given original and removal jurisdiction as broad as the Constitution authorized.

Senator Matt Carpenter (R., Wis.) explained at length the motives of the Senate Judiciary Committee in reporting out such an expansive bill. In 1789, he stated extensive federal jurisdiction was not needed because the nation's commerce was small and waterborne; but in 1875, it "crosses the continent; our people have become vitally changed in their methods of doing business." To accommodate this changed commerce, the former railroad attorney noted, required an expansion of the jurisdiction of the federal courts.[32] Congress, it would appear, was determined not to let the particularist animosities of state court judges and juries impede the national market.

After 1875, comparatively few Negroes or southern Unionists resorted to the removal statutes to escape hostile state courts. Not until our times did removal again become an important means for protecting the civil rights of individuals. But removal was quickly and enthusiastically resorted to by railroads and other interstate corporations.

Habeas Corpus

The second major accretion to federal judicial power came with section 1 of the 1867 Habeas Corpus Act. Not only did this statute expand the power of the courts; it changed the nature of the Great Writ itself. Before 1867, habeas corpus was principally a means of testing the legality of confinements by *executive* authority. After the 1867 Act, the writ became a means of reviewing *judicial* confinement; appellate courts took on power to determine whether lower courts acted properly when they deprived a man of his liberty.

More controversial, then and now, was the shift of power embodied in the 1867 Act. Before 1867, the courts of the nation and the states were insulated from each other in habeas corpus matters by the old maxim that habeas corpus cannot be used as a writ of error. Habeas corpus could not call into question the judgment of a jurisdictionally-competent court. Under the 1867 Act, however, federal courts got the power to review the judgments of state courts, even after these had been affirmed by the state supreme courts. The salvos of the controversy this brought on thundered for nearly a century; their echoes resound today.

32 3 Cong. Rec. 2168 (1875).

The Constitution did not set the bounds of the federal courts' habeas powers; it dealt only with the reasons for suspending the writ.[33] The courts therefore depended entirely on Congress for their habeas powers; without statutory authorization, no court could issue the great writ except the Supreme Court, and then only in aid of its rarely-invoked original jurisdiction.[34] The federal courts did not have power to supervise the rulings of the state courts by habeas corpus. A person on trial in a state court depended completely on the states for the protection of his rights guaranteed by the federal constitution; he had no recourse to the national courts by habeas corpus.

The First Congress did not delay in giving the federal courts habeas jurisdiction, but its jurisdictional grant, section 14 of the 1789 Judiciary Act, was niggardly.[35] By a strict construction of its terms, only the individual judges, not the courts as a body, could issue the Great Writ. (The courts could issue the less important or "ancillary" writs.) The most crippling part of section 14 was contained in its proviso:

> 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 necessary to be brought into court to testify.

This proviso meant that the federal writ could not reach the man held under the order of a state court. No matter how outrageous the violation of his rights under the federal constitution, no matter how emphatically he was protected by federal laws, a man in the grasp of the state courts could not be pried out by federal habeas corpus.

Before the Civil War, the United States Supreme Court tolerated an expansive reading of federal habeas powers only once; more often, it refused to accept the arguments of counsel who suggested a liberal interpretation of federal judicial power under section 14 of the 1789 Judiciary Act. The one exception to this trend was Chief Justice Marshall's opinion in *Ex parte Bollman* (1807),[36] which construed the act broadly to permit courts as well as individual judges to issue the Great Writ. Otherwise the Supreme Court refused to permit habeas to be used for reviewing civil arrests or to be available to a person held by the order of a judge issued in chambers rather than in open court. The justices also con-

33. U.S. Const., Art. I, §9, clause 2.
34. Dallin H. Oaks, *The 'Original' Writ of Habeas Corpus in the Supreme Court*, 1962 SUP. CT. REV. 154.
35. See fn. 8 above.
36. 4 Cranch 75 (U.S. 1807).

firmed the common law nature of the writ by refusing to countenance its use to review a judgment of a court, insisting that it was a pre-trial remedy only. Once trial went through to judgment, the defendant's habeas remedy vanished. Finally, in *Ex parte Dorr* (1844), the court reaffirmed the segregation between federal and state courts imposed by section 14 by holding that federal habeas was not available to a state prisoner.[37]

By 1860, federal habeas power was thus narrowly circumscribed. The Great Writ could not be used in any court to review an order of a jurisdictionally competent tribunal; it was exclusively a pre-trial remedy used to test confinement by executive order. Within the American federal system, the national courts could not use the writ as a means of liberating prisoners held under the authority of the state. Both these restrictions were swept away by the Habeas Corpus Act of 1867. After a century of judicial development of the 1867 Act, the Great Writ has become a procedural device for reviewing convictions after trial in courts which had jurisdiction of the person and the subject matter, and it has been used by federal courts to supervise the administration of justice in state courts.

The origins of the 1867 Habeas Corpus Act may be traced to Republican concern for the condition of Southern freedmen. As a means of enforcing the Thirteenth Amendment, Representative James F. Wilson (R., Iowa) introduced a bill "to secure the writ of habeas corpus to persons held in slavery."[38] In the House Judiciary Committee, Wilson's bill was replaced by a new two-part bill and reported out. Section 1[39] of this substitute bill provided that federal courts and judges could grant a writ of habeas corpus "in all cases where any person may be restrained of his or her liberty in violation of the Constitution, or of any treaty or law of the United States."[40]

Representative William Lawrence (R., Ohio), who reported out the bill, stated that it was originally designed to protect the wives and children of freedmen who served in the Union army, but that, in its revised version, its "effect is to enlarge the privilege of the Writ of habeas corpus, and to make the jurisdiction of the courts and judges of the United States coextensive with all the

37. The cases are, respectively: Ex parte Wilson, 6 Cranch 52 (U.S. 1810); In re Metzger, 5 How. 176 (U.S. 1846); Ex parte Kearney, 7 Wheat. 38 (U.S. 1822) and Ex parte Watkins, 3 Pet. 193 (U.S. 1830); Ex parte Dorr, 3 How. 103 (U.S. 1844). On the last point, cf. Ableman v. Booth, 21 How. 506 (U.S. 1859).

38. Cong. Globe, 39 Cong. 1 sess. 135 (1866).

39. Section 2 will be discussed below.

40. Cong. Globe, 39 Cong. 1 sess 4151 (1866).

powers that can be conferred upon them. It is a bill of the largest liberty. . . ."[41] This sweeping explanation of the jurisdiction conferred by the bill was echoed by Lyman Trumbull in the Senate, who reported the bill out of the Judiciary Committee.

> The habeas corpus act of 1789, [*sic*; Trumbull meant section 14 of the 1789 Judiciary Act] to which this bill is an amendment, confines the jurisdiction of the United States courts in issuing writs of habeas corpus to persons who are held under United States laws. Now, a person might be held under a state law in violation of the Constitution and laws of the United States, and he ought to have in such a case the benefit of the writ, and we agree he ought to have recourse to the United States courts to show that he was illegally imprisoned in violation of the Constitution or laws of the United States.[42]

With no further exegesis or substantial amendment, the bill passed in the next session and became the Habeas Corpus Act of 1867.[43]

The new-born statute nearly suffered infanticide a year later, when the United States Supreme Court announced that it would take jurisdiction in a habeas appeal of one William McCardle.[44] McCardle was a Mississippi editor awaiting trial by a military commission; a federal circuit court had refused his petition for a writ of habeas corpus and he appealed this refusal to the Supreme Court. Democrats in Congress assumed that the Court was about to hold the military reconstruction acts of 1867 unconstitutional. This possibility, unreal though it appears in retrospect,[45] thoroughly frightened congressional Republicans, and they responded by repealing as much of the 1867 act as would authorize the United States Supreme Court to review a lower federal court's disposition

41. Cong. Globe, 39 Cong. 1 sess. 4151 (1866).

42. Cong. Globe, 39 Cong. 1 sess. 4229.

43. Ch. 28, 14 STAT. 385. In an article of exemplary scholarship, Prof. Lewis Mayers of the University of Chicago Law School argues that congressional intent in enacting sec. 1 of the bill was limited to protecting the restricted group of ex-slaves referred to by Rep. Lawrence. *The Habeas Corpus Act of 1867: The Supreme Court as Legal Historian*, 33 U. CHIC. L. REV. 31 (1965). This contention seems insupportable for two reasons. First, the language of the act contains no such limitation; rather, it is comprehensive in its phrasing. Second, both Lawrence and Trumbull, the bill's principal spokesmen in the House and Senate respectively, gave the bill an expansive and inclusive interpretation in debates (although it must be admitted that their remarks were ambiguous enough to provide a nubbin of support for Professor Mayers's reading).

44. Ex parte McCardle, 6 Wall. 318 (U.S. 1868).

45. See Kutler, *op. cit. supra. note* 5, pp. 99-100.

of a habeas petition.[46] Supporters of the "McCardle repealer," as it has been called, were at pains to point out that the repealer did not affect previous grants of habeas jurisdiction; but they did not have quite enough candor to admit that the bill was designed merely to keep McCardle out of the Supreme Court.[47]

The court accepted the repealer and dismissed McCardle's petition, but it passed a useful hint on to counsel, reminding them that the federal habeas jurisdiction, except for the 1867 Act, remained unaffected by the repealer.[48] The hint was taken up by attorneys for Edward M. Yerger, a Mississippian who had been arrested by the army for killing an army officer. The court accepted Yerger's habeas petition as coming up under the 1789 Judiciary Act provisions rather than the 1867 Act, and granted the writ.[49] The effect of the Yerger decision was to nullify the impact of the McCardle repealer as far as federal (not state) prisoners were concerned. In 1885, after the passions of Reconstruction had subsided, Congress restored the McCardle-type jurisdiction it had excised in 1868.[50] Thus the 1867 Act, less than two decades after its passage, was restored to its full force.

The McCardle episode proved to be only a temporary diversion from the mainstream of habeas development in the nineteenth century. This development proceeded in two different directions. First, the Great Writ emerged as a post-conviction form of relief. By the twentieth century, persons convicted in federal courts and in many state courts were getting collateral or direct review of the trial court proceedings by seeking a writ of habeas corpus from a federal appellate court. This evoked little controversy, though it marked a radical departure in the four-hundred year history of the writ.[51]

It was the second transformation in the use of the writ that sparked intense controversy: *federal* courts, lower and Supreme, began granting the writ to review *state* court convictions. State resentment of federal review, smouldering since *Cohens v. Virginia* and *Martin v. Hunter's Lessee* earlier in the century,

46. Act of 27 March 1868, ch. 34, §2, 15 STAT. 44.
47. Debates are at Cong. Globe, 40 Cong. 2 sess. 1860, 2096 (1868).
48. Ex parte McCardle, 7 Wall. 506, 515 (U.S. 1869).
49. Ex parte Yerger, 8 Wall. 85 (U.S. 1869).
50. Act of 3 March 1885, ch. 253, 23 STAT. 437.
51. See generally Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963); Dallin Oaks, *Legal History in the High Court—Habeas Corpus*, 64 MICH. L. REV. 451 (1906); and Henry M. Hart, *The Supreme Court, 1958 Term—Forward*, 73 HARV. L. REV. 84 (1959).

flared up again as persons convicted in state courts sought relief in the federal courts. Partisans of the state judiciary came to realize that the 1867 Act contained no limitations on collateral review by federal courts of state court convictions, and they denounced this "abuse" vociferously in law journals and petitions to Congress.[52]

This denunciation had its effect. In 1885 Congress moved, albeit cautiously, to see what it had accomplished by the 1867 Act. It did so, not by repealing the 1867 Act, but by restoring the McCardle repealer jurisdiction so as to let the United States Supreme Court prick out exact limitations on the use of collateral habeas corpus, with a broad hint that if the courts did not prune this development, Congress would.[53]

The Court took this hint and lent a sympathetic ear to those who complained that the dignity of state courts was abased by having convictions, some of them affirmed by state supreme courts, overturned by lower federal courts by habeas petitions. It began narrowing the sweep of the 1867 Act by formulating the "exhaustion" doctrine of *Ex parte Royall*,[54] by which federal courts may require that a would-be habeas petitioner first be tried by the state courts or exhaust his appeals through the state court system before federal courts grant collateral habeas review. This was done to give the state courts an opportunity to pass on the merits of the case before the federal courts step in.

The Supreme Court's new restrictive mood was further evinced in *In re Wood*, where the court instructed lower federal courts not to retry the merits of federal constitutional questions raised in a habeas petition under the 1867 Act unless the state court lacked jurisdiction of person or cause.[55] This holding, in apparent conflict with congressional intent in passing the 1867 Act, nevertheless suited the new mood of hostility toward federal review. By emphasizing the one desideratum of finality in litigation, the court sacrificed another, that of full judicial protection for individual constitutional rights.

It appeared by 1900 that the expansive possibilities of the 1867 Act had been severely curtailed by judicial surgery. Aside from its use after conviction, habeas corpus had not wrought any drastic changes in the federal system. Yet the act remained in the Revised Statutes, its potential dormant but surviving the winter of judicial

52. See, e.g., *Abuses of the Writ of Habeas Corpus*, 6 A.B.A. REPORTS 243 (1883); *Federal Abuses of the Writ of Habeas Corpus*, 25 AM. L. REV. 149 (1891).
53. See fn. 50 above and H.R. Rep. 730, 48 Cong. 1 sess., ser. 2255 (1884).
54. 117 U.S. 241 (1886).
55. 140 U.S. 278 (1891).

"conservatism" in the late nineteenth century. It was revived dramatically in the 1920s by a bare majority on the court that insisted that federal courts should retry factual issues which, if proved, deprived the petitioner of federal constitutional rights.[56] This began a trend, culminating in several post-World War II cases, toward realizing the full promise of the 1867 Act by permitting federal courts to review the merits of all federal constitutional questions arising in a state court trial.[57] Partisans of the state bench again reacted violently to this trend, but this time they were a century too late. In 1954 the National Association of [state] Attorneys general asked a federal Court of Appeals to hold the 1867 Act unconstitutional. The court, en banc, refused to do so.[58] When litigation failed, friends of the state courts turned to lobbying in an attempt to get Congress to restrict the scope of factual habeas review by legislation.[59] This too failed, and the 1867 Act remains in effect today as the basic authorization for extensive federal supervision of justice in the state court system.

Federal Question Jurisdiction

Section 2 of the 1867 Habeas Corpus Act had even more portentous implications for federal judicial power than section 1. The debate on both sections was scant, making it difficult today to fathom congressional intentions in enacting them, but it is clear that the effect of section 2, had the Supreme Court given it a broad reading, would have been to make the Supreme Court the final appellate authority for virtually all cases decided in the state courts. Seeing these consequences, the Court narrowly construed section 2 to avoid this unimaginable disruption of the federal system.

To understand what changes section 2 might have wrought in the jurisdiction of the federal courts, we must first examine section 25 of the 1789 Judiciary Act.[60] Section 25 authorized

56. Moore v. Dempsey, 261 U.S. 86 (1923). See Frank v. Mangum, 237 U.S. 309 (1915).

57. Waley v. Johnson, 316 U.S. 101 (1942); Brown v. Allen, 345 U.S. 443 (1953); Fay v. Noia, 372 U.S. 391 (1963); Townsend v. Sain, 372 U.S. 293 (1963). A 1961 speech by Justice William Brennan is indicative of the modern attitude of the Supreme Court toward habeas corpus as a means of supervising state administration of justice. See its reprint as *Federal Habeas Corpus and State Prisoners: An Exercise in Federalism*. 7 UTAH L. REV. 423 (1961).

58. United States ex rel. Elliott v. Hendricks, 213 F.2d 922 (C.A.3, 1954), *cert. denied* 348 U.S. 851 (1954).

59. See *Hearings before Subcomm. No. 3, House Judiciary Comm.*, 84 Cong. 1 sess. (1955).

60. See fn. 8 above.

Supreme Court appellate review of what are called "federal questions,"[61] but it narrowly circumscribed this jurisdiction procedurally. The United States Supreme Court could reverse only those errors in state court decisions that appeared on the face of the record and only those errors relating to the federal questions raised. The court could not pass on non-federal questions, and could not pass on federal questions not apparent on the record of the case.[62]

Thirty-five years later the Supreme Court began exploring the implications of section 25 for its review powers over state court decisions in *Osborn v. Bank of the United States* (1824), a suit resulting from the hostility of western states to the "Monster Bank."[63] Chief Justice Marshall there held (among other things) that the presence of one federal question amid a number of non-federal questions sufficed to give the United States Supreme Court appellate jurisdiction in the case. He did not have occasion to go into this more difficult question: suppose the federal questions were decided adversely to the party raising them; did the Supreme Court still retain jurisdiction of the non-federal questions?

It was this question which section 2 of the 1867 Act seemed to answer. It reenacted section 25 of the 1789 Act without the provisos limiting Supreme Court review to errors related to the federal questions in the case. This omission might conceivably have authorized the court to pass on all questions of law, whether federal questions or not, appearing in the case. In other words, any case might eventually go up on appeal to the Supreme Court, no matter how tenuous its jurisdictional basis under the federal Constitution or laws.

House and Senate debates furnish no evidence that the sponsors of section 2 were aware of this possibility. Hardly any congressmen noticed that the critical proviso of section 25 had been omitted, except for a few Democrats who were suspicious of any Republican meddling with jurisdictional statutes but who were

61. "Federal questions" are the issues enumerated in sec. 25: 1) the validity of federal statutes or treaties; 2) the validity of state statutes or "authority" challenged as inconsistent with the federal Constitution, laws, or treaties; and 3) state court decisions adverse to a "title, right, privilege or exemption" claimed under the federal Constitution, laws, or treaties.

62. The clause provides that no error could serve as a ground for reversal "than such as appears on the face of the record, and immediately respects the before mentioned questions of validity or construction of the said constitution, treaties, statutes, commissions, or authorities in dispute."

63. 9 Wheat. 738 (U.S. 1824).

vague as to just what they were suspicious about.[64] It is perhaps possible that the act's sponsors actually did intend the consequences outlined above. They were, after all, working strenuously to extend the protection of the federal courts to southern Negroes and unionists and they might have been willing to go to extreme lengths by making every case in the state courts ultimately reviewable by the federal courts.[65]

It is more likely, though, that the important omissions of section 2 came about by simple absentmindedness. The statute dealt with an abstruse topic, arcane to the non-lawyer members of Congress; it was discussed on the floor in interludes between debates on the military reconstruction acts, when emotional attrition had worn down the attentiveness of many congressmen. That Congress could pass important legislation unaware of the implications lurking in its interstices was not at all unusual, especially during Reconstruction.[66]

The reaction of lawyers, particularly the Supreme Court bar, to the passage of section 2 was hesitant, confused, and tentative. The Supreme Court reporter John Wallace noted that its passage

> was hardly noted for some time within the precincts of this bar—where the venerable Judiciary Act of 1789 was in some sort regarded as only less sacred than the Constitution, and most unlikely to be wished to be altered—and that the less studious observers considered that the new section was but a careless transcript of the old one.[67]

Expert Supreme Court practitioners like Phillip Phillips and ex-Justice Benjamin Curtis realized that the Act probably accomplished something, but they were unwilling to speculate as to just what it was.[68] Attorneys bringing up suits under the federal ques-

64. See debates in Cong. Globe, 39 Cong. 1 sess., 3501, 4151, 4228-4229 (1866); *id.* 39 Cong. 2 sess. 730, 899 (1867).

65. This argument is advanced in Charles A. Wright, *Federal Courts* 426 (1963).

66. Frankfurter and Landis *op. cit. supra* note 28, p. 103, ". . . legislation affecting courts, like all other legislation, discloses in practice aptitudes or consequences not contemplated by its framers and wholly absent from the intention of lawmakers."

67. Reporter's note in Murdock v. Memphis, 20 Wall. 590 (1875).

68. Phillip Phillips, *The Statutory Jurisdiction and Practice of the Supreme Court of the United States*, 128 (1872), quoted *ibid.* Benjamin R. Curtis, *Jurisdiction, Practice, and Peculiar Jurisprudence of the Courts of the United States*, 50 (1880 ed.). Even in Congress there was uncertainty about Congressional intent. See a resolution introduced by Sen. Matthew Carpenter (R., Wis.) asking that the Senate Judiciary Committee be instructed to inquire as to just what the intent of Congress was when it enacted sec. 2. Nothing ever came of this resolution; the inquiry died in Committee. 2 Cong. Rec. 103 (1873).

tion jurisdiction continued to assume that they did so under the superseded section 25.[69]

This state of affairs lasted until 1873; then the question of section 2's effect was presented to the court unavoidably in a case having a mixture of federal and non-federal questions. *Murdock v. Memphis* involved the following facts: Murdock sued the city of Memphis, Tennessee on a reversionary clause in a deed to land which he had donated to the city. Unsuccessful in the state courts, he secured a writ of error from the United States Supreme Court under section 2, alleging as the federal question basis the construction of a conveyance of the property to the city by the United States, authorized by an act of Congress. Once before the high Court, his attorneys insisted that even if the state courts had rightly decided this federal question (adversely to Murdock), the Supreme Court nonetheless had jurisdiction to pass on all non-federal questions as well, simply because their client had gotten through the Court's doors with a federal question that happened to crop up in the case.[70] The chickens of *Osborn v. Bank of the United States* had come home to roost.

The court was deeply troubled by the obvious implications of Murdock's argument. It ordered reargument and invited Curtis and Phillips to appear as *amici*. These authorities on federal jurisdiction did so, and insisted that Murdock's counsel was correct in his reading of the statute. The court then procrastinated its decision, seeking some hint from Congress as to what congressional intent really had been. But Congress remained a Delphic oracle: it incorporated section 2 into the Revised Statutes in 1874 without change or comment.[71]

With no help forthcoming from Congress, the Court finally grasped the nettle in 1875. Justice Samuel Miller, writing for a narrow majority, held that section 2 did not confer jurisdiction on the Supreme Court to decide all questions, including the non-federal ones, necessary to dispose of the case with finality. His opinion was confused and self-contradictory, marred by question-begging and non-sequiturs, but it had the merit of settling the question with definitiveness. The potential revolution in federal question jurisdiction was aborted.

69. See, Jones v. Lavallette, 5 Wall. 579 (U.S. 1867); The Justices v. Murray, 9 Wall. 274 (U.S. 1870); Crews v. Brewer, 19 Wall. 70 (U.S. 1873); The Mayor v. Cooper, 6 Wall. 247 (U.S. 1868); Insurance Co. v. The Treasurer, 11 Wall. 204 (U.S. 1871).

70. 20 Wall. 590 (1875).

71. Congress had, however, refused to reenact sec. 25 of the 1789 Act verbatim, with the old proviso. H.R. 3909, 43 Cong. 2 sess.

Why did Miller decline this sweeping grant of power? His biographers suggest that it was because of his conservative outlook or his sympathy with the prerogatives of the state courts,[72] but neither explanation seems convincing. The *Murdock* result can be accounted for satisfactorily by two things. First, the congressional mandate was unclear. Perhaps the Court would have accepted the new powers had Congress explicitly authorized it to do so, but without such a clear statement of intent, the *Murdock* majority was loath to read this intention into the act. Second, the workload on the federal courts potentially imposed by section 2 would have been staggering. Had the Court adopted an expansionist interpretation, Congress would surely have had to step in immediately with remedial legislation to relieve the dockets.

In view of the possibilities of section 2, it seems simplistic to say that the Republican congresses of the early Reconstruction years were dominated by an implacable hostility to the Supreme Court. It is much more plausible that the pre-Civil War tradition of Congress turning to the courts for aid in establishing national policy continued through the war and Reconstruction. Congress did, to be sure, react defensively when it thought that the courts might pose some threat to legislative policy; *Dred Scott* was a vivid enough memory to assure that. But this was merely a temporary intermission in the otherwise amicable relations between Congress and the federal courts throughout the nineteenth century.

The Court of Claims and Bankruptcy

Reconstruction Congresses enhanced the role of the federal courts in the area of economic regulation. They did this in two principal ways: by creating a Court of Claims having jurisdiction over claims suits against the sovereign; and by enacting a bankruptcy statute to be administered by the federal courts. In both cases, the federal court system took on broad new powers to implement national policy respecting the country's transportation network and other aspects of the national economy.

The problem of providing justice, both procedural and substantive, to persons who had a claim against the United States had plagued Congress ever since 1789. Because the national government was a sovereign, it could not be sued unless it waived its sovereign immunity; yet congressmen always had felt that it would be inequitable to use sovereign immunity as a cloak for evading just obligations. Hence they had experimented with various devices for processing claims against the federal government.

72. Charles M. Gregory, *Samuel Freeman Miller* 26 (1907); Charles Fairman, *Mr. Justice Miller and the Supreme Court* 421 (1939).

Between 1789 and about 1820, Congress made claims determination primarily the responsibility of the executive branch of the government by funnelling claims through the Treasury Department and, after the War of 1812, through an ad hoc administrative commission which processed claims growing out of the war.[73] Beginning sometime in the 1820s and extending to 1855, Congress took on itself the power of adjudicating claims, through its committees.[74] The workload of the committees was so time-consuming, however, that Congress was forced, in the mid-50s, to turn to a quasi-judicial body to handle claims adjudication.

Congress was impeded in its efforts to work out a claims procedure before and during the Civil War by two principal considerations, one practical and one constitutional. The latter stemmed from the seventh clause of Article I, section 9: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law, . . ." The practical difficulty was simply that Congress did not want to relinquish its control of the national purse strings to some extra-legislative body it could not control. Both difficulties hampered the establishment of a Court of Claims during the war and Reconstruction.

By 1855, the time wasted in claims committees had become intolerable to congressmen, and they tried to rid themselves of the unwelcome burden of claims-processing by creating a "court" to decide claims.[75] But their reluctance to part with the power they exercised over claims, together perhaps with scruples about the constitutionality of a wholly independent judicial body whose judgments would have to be honored by the Treasury, led them next year to refuse finality to the judgments of the court.[76] Successful plaintiffs in the claims court still had to have Congress authorize appropriations for their judgments, unsuccessful ones still had their resort to Congress despite an adverse judgment. It was this unsatisfactory structure that still operated when the Civil War broke out. It became obvious that Congress would soon be inundated with war claims.

President Lincoln, in his first annual message,[77] called on Congress to set up a claims court whose judgments would be final,

73. Act of 2 Sept. 1789, ch. 12, 1 STAT. 65; Act of 8 May 1792, ch. 37, 1 STAT. 279; Act of 3 March 1817, ch. 45, secs. 1-4, 3 STAT. 366; Act of 19 April 1816, ch. 40, 3 STAT. 203.

74. See discussion in H.R. Rep. 730, 25 Cong. 2 sess. ser. 335.

75. Act of 24 Feb. 1855, ch. 122, 10 STAT. 612.

76. See Cong. Globe, 34 Cong. 1 sess., 608-610, 970-972, 1241-1243 (1856).

77. *Messages and Papers of the Presidents* (James D. Richardson, comp.), v. 7, p. 3252 (1897-1911).

but Congress did not get around to doing so until 1863. Then it reorganized the court of claims and tried to give finality to its judgments by authorizing them to be paid out of general appropriations made for that purpose, rather than by specific appropriations. At the end of debates, an opponent of finality, Senator John P. Hale (R., N.H.) inserted an amendment to the bill which provided that no claim be paid until it had been "estimated for" by the Secretary of the Treasury. With this amendment, the bill passed and the modern Court of Claims made its debut.[78]

The new court, naturally, did a booming business, and it seemed that all doubts about its constitutional status as an Article III court and the finality of its judgments had been laid to rest. Hence the 1865 holding of the Supreme Court in *Gordon v. United States* came as a shock everywhere. In a brief and opaque opinion, the new Chief Justice, Salmon P. Chase, stated that the authority given to the Secretary of the Treasury to "revise" the decisions of the Court of Claims denied the court Article III judicial status. As a result, appeals could not be taken from it to the United States Supreme Court. Chase's holding left the Court of Claims in existence, but its decisions were by implication not necessarily binding on Congress or the Treasury.[79]

Congress immediately repealed the section of the 1863 Act that Chase had found objectionable, emphasizing its original intention that the Court of Claims be an authentic Article III court.[80] By preserving the right of appeal from Court of Claims decisions to the United States Supreme Court, Congress necessarily gave up its power to revise the judgments of the court, a considerable shift of power from the supposedly hostile Congress to the supposedly intimidated federal courts.

Toward the end of the Reconstruction era, Congress and the Supreme Court discovered that the Court of Claims and the federal courts might play a useful role in regulating the nation's railroads.[81]

78. See Cong. Globe, 37 Cong. 3 sess. 307-309, 426. Act of 12 March 1863, ch. 120, 12 STAT. 820.

79. The reporting of Gordon v. United States compounded the confusion. The official report, 2 Wall. 561, is not Chase's opinion, but rather a note drafted by the reporter, John A. Wallace, which was inaccurate. Chase's opinion appears only in 17 L. Ed. 921. A draft opinion in the case written by Chief Justice Taney just before his death was found and reprinted in 1886. 117 U.S. 697, App.

80. Act of 17 March 1866, ch. 19, 14 STAT. 9, Cong. Globe, 39 Cong. 1 sess. 770-77 (1866).

81. The Supreme Court cooperated with Congress throughout the Reconstruction years to establish paramount national authority over waterborne commerce, both salt and fresh water. See discussions of this

In 1873 Congress tried to relieve itself of the onus of the Credit Mobilier scandal and to introduce some regulation of the national railroads by a rider to an appropriations bill which did two things: 1) it authorized the Secretary of the Treasury to withhold freight payments from railroad companies that had defaulted on interest payments to the federal government, permitting them to sue for the withheld payments in the Court of Claims; and 2) it directed the Attorney General to bring an equitable action in a United States circuit court to straighten out the financial affairs of the Union Pacific and to force the railroad's stockholders who had not yet paid for their stock to cough up.[82]

There was a connection between these apparently unrelated provisions that was immediately perceived by the United States Supreme Court when the Union Pacific's counsel challenged the constitutionality of the latter provision in *United States v. Union Pacific Railroad Co.* (1878).[83] Justice Miller upheld the constitutionality of authorizing an equitable action in this way: he first stated by dictum that Congress could authorize the United States to sue in the Court of Claims as a plaintiff. (This in itself was a remarkable step forward, since until then it had been assumed that the sovereign could only be a defendant in the Court of Claims. By letting the United States sue as plaintiff, the Court of Claims was empowered to act as a sort of bill-collection agency for the government.) If Congress could authorize the United States to sue in the Court of Claims, Miller reasoned, it could also authorize the United States to bring equitable actions there in the nature of actions for an accounting, even where the United States, as a party, did not stand to gain or lose from the suit. Finally, if Congress could authorize such a suit in the Court of Claims, it could authorize the same suit in the regular federal courts of general jurisdiction.

As a result of the *Union Pacific* holding, Congress could now use the federal courts, including the Court of Claims, to accomplish what were essentially legislative or administrative functions in economic regulation: controlling railroad financing through securities and debt obligations, and supervising the operations of federally-chartered railroads. The Court of Claims, originally the demure child of legislative grace, had become, potentially, the stern policeman of the national transportation network.

Regulation of the railroad system was also an unexpected bonus of the Bankruptcy Act of 1867. That relatively short-lived

in Note, *From Judicial Grant to Legislative Power: The Admiralty Clause in the Nineteenth Century*, 67 HARV. L. REV. 1214 (1954); *Expansion of Admiralty Jurisdiction*, 18 ALBANY L. J. 191 (1878).

82. Act of 3 March 1873, ch. 226, sec. 2, 4, 17 STAT. 509.

83. 98 U.S. 569.

statute (it was repealed in 1878), marks another major increment of power passed on to the federal courts by Congress in the Reconstruction era.

Earlier attempts at providing the federal courts with power to supervise insolvencies had failed. The Bankruptcy Law of 1800,[84] a creditor-oriented statute which failed to satisfy its intended beneficiaries, was repealed in 1803.[85] The 1841 Bankruptcy Act, a Whig measure, made available the procedure of voluntary bankruptcy, and broadened the powers of federal courts in supervising the administration of bankrupts' estates. Democrats, southerners and even creditors were dissatisfied with the actual workings of the Act, and it too was repealed within two years.[86] The failure of both statutes indicated that any national bankruptcy legislation would have to appeal to all sections of the country and to both creditor and debtor interests. During the Civil War practical pressures for a new bankruptcy act came as a result of business failures caused by the cancellation of southern indebtedness and the depreciation of currency, north and south, as well as from widespread financial failures in the South because of the war. These pressures brought about the enactment of a third federal bankruptcy statute in 1867.[87]

The 1867 bankruptcy act permitted voluntary as well as involuntary bankruptcies. Federal district courts were made "courts of bankruptcy" and were again given the quasi-equitable jurisdiction of bankruptcy in all cases involving a bankrupt's financial affairs, the interests of his creditors in his property, or the property itself. Appeals from the district courts were provided to the circuit and Supreme courts. This new bankruptcy statute added considerably to the volume of cases in the federal courts.[88]

To the routine bankruptcy business of the federal courts there was soon added a novel function: the supervision of railroad reorganization. Analogous in most respects to certain bankruptcy proceedings, railroad reorganization came to occupy a major part of the time of certain district courts. Railroad receivership suits soon became quasi-permanent proceedings and federal judges took on the unwonted duty of railroad management. Receivership almost became an end in itself, not an ancillary incident to an equity suit. Receivership was not confined to small intrastate feeder lines. A

84. Ch. 19, 2 STAT. 19. On the subject of bankruptcy, see generally Charles Warren, *Bankruptcy in United States History* (1935).

85. Act of 19 Dec. 1803, ch. 6, 2 STAT. 248.

86. Act of 19 Aug. 1841, ch. 9, 5 STAT. 440. Act of 13 March 1843, ch. 82, 5 STAT. 614.

87. Act of 2 March 1867, ch. 176, 14 STAT. 517.

88. Frankfurter and Landis, *op. cit.* supra. note 28, p. 63.

contemporary estimated that "the larger portion of all the railroads in the country are in a condition which would justify [federal courts] in placing them in the hands of receivers."[89] Receivership and railroad reorganization were becoming staples in the business of the lower federal courts by the end of Reconstruction.

The 1867 Act was repealed because of sectional and interest group opposition. Nineteenth century bankruptcy laws had a way of alienating those whom they were intended to benefit. Some northern creditors felt the act was too lenient on southern debtors. Southerners and westerners voiced their instinctive fears of federal courts and national laws providing for the collection of debts. The voluntary bankruptcy provisions seem to have been most unpopular in the south and west, while northeastern creditors disliked the involuntary provisions, a reaction the opposite of what one might have expected. Creditors demanded bigger dividends and more protection; they complained of frauds and high fees.[90] President Grant recommended repeal of the Act in 1878 and Congress soon complied.[91] But the need for national bankruptcy legislation was obvious; it was apparent that if the defects of the 1867 Act could be ironed out, a national bankruptcy law became every day more necessary with the expansion of American commercial activity. The 1898 Chandler Act omitted most of the flaws of the 1867 Act and remains today the basis of our national bankruptcy legislation.

Conclusion

The traditional picture of a vindictive and ruthless Congress intimidating a supine judiciary during Reconstruction is derived from a few exceptional scraps of historical evidence exaggerated by partisan historians. The seeds of fact in this husk of fiction are occasional proposals to abolish the Supreme Court's appellate jurisdiction or to strip the Court of its power of judicial review, together with one successful attempt at trimming federal appellate review, the McCardle repealer. Of these, two things should be noted. First, the amputation in McCardle was not done with a cleaver but

89. *Some New Aspects of the Right of Trial by Jury*, 16 AM. L. REG. (n.s.) 705 (1877). See also, James Maclachlan, *Law of Bankruptcy*, 10 (1956); Fairman, *op. cit. supra* note 72, ch. 10; Leonard A. Jones, *Receivers of Railways*, 4 So. L. Rev. (n.s.) 18, 20 (1879).

90. See: 1 AM. L. REV. 206 (1867); *The Bankrupt Law—Its Provisions and Objects*, 6 CENT. L. J. 273 (1878); 13 CENT. L. J. 221 (1881); *A Permanent Bankrupt Law*, 6 WEST. JUR. 512 (1872); *Abuses of the Bankrupt Law*, 7 AM. L. REV. 641 (1873); *Suggestions of Amendments to the Bankruptcy Act*, 12 AM. L. REG. (n.s.) 737 (1873).

91. *Messages and Papers of the Presidents*, v. 7, p. 250. Act of 7 June 1878, ch. 160, 20 STAT. 99.

with a surgical knife. Congress did not withdraw all habeas review, but only a small portion of it recently conferred. This was far from being an "emasculation" of the Supreme Court, as a recent writer has termed it.[92] Second, the proposals to abolish judicial review are significant, not for what was done, but for what was not done. No such proposal received the approval of either House in the Reconstruction era.

The scope of federal judicial authority was broadened for the most part at the expense of the states. State court determinations affecting a person's federal constitutional or statutory rights were made reviewable by the federal bench. Whole categories of cases could be, and were, taken out of the state judicial systems entirely. This was a consequence of the nationalizing process of Reconstruction. A strong federal bench assured the dominance of the federal government over the states.

The power of the courts within the federal government was greatly expanded in the Reconstruction years. The courts regulated two important segments of the national transportation system, they decided claims against the United States; they presided over the dissolution or reorganization of many business activities, of which the most important were railroads; they exercised the judicial veto over congressional enactments with unprecedented vigor. Only once did Congress intervene to limit this new activism, and that occurrence was clearly an aberration. Otherwise Congress strengthened its working partnership with the federal courts in the implementation of national policy, sometimes by surrendering its prerogative to the courts, sometimes by creating new functions for them.

The expansion of the federal courts' jurisdiction illustrated the use of the law as a means of releasing men's constructive energies.[93] When traditional judicial procedures proved insufficient to untangle the affairs of railroads gutted by financial piracy; when effective national government was impeded by harassment suits directed at federal officials; when the particularism of state and local economic interests threatened to impede the growth of an economy increasingly dominated by nationwide aggregates of capital; when traditional methods of processing claims against the sovereign broke under the weight of Civil War claims; when state courts inadequately protected men's liberties under the federal constitution; in all such instances, the federal courts were called upon to provide relief so that men might be freed for the exercise of their creative capacities.

92. Patricia Acheson, *The Supreme Court*, 127 (1961).

93. See: Willard Hurst, *Law and the Conditions of Freedom*, ch. I (1967 ed.).

Courts in the United States play a vital role in protecting the processes of change and innovation. Where the power to make decisions affecting the economy and the political structure of a nation has been deliberately diffused among many political and economic groups, a permanent and impartial umpire is needed to arbitrate the clash of their interests. Law and the courts must be responsive to the social and economic needs of the society they serve. The jurisdictional legislation and decisions of the Reconstruction years ensured this capability for the federal courts.

The federal judiciary emerged from the turmoil of reconstructing the Union triumphant, vigorous, conscious of its power, and willing to exercise it exuberantly in the decades to come. This reconstruction of federal judicial power proved to be one of the most important and most lasting legacies of Reconstruction.