BOOK REVIEW

A CONSTITUTIONAL HISTORY OF HABEAS CORPUS
By William F. Duker

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Reviewed by John Code Mowbray*

William F. Duker, who has written extensively on legal history, has done an excellent job in encapsulating the writ of habeas corpus in a 313-page text, supplemented by extensive footnotes. Habeas corpus, well-known but enveloped in a web of ancient procedure, is properly characterized as the modern "structural reform mechanism of the criminal justice system"[1]; however, the nature and scope of this remedy has varied with the times. The Great Writ originally functioned to bring a person before the court. Only later did it evolve into an inquiry into the lawfulness of detention. The common law history, illuminated with yearbook case histories, was finally crystallized in the English Habeas Corpus Act of 1679.[2]

The primary American reference is Article I of the Constitution of the United States which states:

> The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in cases of Rebellion or Invasion and Public Safety may require it.[3]

The author impressively argues that in the context of history, this legal procedure, which protects individual liberty against oppressive confinement by government, rested principally with the states. This constitutional prohibition precluded federal encroachment of the state courts' inherent power to issue writs. However, the Judiciary Act of 1789[4] did provide for a federal writ of habeas corpus, and this prerogative writ was confirmed by Chief Justice Marshall in the landmark case, *Ex parte Bollman and Ex parte Swartwout*.[5] Prior to the Civil War the states had issued federal writs on persons held in federal custody, military and judicial. The Supreme Court held in 1871 that the states may not issue writs of habeas corpus for persons in federal custody because to

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1. W. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 3 (1980).
2. Habeas Corpus Act of 1679, 31 Car. 2, c.2.
3. U.S. CONST. art. I, § 9, cl.2.
4. Judiciary Act of 1789, ch. 20, 1 Stat. 73 (1789) (current version at 28 U.S.C. (1976)).
5. 8 U.S. 75 (4 Cranch) (1807).

do so would interfere with the authority of the United States.[6] In *Tarble's Case*, the Court held that state courts had a right to issue the writ unless it appeared that the petitioner was detained "under the authority, or claim and color of the authority, of the United States."[7]

After the Civil War, the plenary power to issue the writ shifted from the state courts to the federal courts, for although state courts could not question federal detention, federal courts would now review any state detention. Federal review for state prisoners is traced to the federal Habeas Corpus Act of 1867[8] which authorized federal relief "in all cases where any person may be restrained of his or her liberty in violation of the Constitution, or any treaty or law of the United States . . . ."[9] Congress may not have understood the impact of this expansive language which permitted federal court review by lower federal courts, as well as by the Supreme Court.

This 1867 legislation was used to test the validity of the Reconstruction Acts by a military detainee scheduled for trial by a military commission. In *Ex parte McCardle*,[10] the Court, in ruling on a motion to dismiss, held that it had jurisdiction to entertain the appeal and commented on the breadth of the new legislation: "It brings within the habeas corpus jurisdiction of every court and of every judge every possible case of privation of liberty contrary to the National Constitution, treaties, or laws. It is impossible to widen this jurisdiction."[11] Three weeks after oral argument on the merits and while the case was under submission, Congress passed an amendment repealing the appellate jurisdiction of the Court under the 1867 Act. President Andrew Johnson vetoed the bill, claiming that it would "eventually sweep away every check or arbitrary and unconstitutional legislation."[12] Congress, however, overrode Johnson's veto. The veto had, however, allowed debate on the measure. Senator Turnbull, Chairman of the Senate Judiciary Committee, who had been responsible for the passage of the 1867 Act in the Senate (he was also counsel for the government in *McCardle*), argued that while the decision in *McCardle* was pending before the Supreme Court there was no case before the Supreme Court under the 1867 Act.[13] The Court then ruled that the repealing amendment was valid and dismissed *McCardle* for lack of jurisdiction, noting nevertheless that the Court still retained its original habeas jurisdiction.

The importance of the writ in subjugating the military to civil au-

6. 80 U.S. 397 (13 Wall.) (1871).
7. *Id.* at 409.
8. Habeas Corpus Act of 1867, ch. 27, 14 Stat. 385 (1867).
9. *Id.*
10. 73 U.S. 318 (6 Wall.) (1867).
11. *Id.* at 325-26.
12. CONG. GLOBE, 40th Cong., 2d Sess. 2094 (1868).
13. *Id.* at 2096.

thority was eloquently expressed in *Duncan v. Kahanamoku*[14] by Justice Murphy, who admonished in a concurring opinion: "But militarism is not our way of life. It is to be used only in the most extreme circumstances. Moreover, we must be on constant guard against an excessive use of any power, military or otherwise, that results in the needless destruction of our rights and liberties."[15] The writ enforces the constitutional rights of the individual by shielding liberty against overreaching by any organ of the state.

A constitutional history of habeas corpus should have included discussion of *United States v. Hayman*,[16] which reversed the Ninth Circuit Court of Appeals that had held that this federal statutory post-conviction remedy (28 U.S.C. § 2255)[17] was an unconstitutional "suspension" of the writ of habeas corpus. The Court approved the use of a section 2255 motion to vacate, set aside, or correct the sentence as a practical device to avoid the labyrinth of ancient collateral attacks. If this statutory procedure is inadequate or ineffective, resort to habeas corpus may still be had.

After 1925 the Supreme Court had principally exercised discretionary review over subordinate federal and state courts. Under the 1867 expansion,[18] the federal writ has permitted broad monitoring of state cases, especially criminal convictions. After a state appeal and certiorari to the Supreme Court has been taken, the convicted defendant may next seek habeas corpus relief in the state courts. In several states this post-conviction collateral attack has been standardized by rule or statute. Certiorari to the Supreme Court from a state court denial may be sought. Thereafter, the state prisoner may seek federal habeas corpus relief[19] in a federal district court and seek appeal and certiorari from a denial. The one-judge, federal district court reversal of a multi-judge, state appellate tribunal has increased tension in federal-state judicial relations, and as a result, the present Supreme Court has sought the curtailment of the federal writ.

Comity between federal and state courts dictated that federal habeas be available only after all available state remedies, trial and appellate, seeking direct or collateral relief, had been exhausted. The "exhaustion doctrine" has been justified on the grounds that it gives the state court the initial opportunity to evaluate the petitioner's claims. This requirement, however, impairs the promptness required of the remedy by the common law. Since the prerequisite of certiorari review from the state proceedings has been eliminated,[20] the petitioner need

14. 327 U.S. 304 (1946).
15. *Id.* at 335.
16. 342 U.S. 205 (1952).
17. 28 U.S.C. § 2255 (1976).
18. Habeas Corpus Act of 1867, ch. 27, 14 Stat. 385 (1867).
19. 28 U.S.C. § 2254 (1976).
20. Fay v. Noia, 372 U.S. 391 (1963).

only exhaust direct or collateral review, not both.[21] The exhaustion requirement is not absolute, for habeas corpus under 28 U.S.C. § 2241[22] could be used to enforce a speedy trial challenge to a pending state charge.[23] In a unique twist of federal habeas corpus review of a state conviction based upon faulty eye-witness identification, the Court shifted focus to the application of a 1966 amendment to the statutory exhaustion requirement[24] that bound the federal court to a state trial court's or appellate court's factual determination made upon an adequate record.[25] *Wainwright v. Sykes*,[26] in which federal habeas was unavailable because the claimed error had not been raised first in the state courts, is but another procedural hurdle designed to emphasize that the state courts are the principal forums for review of state criminal convictions. This valid objective has also the obvious concomitant, though probably unfounded, expectation that the number of prisoners' petitions—approximately one-sixth of the total federal court civil caseload—may diminish. The rise in the number of prisoner petitions from 300 in 1936 to 23,000 in 1979 may be influencing judicial interpretation.

The author notes the judicial retrenchment on the writ. In *Stone v. Powell*,[27] the Court excised the fourth amendment exclusionary rule and required that evidence acquired as a result of an illegal search or seizure be excluded from federal habeas corpus relief. The *Stone* opinion intimated that "innocence" was relevant to the grant of a federal habeas corpus petition, but the author notes that this dictum was qualified by the Court's conclusion in *Rose v. Mitchell*.[28] Although the author is correct, the habeas petitioner in *Rose* did not obtain relief, and Justice Powell's concurring opinion clearly favors return of habeas review to an earlier day when little more than jurisdiction could be examined. It must be remembered that Justice Powell's concurring opinion in *Schneckloth v. Bustamonte*[29] was the ominous precursor of *Stone v. Powell*.[30]

The author also contends that the present Supreme Court has unnecessarily limited federal habeas corpus. In *Bell v. Wolfish*,[31] the Court, on a federal habeas corpus petition of federal pretrial detainees, reversed the lower courts' findings that conditions of confinement[32] violated fundamental protections of those presumed innocent. *Bell* is

21. Brown v. Allen, 344 U.S. 443 (1952).
22. 28 U.S.C. § 2241 (1976).
23. Braden v. 30th Judicial Circuit Court of Kentucky, 410 U.S. 484 (1973).
24. 28 U.S.C. § 2254(a) (1976).
25. Sumner v. Mata, 101 S. Ct. 764 (1981).
26. 433 U.S. 72 (1977).
27. 428 U.S. 465 (1976).
28. 443 U.S. 545 (1979). Five Justices made up the majority in *Rose*.
29. 412 U.S. 218, 252 (1973).
30. 428 U.S. 465 (1976).
31. 441 U.S. 520 (1979).
32. The Court questioned but did not decide whether the writ may be used to challenge conditions of confinement as distinct from its duration. *Id.* at 526 n.6.

unique because the federal courts fail to exercise even minimal supervision over the courts' prisoners—pretrial detainees—to establish any standard for body cavity searches. The author's analysis that the Court not only denies relief but also at the same time denies the availability of a remedy does have support in the recent cases.

The scope of judicial review is carefully synthesized from its early origins, exclusively limited to jurisdiction, to its present-day posture as a post-conviction remedy available to the state or federal prisoner for a violation of a federally protected constitutional right. This text combines easy reading with access to painstaking research and is worthwhile reading for any judge, lawyer, or scholar interested in habeas corpus.