



# THE RIDDLE OF THE ONE-WAY RATCHET

HABEAS CORPUS AND THE DISTRICT OF COLUMBIA

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**I**N RECENT YEARS judges and scholars have struggled to solve what one leading student of the federal courts has called “the constitutional puzzle of habeas corpus.”<sup>1</sup> In this article I briefly sketch the not-entirely-satisfying solutions that have arisen from this struggle so far, and then suggest that a better one lies in the history of the court that is known today as the Superior Court of the District of Columbia.

## THE CONSTITUTIONAL PUZZLE OF HABEAS CORPUS

**I**n his 2001 dissent in *INS v. St. Cyr*, Justice Antonin Scalia raised what remains perhaps the most perplexing question concerning Congress’s power over the habeas corpus jurisdiction of the federal courts: if Congress never had to create a statutory cause of action

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<sup>1</sup> Edward A. Hartnett, *The Constitutional Puzzle of Habeas Corpus*, 46 B.C. L. REV. 251 (2005).

for habeas in the first place, how could a statute purporting to divest the federal courts of jurisdiction over certain habeas petitions violate the Constitution's Suspension Clause? As Justice Scalia suggested, "[i]f . . . the writ could not be suspended within the meaning of the Suspension Clause until Congress affirmatively provided for habeas by statute, then surely Congress may subsequently alter what it had initially provided for, lest the Clause become a one-way ratchet."<sup>2</sup>

In a 2005 article, Professor Edward Hartnett fleshed out the same question, calling it "the constitutional puzzle of habeas corpus." The "puzzle" is the seeming irreconcilability of four well-established propositions:

first, that except where foreign ambassadors are concerned, the Supreme Court cannot issue "original" habeas petitions as an exercise of its constitutional original jurisdiction;

second, that Congress never had to create the lower federal courts in the first place (and therefore exercises plenary control over those courts' jurisdiction);

third, that the state courts lack the power to issue writs of habeas corpus against federal officers; and

fourth, that the Suspension Clause protects access to the writ for (most) federal detainees in *some* forum.

Thus, unless Congress *had* to create lower federal courts *and* confer upon them jurisdiction over federal habeas petitions, these four ideas combine to produce a disturbing lacuna – that individuals in federal custody might be left without a forum in which to contest the legality of their detention, even in cases where the "Privilege of the Writ of Habeas Corpus" has not been properly suspended.

Surprisingly, this puzzle went unaddressed by the Supreme Court this year in *Boumediene v. Bush*.<sup>3</sup> There, the majority concluded that the Military Commissions Act of 2006 violates the Constitution's Suspension Clause entirely because it divests the federal

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<sup>2</sup> 533 U.S. 289, 340 n.5 (2001) (Scalia, J., dissenting).

<sup>3</sup> 128 S. Ct. 2229 (2008).

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courts of statutory jurisdiction over federal habeas petitions without providing an adequate, alternative remedy. Justice Anthony Kennedy's opinion for the Court was mum, though, about why the *Boumediene* majority thought Justice Scalia was wrong in *St. Cyr* — *i.e.*, the majority offered no explanation of how the Constitution could prohibit Congress from taking away jurisdiction that it was not obliged to confer, from courts that it was not obliged to create.

Professor Hartnett has proposed a solution, of course. In his view, the answer lies in the obscure and seldom-invoked power of individual Justices to issue “original” writs of habeas corpus “in chambers.” As Hartnett argued, the exercise of such authority does not run afoul of *Marbury v. Madison* because it is not an exercise of the Court's “original” jurisdiction.<sup>4</sup>

Another possible answer comes from the authors of *Hart & Wechsler*: It might be that, in a world without lower federal courts, the Supreme Court would never have held in *Tarble's Case* that state courts are generally precluded from entertaining federal habeas petitions<sup>5</sup> — that the rule in *Tarble's Case* is based on the “implied exclusion” of state-court jurisdiction by the existence of the lower federal courts in general and the federal habeas statute in particular.<sup>6</sup>

A third possibility is that habeas is simply different. Maybe the Suspension Clause enshrines access to the writ in federal court even if federal statutes do not. The idea that there is a “constitutional” writ of habeas corpus separate from the statutory writ codified at 28 U.S.C. § 2241 has repeatedly surfaced in judicial analysis of statutes purporting to narrow the scope of the statutory writ. Indeed, Justice Scalia himself noted the possibility of such a self-executing remedy three years after *St. Cyr*, suggesting in his dissent in *Rasul v. Bush* that “[t]he constitutional doubt that the [D.C. Circuit] had errone-

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<sup>4</sup> See Hartnett, *The Constitutional Puzzle of Habeas Corpus* at 271-89; see also Daniel M. Gonen, *Judging in Chambers: The Powers of a Single Justice of the Supreme Court*, 76 U. CIN. L. REV. 1159 (2008).

<sup>5</sup> 80 U.S. (13 Wall.) 397 (1872).

<sup>6</sup> See RICHARD H. FALLON, JR. ET AL., *HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 439 (5th ed. 2003).

ously attributed to the lack of habeas for an alien abroad [in *Eisentrager v. Forrestal*<sup>7</sup>] might indeed exist with regard to a citizen abroad – justifying a strained construction of the habeas statute, or (more honestly) a determination of constitutional right to habeas.”<sup>8</sup>

Whatever the merits of these approaches to the “constitutional puzzle of habeas corpus,” they fail to account for – or capitalize on – a key chapter in the history of judicial power. The missing chapter concerns another important form of relief: the common-law writ of mandamus.

In drawing parallels between the Supreme Court’s mandamus and habeas jurisprudences, this short essay explains how Justice Scalia’s “one-way ratchet” is actually a misnomer, and is instead the result of a trap Congress unknowingly set for itself. To give away the punch-line, the mandamus cases illustrate a point lost on courts and commentators alike: the constitutional problem raised by habeas-stripping statutes does *not* arise solely from their constriction of the jurisdiction of the Article III courts. The problem is that a separate (and neglected) Act of Congress constrains the power of the one court that might otherwise be left to hear a federal detainee’s habeas petition absent Article III review: the Superior Court of the District of Columbia.

## WRITS OF MANDAMUS, FEDERAL AND STATE

First, to the Supreme Court’s mandamus jurisprudence. *Marbury v. Madison* famously rejected the Court’s power to issue writs of mandamus pursuant to its constitutional “original” jurisdiction.<sup>9</sup> A decade later, the Court held in *McIntire v. Wood* that the lower federal courts lacked the authority to issue common-law writs of mandamus, after concluding that Congress had not conferred statutory authority to so act through section 11 of the Judiciary Act of 1789.<sup>10</sup>

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<sup>7</sup> 174 F.2d 961 (D.C. Cir. 1949), *rev’d sub nom.* *Johnson v. Eisentrager*, 339 U.S. 763 (1950).

<sup>8</sup> 542 U.S. 466, 497 (2004) (Scalia, J., dissenting).

<sup>9</sup> See 5 U.S. (1 Cranch) 137 (1803).

<sup>10</sup> See 11 U.S. (7 Cranch) 504 (1813).

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And in 1821, the Court denied state courts the power to issue writs of mandamus against federal officers in *McClung v. Silliman*.<sup>11</sup> Taken together, *Marbury*, *McIntire*, and *McClung* suggested that no state or federal court had the power to issue a common-law writ of mandamus against a federal officer. With no extant statutory mandamus remedy, the result of this trilogy of decisions would have effectively immunized federal officials from most prospective judicial review.

This quandary was cleverly resolved in 1837 by William Cranch, the chief judge of the then-Circuit Court for the District of Columbia. In *United States ex rel. Stokes v. Kendall*, Cranch reasoned that the D.C. Circuit alone could hear such claims, concluding that “[t]his court has all the jurisdiction which any other circuit court of the United States can have in its circuit, and much more.”<sup>12</sup> The “more,” Cranch explained, came from the D.C. Circuit’s succession at the time of its creation in 1801 to the “local” jurisdiction of the Maryland and Virginia state courts.<sup>13</sup> (Indeed, federal courts in the nascent capital continued to apply Maryland and Virginia state law until after the Civil War.)

Thus, because the D.C. Circuit Court exercised species of both federal *and* local subject-matter jurisdiction, and because it unquestionably had territorial jurisdiction over the federal government, it possessed the unique and hybrid power to issue common-law writs (which the Supreme Court had denied to pure Article III courts in *McIntire*) against federal officers (which the Supreme Court had denied to state courts in *McClung*). As Chief Justice John Roberts has put it, Cranch’s logic, at its core, was that the whole was bigger than the sum of its parts.<sup>14</sup>

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<sup>11</sup> See 19 U.S. (6 Wheat.) 598 (1821).

<sup>12</sup> *United States ex rel. Stokes v. Kendall*, 26 F. Cas. 702, 713 (C.C.D. D.C. 1837), *aff’d*, 37 U.S. (12 Pet.) 524 (1838).

<sup>13</sup> See *id.* at 706. See also Act of Feb. 27, 1801, ch. 15, 2 Stat. 103. Congress retroceded the Potomac’s west bank back to Virginia in 1846. See Act of July 9, 1846, ch. 35, 9 Stat. 35. See generally Note, *Federal and Local Jurisdiction in the District of Columbia*, 92 YALE L.J. 292, 298 n.26 (1982) (recounting this history).

<sup>14</sup> John G. Roberts, Jr., *What Makes the D.C. Circuit Different? A Historical View*, 92 VA. L. REV. 375, 381 (2006).

In 1838, and for effectively the same reasons, the Supreme Court affirmed *Kendall*.<sup>15</sup> The D.C. courts thereby became the exclusive forum for original mandamus suits against federal officers, until 1962, when Congress finally supplanted the common-law writ with a statutory cause of action.<sup>16</sup> The scheme that resulted from *Kendall* would eventually prove terribly onerous for litigants in jurisdictions far removed from the nation's capital,<sup>17</sup> but it solidified the D.C. courts as the principal forum for judicial oversight of federal executive action, a role the D.C. Circuit continues to play today.

### THE MANDAMUS–HABEAS ANALOGY

Just as the Supreme Court denied to Article III courts the power to issue common-law writs of mandamus in *McIntire*, so it similarly rejected the power of those courts to issue common-law writs of habeas corpus in *Ex parte Bollman*. As Chief Justice John Marshall wrote, “for the meaning of the term *habeas corpus*, resort may unquestionably be had to the common law; but the power to award the writ by any of the courts of the United States, must be given by written law.”<sup>18</sup> And just as *McClung* denied to the state courts the power to issue writs of mandamus against federal officers, decisions bookending the Civil War in *Ableman v. Booth*<sup>19</sup> and *Tarble's Case*<sup>20</sup> similarly rejected arguments for state courts' power to direct writs of habeas corpus to federal officers, despite decades of state court jurisprudence to the contrary.<sup>21</sup>

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<sup>15</sup> *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524 (1838).

<sup>16</sup> Mandamus and Venue Act of 1962, Pub. L. No. 87-748, § 1(a), 76 Stat. 744, 744 (codified at 28 U.S.C. § 1361 (2000)).

<sup>17</sup> See, e.g., Clark Byse & Joseph V. Fiocca, *Section 1361 of the Mandamus and Venue Act of 1962 and “Nonstatutory” Judicial Review of Federal Administrative Action*, 81 HARV. L. REV. 308, 310-13 (1967).

<sup>18</sup> *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 93-94 (1807).

<sup>19</sup> 62 U.S. (21 How.) 506 (1859).

<sup>20</sup> 80 U.S. (13 Wall.) 397 (1872).

<sup>21</sup> See Todd E. Pettys, *State Habeas Relief for Federal Extrajudicial Detainees*, 92 MINN. L. REV. 265, 270-81 (2007).

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As Marshall implicitly recognized in *Bollman*,<sup>22</sup> what separated the habeas cases from the mandamus cases was the availability in the former of a superseding statutory remedy in the lower federal courts. Section 13 of the Judiciary Act of 1789, which the Marshall Court invalidated in *Marbury*, referred to the power of the Supreme Court – not the lower federal courts – to issue writs of mandamus. Section 14, in contrast, 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.”<sup>23</sup> Section 14 thereby provided a statutory cause of action for habeas corpus that appeared to vitiate any need to resort to the common-law remedy. And by the time *Tarble* conclusively rejected the power of state courts to direct writs of habeas corpus to federal officers in 1872, the Habeas Corpus Act of 1867 had extended the scope of the statutory writ to the “constitutional limit” of federal jurisdiction.<sup>24</sup>

The conundrum that precipitated the *Kendall* decision with respect to mandamus therefore did not arise in the parallel context of habeas. Until 1970, when Congress finally bifurcated the D.C. courts’ hybrid local and federal jurisdiction into distinct local and federal courts,<sup>25</sup> the question whether the D.C. courts retained the authority to issue common-law writs of habeas corpus against federal officers was never presented.

After 1970, that question became moot. The new “federal” courts were to be regular Article III tribunals, in which *Bollman*’s rejection of common-law habeas jurisdiction would necessarily apply. As for the new “local” courts (including the new general court of first instance, the Superior Court of the District of Columbia),

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<sup>22</sup> See *Bollman*, 8 U.S. (4 Cranch) at 95. Because federal prisoners could pursue habeas relief in state courts at the time, such a reading would not have raised a serious constitutional question.

<sup>23</sup> Judiciary Act of 1789 § 14, 1 Stat. 73, 81-82 (codified as amended at 28 U.S.C. § 2241(a)) (emphasis added).

<sup>24</sup> WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 191 (1980).

<sup>25</sup> See D.C. Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 91-358, 84 Stat. 473; *M.A.P. v. Ryan*, 285 A.2d 310, 313 (D.C. 1971).

the same statute bifurcating the D.C. courts also provided, without any explanation or legislative history, that “[p]etitions for writs [of habeas corpus] directed to Federal officers and employees shall be filed in the United States District Court for the District of Columbia.”<sup>26</sup> In other words, this provision – which became section 16-1901(b) of the D.C. Code – codified the rule of *Tarble’s Case*.

Even though *Tarble* would not have applied of its own force,<sup>27</sup> and even though the common law of Maryland remained in force in the District (as it still does today),<sup>28</sup> Congress interposed a statutory bar to the new D.C. Superior Court’s power to issue writs of habeas corpus against federal respondents. That the logic of *Kendall* would otherwise have provided the new D.C. Superior Court with such authority was a prospect relegated to obscurity.

### THE END OF OBSCURITY?

Congress gives obscurity, and Congress can take obscurity away. Beginning with the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), and as manifested most recently in the REAL ID Act of 2005 and the Military Commissions Act of 2006 (“MCA”), recent years have witnessed unprecedented attempts by Congress to constrain the scope of the statutory writ of habeas corpus. As just one example, section 7 of the MCA, the provision invalidated by the Supreme Court in *Boumediene*, provided in part that

No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.<sup>29</sup>

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<sup>26</sup> D.C. CODE § 16-1901(b).

<sup>27</sup> As the recent D.C. gun control case illustrates, even “local” D.C. laws are an exercise of “federal” sovereignty. *Cf.* *District of Columbia v. Carter*, 409 U.S. 418, 429-31 (1973) (summarizing Congress’s powers over the District).

<sup>28</sup> *See, e.g.*, D.C. CODE § 45-401(a); *see also* *Griffin v. Acadia Life Ins. Co.*, 925 A.2d 564, 576 n.30 (D.C. 2007) (per curiam).

<sup>29</sup> Pub. L. No. 109-366, § 7(a), 120 Stat. 2600, 2636.



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As with similar provisions in other recent statutes, section 7 was challenged on the ground that such a complete divestiture of habeas jurisdiction without the substitution of an adequate alternative remedy violates the Suspension Clause. And yet, rather than focusing on the constitutional puzzle and Justice Scalia's riddle of the one-way ratchet, the resulting litigation – and the Supreme Court's decision in *Boumediene* – reduced instead to the question of just *what* (and *who*) the Suspension Clause protects.<sup>30</sup> Like Justice Kennedy's majority opinion, the arguments on both sides in *Boumediene* necessarily presupposed that *if* the Suspension Clause applies, and *if* the MCA does not provide an adequate alternative remedy to habeas corpus, then the MCA is unconstitutional. But such analysis skips over a vital question: Why would the MCA be unconstitutional if it merely eviscerated a statutory writ that Congress never had to create in the first place?

The answer is that such a statute would not be unconstitutional, unless there was also no access to the common-law writ of habeas corpus. Taking *Bollman* at face value, the common-law writ of habeas corpus is a remedy that the Article III courts are constitutionally powerless to provide. Taking *Tarble* at face value, such a remedy is also one that state courts are constitutionally powerless to provide against federal officers. But the D.C. Superior Court suffers from neither constitutional shortcoming. Instead, the limit on its power to issue a common-law writ of habeas corpus against a federal officer is necessarily *statutory*. Under *Kendall*, and absent section 16-1901(b) of the D.C. Code, the D.C. Superior Court would have the authority to fashion common-law habeas relief against a federal

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<sup>30</sup> See, e.g., *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007), *rev'd*, 128 S. Ct. 2229 (2008). I have argued that this issue has been framed incorrectly – that the Suspension Clause does not “protect” anyone, but rather empowers the federal government to *preclude* access to habeas in some cases, leaving the writ (whether in statutory or common-law form) available in all others. See Stephen I. Vladeck, *The Suspension Clause as a Structural Right*, 62 U. MIAMI L. REV. 275 (2008). But regardless of which formulation is correct, the problem of the “one-way ratchet” remains.

officer,<sup>31</sup> at least in those cases where the Article III federal courts would not.<sup>32</sup>

And if (like the MCA) the statute precluding habeas jurisdiction included the D.C. local courts within its sweep, Congress would not simply be taking away jurisdiction that it had conferred; in such a case, it would be divesting courts with common-law jurisdiction of authority that they would otherwise inherently possess. So framed, the constitutional defect in such a habeas-stripping statute becomes that much more tangible, and the descriptive inaccuracy of Justice Scalia's "one-way ratchet" that much more obvious. Put simply, Congress cannot and does not run afoul of the Suspension Clause unless it simultaneously blocks access to the writ of habeas corpus in both the federal and D.C. local courts, whether through one statute or several.

One last problem remains: especially after *Boumediene*, one might question whether habeas review in the D.C. Superior Court — an Article I court — is an adequate alternative to the habeas review that might otherwise be available in the Article III courts. But the Supreme Court has already answered that question in the affirmative, so holding in *Swain v. Pressley*.<sup>33</sup> To be sure, the statute upheld in *Pressley* still allowed for Article III habeas review if the post-conviction remedy in the local courts proved "inadequate or ineffective to test the legality of [the petitioner's] detention,"<sup>34</sup> but the majority held that the mere presence of an Article I judge was, of itself, not enough to establish inadequacy.

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<sup>31</sup> I am assuming here, for the sake of argument, that some federal custodian would be amenable to the D.C. Superior Court's personal jurisdiction. *Cf.* *Rumsfeld v. Padilla*, 542 U.S. 426, 436 n.9 (2004) (noting an "exception to the immediate custodian rule" where the detainee is held outside the territorial jurisdiction of any district court).

<sup>32</sup> *Cf.* *United States v. Cogdell*, 585 F.2d 1130, 1133-34 (D.C. Cir. 1978) (upholding D.C. Superior Court's power to issue writs under the federal All Writs Act, 28 U.S.C. § 1651), *rev'd on other grounds sub nom.* *United States v. Bailey*, 444 U.S. 394 (1980).

<sup>33</sup> 430 U.S. 372 (1977).

<sup>34</sup> D.C. CODE § 23-110(g).

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It may well strike the reader as somewhat backward – if not downright perverse – that the last line of defense for the “Great Writ of Liberty” could be a court that, whether deservedly or not, is hardly considered one of the country’s more elite judicial tribunals.

Two responses may assuage such concerns: First, such a role was precisely that played by the D.C. courts with respect to petitions for writs of mandamus from 1837 to 1962. Congress eventually provided a nationwide remedy to alleviate the massive logistical problems that inevitably arose, but the constitutional structure was hardly undermined by the exercise of such jurisdiction by such a uniquely situated court.

Second, and perhaps more importantly, the D.C. Superior Court’s common-law jurisdiction is only of such potential significance in the habeas context because of a series of legal conclusions that, to put it charitably, were hardly inevitable. That is to say, it didn’t have to be this way. *Marbury* could just as easily have held that Congress could not *restrict* the Supreme Court’s original jurisdiction, but that it could expand that power.<sup>35</sup> *Tarble* could just as easily have held that state courts *are* competent to entertain federal habeas petitions (just as they are most other federal-question lawsuits), especially in light of the Supreme Court’s appellate jurisdiction to review state-court decisions in such cases.<sup>36</sup> More recently, Congress could have avoided the difficult questions raised in recent habeas cases by leaving the scope of the federal statutory writ intact, and not so squarely forcing the issue on such major constitutional questions.

But in a world with *Marbury*, *Tarble*, and an un-bashful Congress, these questions have become unavoidable, as *Boumediene* showed.

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<sup>35</sup> See, e.g., Akhil Reed Amar, *Marbury, Section 13, and the Original Jurisdiction of the Supreme Court*, 56 U. CHI. L. REV. 443 (1989) (suggesting that this reading of Congress’s power is more plausible).

<sup>36</sup> See, e.g., *Tarble’s Case*, 80 U.S. (13 Wall.) 397, 412-13 (1872) (Chase, C.J., dissenting) (making this argument).

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The reason why Congress cannot take habeas jurisdiction away from the Article III federal courts in cases in which the Suspension Clause “applies” is because it has already taken that jurisdiction away from the D.C. Superior Court. Thus, it is ultimately D.C. Code § 16-1901(b), as much as it is the MCA’s jurisdiction-stripping provision, that forces the constitutional question, and that proves that the riddle of Justice Scalia’s one-way ratchet is no riddle, at all.

*GB*