so it has been understood since,[269] with only a few judicial voices raised to suggest that what Congress could not do directly (by suspension) it could not do by omission (by failing to provide for *habeas*).[270] But, because statutory authority had always existed authorizing the federal courts to grant the relief they deemed necessary under *habeas corpus*, the Court did not need to face the question.[271]

Having determined in *Bollman* that a statute was necessary before the federal courts had power to issue writs of *habeas corpus*, Chief Justice Marshall pointed to § 14 of the Judiciary Act of 1789 as containing the necessary authority.[272] As the Chief Justice read it, the authorization was limited to persons imprisoned under federal authority. It was not until 1867, with two small exceptions,[273] that legislation specifically empowered federal courts to inquire into the imprisonment of persons under state authority.[274] Pursuant to this authorization, the Court then expanded the use of the writ into a major instrument to reform procedural criminal law in both federal and state jurisdictions.

However, the question then arose as to what aspects of this broader *habeas* are protected against suspension. Noting that the statutory writ of habeas corpus has been expanded dramatically since the First Congress, the Court has written that it "assume[s] . . . that the Suspension Clause of the Constitution refers to the writ as it exists

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[269] *See Ex parte* McCardle, 74 U.S. (7 Wall.) 506 (1869). *Cf.* Carbo v. United States, 364 U.S. 611, 614 (1961).

[270] *E.g.*, Eisentrager v. Forrestal, 174 F.2d 961, 966 (D.C. Cir. 1949), *revd. on other grounds sub nom.*, Johnson v. Eisentrager, 339 U.S. 763 (1950) (holding that habeas exists as an inherent common law right); *see also* Justice Black's dissent, id. at 791, 798: "*Habeas corpus*, as an instrument to protect against illegal imprisonment, is written into the Constitution. Its use by courts cannot in my judgment be constitutionally abridged by Executive or by Congress." And, in Jones v. Cunningham, 371 U.S. 236, 238 (1963), the Court said: "The habeas corpus jurisdictional statute implements the *constitutional command* that the writ of habeas corpus be made available." (Emphasis added).

[271] *Cf. Ex parte* McCardle, 74 U.S. (7 Wall.) 506 (1869).

[272] *Ex parte* Bollman, 8 U.S. (4 Cr.) 75, 94 (1807). *See* Fay v. Noia, 372 U.S. 391, 409 (1963).

[273] Act of March 2, 1833, § 7, 4 Stat. 634 (federal officials imprisoned for enforcing federal law); Act of August 29, 1842, 5 Stat. 539 (foreign nationals detained by a state in violation of a treaty). *See also* Bankruptcy Act of April 4, 1800,§ 38, 2 Stat. 19, 32 (*habeas corpus* for imprisoned debtor discharged in bankruptcy), repealed by Act of December 19, 1803, 2 Stat. 248.

[274] The act of February 5, 1867, 14 Stat. 385, conveyed power to federal courts "to grant writs 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. . . ." On the law with respect to state prisoners prior to this statute, *see Ex parte* Dorr, 44 U.S. (3 How.) 103 (1845); *cf.* Elkison v. Deliesseline, 8 Fed. Cas. 493 (No. 4366) (C.C.D.S.C. 1823) (Justice Johnson); *Ex parte* Cabrera, 4 Fed. Cas. 964 (No. 2278) (C.C.D. Pa. 1805) (Justice Washington).