Sec. 1—Judicial Power, Courts, Judges

Habeas Corpus: Congressional and Judicial Control.— The writ of *habeas corpus* [261] has a special status because its suspension is forbidden, except in narrow circumstances, by Article I, § 9, cl. 2. The writ also has a venerable common law tradition, long antedating its recognition by the first Congress in the Judiciary Act of 1789,[262] as a means "to relieve detention by executive authorities without judicial trial." [263] Nowhere in the Constitution, however, is the power to issue the writ vested in the federal courts, which raises the question of whether Congress could suspend the writ *de facto* by declining to authorize its issuance. In other words, is a statute needed to make the writ available or does the right to *habeas corpus* stem by implication from the Suspension Clause or from the grant of judicial power? [264]

Since Chief Justice Marshall's opinion in *Ex parte Bollman*,[265] it was generally [266] accepted that "the power to award the writ by any of the courts of the United States, must be given by written law." [267] As Marshall explained, however, the suspension clause was an "injunction," an "obligation" to provide "efficient means by which this great constitutional privilege should receive life and activity; for if the means be not in existence, the privilege itself would be lost, although no law for its suspension should be enacted." [268] And

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[261] Reference to the "writ of *habeas corpus*" is to the "Great Writ," *habeas corpus ad subjiciendum*, by which a court would inquire into the lawfulness of a detention of the petitioner. *Ex parte* Bollman, 8 U.S. (4 Cr.) 75, 95 (1807). For other uses, *see* Carbo v. United States, 364 U.S. 611 (1961); Price v. Johnston, 334 U.S. 266 (1948). Technically, federal prisoners no longer utilize the writ of *habeas corpus* in seeking post-conviction relief, now the largest office of the writ, but proceed under 28 U.S.C. § 2255, on a motion to vacate judgment. Intimating that if § 2255 afforded prisoners a less adequate remedy than they would have under *habeas corpus*, it would be unconstitutional, the Court in United States v. Hayman, 342 U.S. 205 (1952), held the two remedies to be equivalent. *Cf.* Sanders v. United States, 373 U.S. 1, 14 (1963). The claims cognizable under one are cognizable under the other. Kaufman v. United States, 394 U.S. 217 (1969). Therefore, the term *habeas corpus* is used here to include the § 2255 remedy. There is a plethora of writings about the writ. *See*, *e.g.*, Hart & Wechsler (6th ed), *supra* at 1153–1310; *Developments in the Law: Federal Habeas Corpus*, 83 HARV. L. REV. 1038 (1970).

[262] Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 82.

[263] INS v. St. Cyr, 533 U.S. 289, 301 (2001), quoted in Rasul v. Bush, 542 U.S. 466, 474 (2004).

[264] Professor Chafee contended that by the time of the Constitutional Convention the right to *habeas corpus* was so well established no affirmative authorization was needed. *The Most Important Human Right in the Constitution*, 32 B.U.L. REV. 143, 146 (1952). *But compare* Collins, *Habeas Corpus for Convicts: Constitutional Right or Legislative Grace?*, 40 CALIF. L. REV. 335, 344–345 (1952).

[265] 8 U.S. (4 Cr.) 75 (1807).

[266] 8 U.S. at 94. *See also Ex parte* Dorr, 44 U.S. (3 How.) 103 (1845).

[267] 8 U.S. at 64.

[268] 8 U.S. at 95. In quoting the clause, Marshall renders "shall not be suspended" as "should not be suspended."