been passed on the subject." [1175] Later Justices viewed the matter differently from Marshall. "By the constitution of the United States," it was said in one opinion, "the Supreme Court possesses no appellate power in any case, unless conferred upon it by act of Congress." [1176] In order for a case to come within its appellate jurisdiction, the Court has said, "two things must concur: the Constitution must give the capacity to take it, and an act of Congress must supply the requisite authority." Moreover, "it is for Congress to determine how far, within the limits of the capacity of this court to take, appellate jurisdiction shall be given, and when conferred, it can be exercised only to the extent and in the manner prescribed by law. In these respects it is wholly the creature of legislation." [1177]

This congressional power, conferred by the language of Article III, § 2, cl. 2, which provides that all jurisdiction not original is to be appellate, "with such Exceptions, and under such Regulations as the Congress shall make," has been utilized to forestall a decision which the congressional majority assumed would be adverse to its course of action. In *Ex parte McCardle*,[1178] the Court accepted review on *certiorari* of a denial of a petition for a writ of *habeas corpus* by the circuit court; the petition was by a civilian convicted by a military commission of acts obstructing Reconstruction. Anticipating that the Court might void, or at least undermine, congressional reconstruction of the Confederate States, Congress enacted over the President's veto a provision repealing the act which authorized the appeal McCardle had taken.[1179] Although the Court had already heard argument on the merits, it then dis-

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[1175] Durousseau v. United States, 10 U.S. (6 Cr.) 307, 313–314 (1810). "Courts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction." *Ex parte* Bollman, 8 U.S. (4 Cr.) 75, 93 (1807) (Chief Justice Marshall). Marshall had earlier expressed his *Durousseau* thoughts in United States v. More, 7 U.S. (3 Cr.) 159 (1805).

[1176] Barry v. Mercein, 46 U.S. (5 How.) 103, 119 (1847) (case held nonreviewable because minimum jurisdictional amount not alleged).

[1177] Daniels v. Railroad Co., 70 U.S. (3 Wall.) 250, 254 (1865) (case held nonreviewable because certificate of division in circuit did not set forth questions in dispute as provided by statute).

[1178] 73 U.S. (6 Wall.) 318 (1868). That Congress's apprehensions might have had a basis in fact, *see* C. FAIRMAN, HISTORY OF THE SUPREME COURT OF THE UNITED STATES, VOL. VI, PT. I: RECONSTRUCTION AND REUNION 1864–88 493–495 (1971). *McCardle* is fully reviewed at pp. 433–514.

[1179] By the Act of February 5, 1867, § 1, 14 Stat. 386, Congress had authorized appeals to the Supreme Court from circuit court decisions denying *habeas corpus*. Previous to this statute, the Court's jurisdiction to review *habeas corpus* decisions, based in § 14 of the Judiciary Act of 1789, 1 Stat. 81, was somewhat fuzzily conceived. *Compare* United States v. Hamilton, 3 U.S. (3 Dall.) 17 (1795), *and Ex parte* Burford, 7 U.S. (3 Cr.) 448 (1806), with *Ex parte* Bollman, 8 U.S. (4 Cr.) 75 (1807). The repealing statute was the Act of March 27, 1868, 15 Stat. 44. The repealed act was reenacted March 3, 1885. 23 Stat. 437.