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Cases that Shaped the Federal Courts

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*Ex parte McCardle*

1869



Chief Justice Salmon P. Chase

**Federal Judicial Center**  
2020

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# Central Question

COULD CONGRESS REMOVE A PENDING APPEAL FROM THE  
SUPREME COURT'S JURISDICTION?

## Historical Context

During and after the U.S. Civil War (1861–1865), debate raged as to the approach the federal government should adopt in reintroducing former Confederate states to the Union. Some moderate Republicans and most Democrats, including President Andrew Johnson, argued that Southern states should be reintegrated into the nation as quickly as possible, provided they adopted a few basic legal protections for formerly enslaved people (like allowing them to testify in court). A growing number of Republicans in Congress, however, argued that a much stronger set of federal safeguards was needed to ensure the fairness of Southern governments. Congressional plans for this process, known as Reconstruction, included the imposition of military government in large parts of the South.

Advocates of military Reconstruction in the South argued that Southern governments could not be trusted to govern fairly. Many white Southerners, however, complained that the process was rife with corruption and that the imposition of federal rule through military occupation was tyrannical. *Ex Parte McCordle* (1868) reflected important legal challenges to Reconstruction brought by one such Southerner, William McCordle. While the case did not ultimately determine the validity of Military Reconstruction in the South, it played an important role in establishing the boundaries of congressional and judicial power during and beyond the period.

## Legal Debates Before *McCordle*

The *McCordle* litigation ultimately raised three major legal questions: (1) Could the Supreme Court hear an appeal of a habeas corpus suit brought in a U.S. circuit court against U.S. military officials?; (2) Was the use of military tribunals (and, by implication, Military Reconstruction itself) constitutional?; and (3) What, if any, limits did the Constitution place on Congress's power to regulate the Supreme Court's jurisdiction? Though the Supreme Court did not definitively resolve these questions in *McCordle*, the case played an important role in debates over all three.

President Johnson vetoed the Military Reconstruction Act of 1867, the main law setting up the framework for Reconstruction in the South, partly because he believed the Act violated the Constitution by replacing civil governments in Southern states with military rule. The Act divided the former Confederate states except Tennessee into five military districts under the control of Northern military officers. Proclaiming the states' civil

governments illegitimate, the Act granted the military broad powers to keep the peace, restore government administration, and protect the civil rights of freedpeople. Johnson argued that the Constitution did not permit Congress to replace state governments in this way. Nevertheless, Congress overrode the President's veto.

Mississippi and Georgia separately launched lawsuits in the Supreme Court seeking to stop the President and the Secretary of War, respectively, from enforcing the Act. The Court, however, dismissed these suits on the grounds that they sought abstract opinions on political matters best left to other branches of government. This did not mean, however, that the Court could not hear constitutional challenges to Reconstruction if they arose in the course of an ordinary lawsuit. Indeed, in dismissing the Georgia case, Justice Samuel Nelson indicated constitutional questions like those raised by the state "might, perhaps, be decided by this court in a proper case with proper parties."

Republicans had reason to suspect the Court might invalidate Reconstruction if it heard such a case. In *Ex Parte Milligan* (1866) the Court had ruled that military authorities in Indiana could not try civilians where legitimate civilian courts were in operation. Many white Southerners and some Northern Democrats argued that *Milligan* suggested the use of military rule in the South was improper. The regions were no longer at war and most Southern state courts were prepared to hear cases once again. Proponents of Military Reconstruction either argued that *Milligan* was itself wrongly decided or that the case did not apply to the South. They pointed out that Congress had not authorized the use of military tribunals in Indiana, but had done so in the Southern states. They also noted that *Milligan* had assumed the existence of a legitimate, legal government in Indiana, but Congress had proclaimed that, due to their secession and continued refusal to recognize the civil rights of freedpeople, the Southern states had no legally constituted governments.

## **The Case**

During the fall of 1867, a Mississippi newspaper editor named William McCardle published a series of articles criticizing military leaders placed in charge of Reconstruction. In one piece, for example, he called the officers "infamous, cowardly, and abandoned villains, who, instead of . . . ruling millions of people, should have their heads shaved, their ears cropped, their foreheads branded, and their precious persons lodged in a penitentiary." He wrote equally inflammatory articles about black suffrage during that year's election. On November 8, 1867, military officers arrested McCardle for disturbing the peace, impeding the right to vote, libel, and inciting insurrection. The local military commander ordered him tried before a military commission, which did not have many of the procedural protections available to defendants in civilian courts.

McCardle's lawyers petitioned the U.S. Circuit Court for the Southern District of Mississippi seeking a writ of habeas corpus. Circuit courts were the main trial courts in the federal system until 1911. The courts were usually presided over by a U.S. district judge and a justice of the Supreme Court assigned to each circuit. Supreme Court justices, however, did not "ride circuit" in the South during Reconstruction's early years because Chief Justice Salmon P. Chase had argued the justices could not appear subordinate to military officials. As a result, District Judge Robert Hill presided alone over the case. Distinguishing the case from *Milligan* based on Congress's explicit authorization of military rule in Mississippi and its declaration that the state had no legally constituted government, Judge Hill ruled that McCardle was not entitled to release. Although he remained in military custody, McCardle's trial before the commission was delayed while he appealed to the Supreme Court.

### **Initial Supreme Court Proceedings**

Perhaps ironically, McCardle's appeal relied in part on one of the most important legal innovations of the Reconstruction-era Congress. The Habeas Corpus Act of 1867 had expanded the availability of the writ for state prisoners and permitted appeals to the Supreme Court in habeas cases. The purpose of this expanded jurisdiction was undoubtedly to enable freedpeople to secure their liberty if state courts treated them unfairly. In this instance, however, McCardle was attempting to use the new law to challenge another key component of Reconstruction. The government—represented by Lyman Trumbull, a prominent Republican Senator from Illinois who had played an important role in the passage of the Habeas Corpus Act—filed a motion with the Supreme Court to have the case dismissed for a lack of jurisdiction. Trumbull argued the Court should not read the law to allow appeals like McCardle's. Noting that the Habeas Corpus Act granted the broadest possible appellate jurisdiction, the Supreme Court unanimously denied this motion.

Having decided it had jurisdiction over the case, the Supreme Court proceeded to hear oral arguments in March 1868. These arguments took place amid an extraordinary showdown between Congress and the President. Just weeks prior, on February 24, 1868, the House of Representatives had voted to impeach Johnson on the grounds that he had violated a statute limiting his power to remove officials from their posts. This quarrel was part of a longer battle over the meaning of the Constitution in postwar America, as Johnson had issued, and Congress overridden, several vetoes of major legislation related to Reconstruction in the South. Attorney General Henry Stanbery, who had apparently advised Johnson that the Military Reconstruction Act was unconstitutional before his veto, declined to defend the legislation before the Court, and Trumbull argued the case on behalf of Congress instead. McCardle was represented by David Dudley Field, one of the preeminent lawyers in nineteenth-century America and the brother of Justice Stephen Field.

## **Repeal Act**

It was not certain how the Supreme Court would have ruled at this stage, but it appears that Trumbull's colleagues in Congress were concerned the Court would invalidate part or all of the Military Reconstruction Act. House Republicans inserted a provision repealing the appellate jurisdiction granted by the Habeas Corpus Act into an otherwise innocuous piece of legislation involving tax appeals. The law passed with little debate, but some Democrats were outraged when they realized the law threatened the *McCardle* litigation. Johnson vetoed the law, arguing that if Congress could withdraw jurisdiction from cases challenging the validity of federal laws, it could "sweep away every check on arbitrary and unconstitutional legislation." Congress again overrode the veto, forcing the Supreme Court to reckon with the legal effect of the Repeal Act on the case. The justices opted to postpone any decision in the case until the Court's next term, asking the parties to reargue the case in light of the Repeal Act.

## **Reargument and Ruling**

Article III, Section 2 of the Constitution provides that Congress may make "[e]xceptions" to the Supreme Court's appellate jurisdiction. Trumbull argued that this power permitted Congress to abolish any part of the Court's appellate jurisdiction. McCardle's lawyers responded that the Court's jurisdiction derived from the Constitution itself and that Congress could not repeal the Court's power to hear pending cases or to target particular cases legislators did not want the Court to address.

In a unanimous opinion delivered by Chief Justice Salmon P. Chase, the Court ruled that it did not have jurisdiction to hear the appeal. While the Court's appellate jurisdiction came from the Constitution rather than Congress, Chase reasoned, the legislature's power to make exceptions effectively meant that Congressional legislation operated as a grant of power to the Court. When Congress revoked that grant, the Supreme Court's only role was "that of announcing the fact and dismissing the cause." Chase did not address whether the Constitution imposed any limitations on Congress's power to revoke the Court's jurisdiction, though subsequent cases suggested there were some very narrow restrictions.

## **Aftermath and Legacy**

The scope of both habeas corpus and congressional power over Supreme Court appeals remained important legal issues throughout Reconstruction. Chase had ended his opinion in *McCardle* by noting that, although the Repeal Act revoked the Court's jurisdiction under the 1867 Habeas Corpus Act, the Court retained the ability to hear habeas corpus cases it had held under prior laws. In *Ex Parte Yerger* (1869), the Court made this point clearer by holding that a circuit court could grant a writ to another Mississippian in military

custody (though that case did not ultimately reach the question of the validity of the commissions themselves). In *United States v. Klein* (1871), the Court, for the first time, struck down a congressional statute restricting federal jurisdiction, though it has upheld the vast majority of such statutes in the years since. Scholars continue to debate the nature and extent of this power.

The Supreme Court never issued a definitive ruling on the constitutionality of Congress's Reconstruction policy. Military Reconstruction gradually wound down over the course of the 1870s, however, with troops withdrawn from the final two Southern states in 1877 as part of a political compromise to resolve the previous year's contested presidential election.

## Discussion Questions

- Did the Supreme Court “back down” from a confrontation with Congress in *McCordle*, or were the justices simply acknowledging a constitutional check on their own power?
- Was President Johnson right to argue that repealing the Supreme Court's appellate jurisdiction would “sweep away every check on arbitrary and unconstitutional legislation”? Were there other checks on Congress's power to interfere with the courts?
- It is important to understand that the debate over Reconstruction and the use of military commissions took place shortly after the unprecedented bloodshed of the Civil War. Do wars and similar emergencies change the scope of legal rights? Should they?
- Why did the framers give Congress authority to regulate the Supreme Court's appellate jurisdiction? What other powers does Congress hold regarding the courts?
- Questions about the scope of habeas corpus and the use of military rule have often arisen during or immediately after wars. What might this indicate about the importance of the writ and the right to a fair trial?

## Documents

### **Supreme Court of the United States, Opinion in *Ex Parte McCardle*, February 17, 1868**

*This excerpt from the first of the two opinions Chief Justice Chase wrote for the Supreme Court in McCardle holds that the Court had jurisdiction to hear the case.*

The motion to dismiss the appeal has been thoroughly argued, and we are now to dispose of it.

The ground assigned for the motion is want of jurisdiction, in this court, of appeals from the judgments of inferior courts in cases of habeas corpus.

Whether this objection is sound or otherwise depends upon the construction of the act of 1867....

It was insisted on argument that appeals to this court are given by the act only from the judgments of the Circuit Court rendered upon appeals to that court from decisions of a single judge, or of a District Court.

The words of the act are these: "From the final decision of any judge, justice, or court inferior to the Circuit Court, an appeal may be taken to the Circuit Courts of the United States for the district in which said cause is heard, and from the judgment of said Circuit Court to the Supreme Court of the United States."

These words, considered without reference to the other provisions of the act, are not unsusceptible of the construction put upon them at the bar; but that construction can hardly be reconciled with other parts of the act.

The first section gives to the several courts of the United States, and the several justices and judges of such courts within their respective jurisdictions, in addition to the authority already conferred by law, power to grant writs of habeas corpus in all cases where any person may be restrained of liberty in violation of the Constitution, or of any treaty or law of the United States.

This legislation is of the most comprehensive character. 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.

And it is to this jurisdiction that the system of appeals is applied. From decisions of a judge or of a District Court appeals lie to the Circuit Court, and from the judgment of the Circuit Court to this court. But each Circuit Court, as well as each District Court, and each judge, may exercise the original jurisdiction; and no satisfactory reason can be assigned for giving appeals to this court from the judgments of the Circuit Court rendered



on appeal, and not giving like appeals from judgments of Circuit Courts rendered in the exercise of original jurisdiction. If any class of cases was to be excluded from the right of appeal, the exclusion would naturally apply to cases brought into the Circuit Court by appeal rather than to cases originating there. In the former description of cases the petitioner for the writ, without appeal to this court, would have the advantage of at least two hearings, while in the latter, upon the hypothesis of no appeal, the petitioner could have but one.

These considerations seem to require the construction that the right of appeal attaches equally to all judgments of the Circuit Court, unless there be something in the clause defining the appellate jurisdiction which demands the restricted interpretation. The mere words of that clause may admit either, but the spirit and purpose of the law can only be satisfied by the former.

We entertain no doubt, therefore, that an appeal lies to this court from the judgment of the Circuit Court in the case before us.

Another objection to the jurisdiction of this court on appeal was drawn from the clause of the first section, which declares that the jurisdiction defined by it is "in addition to the authority already conferred by law."

This objection seems to be an objection to the jurisdiction of the Circuit Court over the cause rather than to the jurisdiction of this court on appeal.

The latter jurisdiction, as has just been shown, is coextensive with the former. Every question of substance which the Circuit Court could decide upon the return of the habeas corpus, including the question of its own jurisdiction, may be revised here on appeal from its final judgment.

But an inquiry on this motion into the jurisdiction of the Circuit Court would be premature. It would extend to the merits of the cause in that court; while the question before us upon this motion to dismiss must be necessarily limited to our jurisdiction on appeal.

The same observations apply to the argument of counsel that the acts of McCardle constituted a military offence, for which he might be tried under the Reconstruction Acts by military commission. This argument, if intended to convince us that the Circuit Court had no jurisdiction of the cause, applies to the main question which might arise upon the hearing of the appeal. If intended to convince us that this court has no appellate jurisdiction of the cause, it is only necessary to refer to the considerations already adduced on this point.

We are satisfied, as we have already said, that we have such jurisdiction under the act of 1867, and the motion to dismiss must therefore be

DENIED.

**“The Anti-McCardle Measure,” *Louisville Daily Journal*, March 24, 1868**

*This newspaper editorial from the border state of Kentucky criticizes the repeal act as an attack on the independence of the Supreme Court.*

The repeal is . . . levelled directly at the McCardle case. It is simply an anti-McCardle measure.

This indeed was admitted by one of [the repeal’s supporters], on subsequently being held to account for the disgraceful trickery which he and his associates had practiced upon the [Democrats]. Witness the following passage from the *Congressional Globe*:

Mr. Schenck. The gentleman has alluded to the Supreme Court and to its jurisdiction, which he thinks it was the intention of this amendment to affect, as applied to the McCardle case, and a conspiracy to undermine and destroy that court.

Sir, I have lost confidence in the majority of the Supreme Court of the United States. Is not that plain enough? I believe that they usurp power whenever they dare to undertake to settle questions purely political, in regard to the status of States, and in the manner in which those states are to be held subject to the lawmaking power. And if I find them abusing that power by attempting to arrogate to themselves jurisdiction under any statute that happens to be upon the record, from which they claim to derive that jurisdiction, and I can take it away from them by a repeal of that statute, I will do it. . . .

Mr. Boyer. That is very manly and courageous.

Mr. Schenck. Now, I hold that the Supreme Court of the United States, arrogating to themselves the pretension to settle not merely judicial but political questions . . . are, the majority of them, proceeding step by step to the usurpation of jurisdiction that does not belong to them. And I hold it to be not only my right but my duty, as a Representative of the people, to clip the wings of that court wherever I can, in any attempt to take such flights.

This is at once an admission that the Supreme Court, if it decides the McCardle case, must decide it for McCardle, and that the object of this repeal is to snatch the case from the court before a decision can be declared. . . .

Can Congress snatch from the Supreme Court a particular case which has been not merely docketed but argued and submitted? Is not such a divestment unconstitutional? In our judgement, it clearly is. It is stated, we observe, that the Supreme Court itself has decided that such a divestment is constitutional; but we question the statement. We do not believe the Supreme Court has ever been called upon to consider precisely such an argument. . . .

It is, as we conceive, an exercise of judicial power on the part of Congress, or an interference with the exercise of judicial power by the judiciary, either of which is contrary to the Constitution, which declares that the judicial power of the federal government shall be

exercised by the federal judiciary and by no other body. Furthermore, it lessens the means of legal defense which existed when the alleged offense was committed, which, in point of principle, is equivalent to lessening the evidence required to convict the alleged offender; and this, as all the authorities acknowledge, falls within the constitutional prohibition of *ex post facto* laws. The measure, it appears to us, is doubly unconstitutional.

How it will appear to the Supreme Court we cannot say; but ... we shall all soon know how, for in that event the question of the validity of the measure will have to be decided first, since the measure became a law yesterday ....

Document Source: "The Anti-McCardle Measure," *Louisville Daily Journal*, March 24, 1868, p. 1.

### **Andrew Johnson, Veto Message on Repeal Act, March 25, 1868**

*In this message, Johnson outlines the basis for his rejection of the Repeal Act, warning that Congress should not be permitted to insulate unconstitutional laws from review in the Supreme Court.*

I can not give my assent to a measure which proposes to deprive any person "restrained of his or her liberty in violation of the Constitution or of any treaty or law of the United States" from the right of appeal to the highest judicial authority known to our Government. To "secure the blessings of liberty to ourselves and our posterity" is one of the declared objects of the Federal Constitution. To assure these, guaranties are provided in the same instrument, as well against "unreasonable searches and seizures" as against the suspensions of "the privilege of the writ of *habeas corpus*,... unless when, in cases of rebellion or invasion, the public safety may require it." It was doubtless to afford the people the means of protecting and enforcing these inestimable privileges that the jurisdiction which this bill proposes to take away was conferred upon the Supreme Court of the nation. The act conferring that jurisdiction was approved on the 5th day of February, 1867, with a full knowledge of the motives that prompted its passage, and because it was believed to be necessary and right. Nothing has since occurred to disprove the wisdom and justness of the measures, and to modify it as now proposed would be to lessen the protection of the citizen from the exercise of arbitrary power and to weaken the safeguards of life and liberty, which can never be made too secure against illegal encroachments.

The bill not only prohibits the adjudication by the Supreme Court of cases in which appeals may hereafter be taken, but interdicts its jurisdiction on appeals which have already been made to that high judicial body. If, therefore, it should become a law, it will by its retroactive operation wrest from the citizen a remedy which he enjoyed at the time of

his appeal. It will thus operate most harshly upon those who believe that justice has been denied them in the inferior courts.

The legislation proposed in the second section, it seems to me, is not in harmony with the spirit and intention of the Constitution. It can not fail to affect most injuriously the just equipoise of our system of Government, for it establishes a precedent which, if followed, may eventually sweep away every check on arbitrary and unconstitutional legislation. Thus far during the existence of the Government the Supreme Court of the United States has been viewed by the people as the true expounder of their Constitution, and in the most violent party conflicts its judgments and decrees have always been sought and deferred to with confidence and respect. In public estimation it combines judicial wisdom and impartiality in a greater degree than any other authority known to the Constitution, and any act which may be construed into or mistaken for an attempt to prevent or evade its decision on a question which affects the liberty of the citizens and agitates the country can not fail to be attended with unpropitious consequences. It will be justly held by a large portion of the people as an admission of the unconstitutionality of the act on which its judgment may be forbidden or forestalled, and may interfere with that willing acquiescence in its provisions which is necessary for the harmonious and efficient execution of any law.

For these reasons, thus briefly and imperfectly stated, and for others, of which want of time forbids the enumeration, I deem it my duty to withhold my assent from this bill, and to return it for the reconsideration of Congress.

Document Source: Andrew Johnson, Veto Message on Repeal Act, March 25, 1868.

### **Supreme Court of the United States, Opinion in *Ex Parte McCardle*, April 12, 1869**

*In the following excerpted opinion, Chief Justice Chase wrote for a unanimous Supreme Court that the Repeal Act had successfully eliminated the Court's jurisdiction. Note that Chase did not discuss whether the Constitution placed any limitations on Congress's power.*

The first question necessarily is that of jurisdiction; for, if the act of March, 1868, takes away the jurisdiction defined by the act of February, 1867, it is useless, if not improper, to enter into any discussion of other questions.

It is quite true, as was argued by the counsel for the petitioner, that the appellate jurisdiction of this court is not derived from acts of Congress. It is, strictly speaking, conferred by the Constitution. But it is conferred "with such exceptions and under such regulations as Congress shall make." ...

The exception to appellate jurisdiction in the case before us ... is not an inference from the affirmation of other appellate jurisdiction. It is made in terms. The provision of the act of 1867, affirming the appellate jurisdiction of this court in cases of habeas corpus is expressly repealed. It is hardly possible to imagine a plainer instance of positive exception.

We are not at liberty to inquire into the motives of the legislature. We can only examine into its power under the Constitution; and the power to make exceptions to the appellate jurisdiction of this court is given by express words.

What, then, is the effect of the repealing act upon the case before us? We cannot doubt as to this. Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause. And this is not less clear upon authority than upon principle.

Several cases were cited by the counsel for the petitioner in support of the position that jurisdiction of this case is not affected by the repealing act. But none of them, in our judgment, afford any support to it. They are all cases of the exercise of judicial power by the legislature, or of legislative interference with courts in the exercising of continuing jurisdiction.

On the other hand, the general rule, supported by the best elementary writers, is, that "when an act of the legislature is repealed, it must be considered, except as to transactions past and closed, as if it never existed." And the effect of repealing acts upon suits under acts repealed, has been determined by the adjudications of this court. The subject was fully considered in *Norris v. Crocker*, and more recently in *Insurance Company v. Ritchie*. In both of these cases it was held that no judgment could be rendered in a suit after the repeal of the act under which it was brought and prosecuted.

It is quite clear, therefore, that this court cannot proceed to pronounce judgment in this case, for it has no longer jurisdiction of the appeal; and judicial duty is not less fitly performed by declining ungranted jurisdiction than in exercising firmly that which the Constitution and the laws confer.

Counsel seem to have supposed, if effect be given to the repealing act in question, that the whole appellate power of the court, in cases of habeas corpus, is denied. But this is an error. The act of 1868 does not except from that jurisdiction any cases but appeals from Circuit Courts under the act of 1867. It does not affect the jurisdiction which was previously exercised.

The appeal of the petitioner in this case must be

DISMISSED FOR WANT OF JURISDICTION.

Document Source: *Ex Parte McCardle*, 74 U.S. 506, 512–15 (1869).

**Supreme Court of the United States, Opinion in *Ex Parte Yerger*,  
October 25, 1869**

*Though perhaps a less famous case than McCardle, Ex Parte Yerger arguably limited some of the long-term influence of the earlier precedent. Yerger held that although Congress had revoked the Court's jurisdiction to hear habeas appeals under the 1867 Habeas Corpus Act, the Court could continue to hear such cases under previous laws.*

In McCardle's case, we expressed the opinion that [the 1868 repeal act] does not [affect the Court's existing jurisdiction in habeas cases], and we have now re-examined the grounds of that opinion.

The circumstances under which the act of 1868 was passed were peculiar.

On the 5th of February, 1867, Congress passed the act to which reference has already been made, extending the original jurisdiction by habeas corpus of the District and Circuit Courts, and of the several judges of these courts, to all cases of restraint of liberty in violation of the Constitution, treaties, or laws of the United States. This act authorized appeals to this court from judgments of the Circuit Court, but did not repeal any previous act conferring jurisdiction by habeas corpus, unless by implication.

Under this act, one McCardle, alleging unlawful restraint by military force, petitioned the Circuit Court for the Southern District of Mississippi for the writ of habeas corpus. The writ was issued, and a return was made; and, upon hearing, the court decided that the restraint was lawful, and remanded him to custody. McCardle prayed an appeal, under the act, to this court, which was allowed and perfected. A motion to dismiss the appeal was made here and denied. The case was then argued at the bar, and the argument having been concluded on the 9th of March, 1869, was taken under advisement by the court. While the cause was thus held, and before the court had time to consider the decision proper to be made, the repealing act under consideration was introduced into Congress. It was carried through both houses, sent to the President, returned with his objections, repassed by the constitutional majority in each house, and became a law on the 27th of March, within eighteen days after the conclusion of the argument.

The effect of the act was to oust the court of its jurisdiction of the particular case then before it on appeal, and it is not to be doubted that such was the effect intended. Nor will it be questioned that legislation of this character is unusual and hardly to be justified except upon some imperious public exigency.

It was, doubtless, within the constitutional discretion of Congress to determine whether such an exigency existed; but it is not to be presumed that an act, passed under such circumstances, was intended to have any further effect than that plainly apparent from its terms.

It is quite clear that the words of the act reach, not only all appeals pending, but all future appeals to this court under the act of 1867; but they appear to be limited to appeals taken under that act.

The words of the repealing section are, “that so much of the act approved February 5th, 1867, as authorizes an appeal from the judgment of the Circuit Court to the Supreme Court of the United States, or the exercise of any such jurisdiction by said Supreme Court on appeals which have been, or may be hereafter taken, be, and the same is hereby repealed.”

These words are not of doubtful interpretation. They repeal only so much of the act of 1867 as authorized appeals, or the exercise of appellate jurisdiction by this court. They affected only appeals and appellate jurisdiction authorized by that act. They do not purport to touch the appellate jurisdiction conferred by the Constitution, or to except from it any cases not excepted by the act of 1789. They reach no act except the act of 1867.

It has been suggested, however, that the act of 1789, so far as it provided for the issuing of writs of habeas corpus by this court, was already repealed by the act of 1867. We have already observed that there are no repealing words in the act of 1867. If it repealed the act of 1789, it did so by implication, and any implication which would give to it this effect upon the act of 1789, would give it the same effect upon the acts of 1833 and 1842. If one was repealed, all were repealed.

Repeals by implication are not favored. They are seldom admitted except on the ground of repugnancy; and never, we think, when the former act can stand together with the new act. It is true that exercise of appellate jurisdiction, under the act of 1789, was less convenient than under the act of 1867, but the provision of a new and more convenient mode of its exercise does not necessarily take away the old; and that this effect was not intended is indicated by the fact that the authority conferred by the new act is expressly declared to be “in addition” to the authority conferred by the former acts. Addition is not substitution.

The appeal given by the act of 1867 extended, indeed, to cases within the former acts; and the act, by its grant of additional authority, so enlarged the jurisdiction by habeas corpus that it seems, as was observed in the *McCardle* case, “impossible to widen” it. But this effect does not take from the act its character of an additional grant of jurisdiction, and make it operate as a repeal of jurisdiction theretofore allowed.

Our conclusion is, that none of the acts prior to 1867, authorizing this court to exercise appellate jurisdiction by means of the writ of habeas corpus, were repealed by the act of that year, and that the repealing section of the act of 1868 is limited in terms, and must be limited in effect to the appellate jurisdiction authorized by the act of 1867.

We could come to no other conclusion without holding that the whole appellate jurisdiction of this court, in cases of habeas corpus, conferred by the Constitution, recognized by law, and exercised from the foundation of the government hitherto, has been taken away, without the expression of such intent, and by mere implication, through the operation of the acts of 1867 and 1868....

Document Source: *Ex Parte Yerger*, 75 U.S. 85, 103–06 (1869).

### **Justice Harold H. Burton, *American Bar Association Journal*, 1955**

*This article, written by a Supreme Court Justice more than eighty years after McCordle, describes the dramatic developments in the case and identifies Congress's power to create exceptions to the Supreme Court's appellate jurisdiction as the Court's "Achilles heel."*

The story of [*Ex Parte McCordle*] begins February 5, 1867, when Congress expressly provides for the issuance of writs of habeas corpus by federal courts when persons are restrained of their liberty in violation of the Constitution or of any treaty or law of the United States. The Act also states specifically that appeals may be taken from the Circuit Courts to the Supreme Court in habeas corpus cases. Not long thereafter, McCordle, who is a newspaper editor in Mississippi, is arrested and held for trial before a military commission under one of the Reconstruction Acts. The principal charges against him are libel and those of inciting to insurrection, disorder and violence. Promptly, he petitions a Federal Circuit Court for a writ of habeas corpus under the 1867 Act. When the Circuit Court remands him to military custody, he appeals to the Supreme Court. In January, 1868, his counsel, Jeremiah S. Black, moves for a speedy hearing. The Court, however, puts off the hearing until the first Monday in March, 1868.

Radical Reconstructionists begin to fear that the Court may hold unconstitutional legislation upon which the jurisdiction of the military commission depends. Accordingly, they seek, by legislative action, to avert such a decision. First, they induce the House to pass a bill requiring a two-thirds vote of the Supreme Court to declare any act unconstitutional. The Senate, however, is not responsive. Next they propose a bill to deprive the Supreme Court of appellate jurisdiction over any case arising out of the Reconstruction Acts. That bill also languishes.

#### ***The McCordle Case ... The Court's Achilles' Heel***

Monday, March 2, the arguments on the merits of the *McCordle* case begin in the Supreme Court. Because Justice Wayne has died, only eight Justices are present. Six hours



are allowed each side. Black and Field speak for McCardle. Senator Lyman Trumbull, of Illinois, and Matthew Hale Carpenter, later to be a Senator from Wisconsin, represent the Government. March 9, the Court takes the case under advisement and seems likely to postpone further action until the next term because Chief Justice Chase has been called from the Supreme Court Bench to preside over the impeachment trial of President Johnson. What the decision would have been on the merits of that case, we shall never know. Watchful of their opportunities, supporters of the Reconstruction program quietly secure the passage in the House of an amendment to an inconspicuous bill. If adopted, that amendment will repeal the appellate jurisdiction of the Supreme Court under the Habeas Corpus Act of 1867, even as to pending cases, and thus deprive the Court of its jurisdiction over the *McCardle* case. The Achilles' heel of the Supreme Court's right of judicial review is thus disclosed. The weakness lies in the fact that the Constitution does not give the Court absolute appellate jurisdiction. The Constitution confers appellate jurisdiction on the Court only "with such Exceptions, and such Regulations as the Congress shall make".

The amendment passes the Senate. President Johnson at once sees in it grave danger of a precedent for congressional manipulation of the Court's jurisdiction. With high courage, in the midst of his own impeachment trial, he vigorously vetoes the bill. This forces the issue into the open, only to have a hostile Senate pass the bill over his veto 33 to 9, with thirteen Senators absent. The House of Representatives follows suit with a vote of 115 to 57, thus providing a margin of one vote above the constitutionally required two-thirds.

On March 27, only eighteen days after the argument of the appeal in the *McCardle* case, the Court's jurisdiction to hear such appeals is thus cut off by Congress. Despite this, Jeremiah Black asks to be heard in opposition to the right of Congress thus to enter the field of pending litigation in a case already submitted to the Court. Following a sharp controversy within the Court, such a hearing is put over until the next term. Final argument is had March 19, 1869, and, April 12, the Court unanimously concedes its loss of jurisdiction.

The weakness thus demonstrated in the Court's armor is a matter of continuing concern. To overcome it, the Senate, at a recent session, in 1954, included in S. J. Res. 44 a proposal for a constitutional amendment guaranteeing to the Court appellate jurisdiction in all cases arising under the Constitution and limiting to "other cases" the right of Congress to make exceptions to the Court's appellate jurisdiction. The House of Representatives did not vote upon the resolution before adjournment. To be deserving of such confidence is one of the Court's highest responsibilities.

Document Source: Justice Harold H. Burton, "Two Significant Decisions: *Ex parte Milligan* and *Ex parte McCardle*," *American Bar Association Journal* 41 no. 2 (February 1955): 121, 176-77 (footnotes omitted).

## Cases that Shaped the Federal Courts

This series includes case summaries, discussion questions, and excerpted documents related to cases that had a major institutional impact on the federal courts. The cases address a range of political and legal issues including the types of controversies federal courts could hear, judicial independence, the scope and meaning of “the judicial power,” remedies, judicial review, the relationship between federal judicial power and states’ rights, and the ability of federal judges to perform work outside of the courtroom.

- *Hayburn’s Case* (1792). Could Congress require the federal courts to perform non-judicial duties?
- *Chisholm v. Georgia* (1793). Could states be sued in federal court by individual citizens of another state?
- *Marbury v. Madison* (1803). Could federal courts invalidate laws made by Congress that violated the Constitution?
- *Fletcher v. Peck* (1810). Could federal courts strike down state laws that violated the Constitution?
- *United States v. Hudson and Goodwin* (1812). Did the federal courts have jurisdiction over crimes not defined by Congress?
- *Martin v. Hunter’s Lessee* (1816). Were state courts bound to follow decisions issued by the Supreme Court of the United States?
- *Osborn v. Bank of the United States* (1824). Could Congress grant the Bank of the United States the right to sue and be sued in the federal courts?
- *American Insurance Co. v. Canter* (1828). Did the Constitution require Congress to give judges of territorial courts the same tenure and salary protections afforded to judges of federal courts located in the states?
- *Louisville, Cincinnati, and Charleston Rail-road Co. v. Letson* (1844). Should a corporation be considered a citizen of a state for purposes of federal jurisdiction?
- *Ableman v. Booth* (1859). Could state courts issue writs of habeas corpus against federal authorities?
- *Gordon v. United States* (1865). Could the Supreme Court hear an appeal from a federal court whose judgments were subject to revision by the executive branch?
- *Ex parte McCardle* (1869). Could Congress remove a pending appeal from the Supreme Court’s jurisdiction?
- *Ex parte Young* (1908). Could a federal court stop a state official from enforcing an allegedly unconstitutional state law?
- *Moore v. Dempsey* (1923). How closely should federal courts review the fairness of state criminal trials on petitions for writs of habeas corpus?

- *Frothingham v. Mellon* (1923). Was being a taxpayer sufficient to give a plaintiff the right to challenge the constitutionality of a federal statute?
- *Crowell v. Benson* (1932). What standard should courts apply when reviewing the decisions of executive agencies?
- *Erie Railroad Co. v. Tompkins* (1938). What source of law were federal courts to use in cases where no statute applied and the parties were from different states?
- *Railroad Commission of Texas v. Pullman Co.* (1941). When should a federal court abstain from deciding a legal issue in order to allow a state court to resolve it?
- *Brown v. Allen* (1953). What procedures should federal courts use to evaluate the fairness of state trials in habeas corpus cases?
- *Monroe v. Pape* (1961). Did the Ku Klux Klan Act of 1871 permit lawsuits in federal court against police officers who violated the constitutional rights of suspects without authorization from the state?
- *Baker v. Carr* (1962). Could a federal court hear a constitutional challenge to a state's apportionment plan for the election of state legislators?
- *Glidden Co. v. Zdanok* (1962). Were the Court of Claims and the Court of Customs Appeals "constitutional courts" exercising judicial power, or "legislative courts" exercising powers of Congress?
- *United States v. Allocco* (1962). Were presidential recess appointments to the federal courts constitutional?
- *Walker v. City of Birmingham* (1967). Could civil rights protestors challenge the constitutionality of a state court injunction, having already been charged with contempt of court for violating the injunction?
- *Bivens v. Six Unknown Named Agents* (1971). Did the Fourth Amendment create an implied right to sue officials who conducted illegal searches and seizures?
- *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.* (1982). Did the Bankruptcy Reform Act of 1978 violate the Constitution by granting too much judicial power to bankruptcy judges?
- *Morrison v. Olson* (1988). Could Congress empower federal judges to appoint independent counsel investigating executive branch officials?
- *Mistretta v. United States* (1989). Could Congress create an independent judicial agency to guide courts in setting criminal sentences?
- *Lujan v. Defenders of Wildlife* (1992). Could an environmental organization sue the federal government to challenge a regulation regarding protected species?
- *City of Boerne v. Flores* (1997). Could Congress reverse the Supreme Court's interpretation of the Constitution through a statute purportedly enforcing the Fourteenth Amendment?