On a November night in 1867, military officers under orders from General Edward C. Ord, commanding military officer of the Fourth Military District, arrested William H. McCardle, a newspaper editor for the *Vicksburg Times*, who had been critical of both General Ord and the military occupation of Southern states after the Civil War. Charged with disturbing the peace, inciting rebellion, libel, and impeding reconstruction acts within the state of Mississippi, McCardle petitioned a federal circuit court for a writ of habeas corpus on the grounds that he had been illegally arrested. When his petition was denied, McCardle sought redress from the United States Supreme Court, which agreed to hear the case. Prosecutors for the government argued that the Supreme Court did not have jurisdiction to review the case because McCardle was in military custody charged with military offenses. The Court disagreed with the government’s arguments over jurisdiction, setting the stage for the biggest battle between Congress and the Supreme Court in this nation’s history, when Congress would for the first and only time remove the Court’s jurisdiction to hear a case.

This paper traces the increased jurisdiction in the Federal Judiciary through Reconstruction. It has been argued erroneously by historians that the Reconstruction Era was a period of judicial impotency. This paper will show that in the years following the Civil War, Congress greatly expanded the jurisdiction of federal courts. From the Judiciary Act of 1789 to the suspension of habeas corpus, Congress slowly increased the power of United States judges, but it was not until the era of Reconstruction that federal courts were given complete supremacy to safeguard the individual liberties of all citizens in the country through the Fourteenth Amendment and the expanded power of habeas corpus. And while the increase of federal jurisdiction was not without conflict, these points of contention between Congress and the Supreme Court do not go to bolster claims that the will of Congress weakened or pacified federal courts but instead prove the increased importance and potency of the federal judiciary.

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4 Neither of these safeguards allowed for the complete protection for citizens. It would be almost another one hundred years before the full might of the Fourteenth Amendment would come to fruition through the application of the Incorporation Doctrine.
The Expansion of Federal Jurisdiction to 1867

Section 14 of the Judiciary Act of 1789 gave federal courts very limited use of habeas corpus enumerating that federal courts can issue writs of habeas corpus only for the “exercise of their respective jurisdiction” and only to test the pre-trial confinement of citizens.\(^4\) A writ of habeas corpus is a constitutional right of anyone accused of a crime to have their arrest and detention reviewed by a judge to ensure that a person’s confinement is not illegal.\(^5\) These provisions drastically limited the power of federal courts. No matter how blatantly state courts abridged the rights of citizens, no matter how well citizens were protected by federal laws against similar trials, national courts could not review the trials of citizens in state courts under habeas corpus. Also under section 14, habeas corpus could only be used to review the legality of an arrest and not the conviction of a citizen after trial.

The Supreme Court in *Martin v. Hunter’s Lessee* (1816) addressed the possibility of injustice in state courts when they declared that a citizen could be tried by a state for laws in violation of the U.S. Constitution and the federal government would have no recourse to right the wrong. The Supreme Court, through its opinion in this case, petitioned Congress to expand the federal court’s jurisdiction so that these injustices could be remedied.\(^6\) But with only two exceptions, Congress failed to provide a solution to such glaring constitutional problems. Only Reconstruction could provide an impetus to expand the role of federal courts.

Congress did expand the role of federal courts through the Force Act of 1833 and the “*Caroline* Act” of 1842. But these increases in the jurisdiction of national courts were limited and provided by Congress to ensure the safety of revenue collection and to protect federal officers in carrying out their duties from state courts.\(^7\) However, these limited increases in judicial authority show Congress and the courts working together to circumvent hostile state courts.

By 1860, limitations on the jurisdiction of federal courts seemed set in concrete, and federal judges were unable to issue writs of habeas corpus to rescue prisoners wrongfully held under state authority.\(^8\) The ability of federal courts to free themselves from the shackles of section 14 were stymied by the United States Constitution by Article 1, Section 9, Clause 2, which enumerated only the circumstances under which the government could suspend writs of habeas corpus.\(^9\) This provision of the Constitution offered no means by which the scope of habeas could be increased. Only through acts of Congress could the power of federal courts be expanded.

In March of 1863, President Lincoln suspended the writ of habeas corpus. A suspension of habeas corpus would seem to limit the jurisdiction of federal courts, but quite the opposite occurred. In passing *The Habeas Corpus Act of 1863*, Congress built into the act safeguards to

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\(^4\) Richard Peters Esq., *Statutes at Large, Treaties, and Proclamations, of the United States of America, from 1789 to March 3, 1845*, (Boston: Charles C. Brown and James Little, 1845), 81-82.


\(^6\) *Martin v. Hunter’s Lessee*, 14 U.S. 304 (1816) United States Supreme Court.


\(^8\) Ibid. 241.

\(^9\) United States Constitution, Article 1, Section 9, Clause 2. "The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."
protect against possible abuses of authority. Section 2 of the act required that a list of all those arrested under military or civilian authority would have their names forwarded to federal judges within the district of the arrest. A grand jury was to assemble and indict the detainee. If the grand jury failed to bring back an indictment, the person would be released immediately. To ensure the safety of the judicial process, federal judges were given the power under this act of Congress to supervise the indictment process. If any lower court failed to release the detainee, having not obtained an indictment, federal judges were empowered to try and convict any officer refusing to follow the law under this act. Under section 5 of this act, if a state took action against a federal officer fulfilling his duty under any federal act he would be protected under an expansion of federal court jurisdiction. Any case against an officer of the United States arising out of a state court could be removed into a federal court protecting federal officials from the power of state governments that attempted to thwart federal law. Thus even in a time that would seem to be a nadir in the power of federal courts, their jurisdiction was increased, but it would take the impetus of the Reconstruction to fully expand the power of United States courts.

When Congress ratified the Thirteenth Amendment abolishing slavery in February of 1865, Republicans were well aware that southern states might not recognize the rights bestowed upon freedmen. Moreover, southern states might attempt to prosecute federal agents, whose duty it was to safeguard those rights, in order to deny the guarantees of the Thirteenth Amendment. In order to secure these rights, Congress enacted the Separable Controversies Act of 1866. This expanded the jurisdiction of federal courts, allowing any person involved in a case in a state that they did not reside in to have the case removed to a federal court. In 1867, Congress passed the Local Prejudice Act. Under this act, any citizen in the country could remove a state case against him or her and have the case tried in a federal court by simply filing an affidavit “stating that he has reason to, and does believe that, from prejudice or local influence, he will not be able to obtain justice in such state court.” In May of 1866, Congress made its first steps to providing national rights to citizens of every state within the Union by allowing the U.S. Circuit to hear cases coming out of state courts. Through these acts, Congress relied on the federal judiciary to provide a neutral forum for justice when state courts proved incapable or unwilling. Through this partnership between the legislative and judicial branches of government the national policy of Reconstruction was allowed to go forward.

While the jurisdiction of federal courts had been expanded, the writ of habeas corpus was still constrained by the handicaps of the Judiciary Act of 1789. The writ was still only a method for pre-trial detention. And that method of relief was still confined to federal cases and could not be used to interfere with state court proceedings. It would be up to Congress to amend the writ of habeas corpus and allow the full force and power of the federal judiciary to impose the rights of the U.S. Constitution upon state governments.

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10 George P. Sanger, Statutes at Large, Treaties, and Proclamations, of the United States of America, from December 5, 1859 to March 3, 1863, (Boston: Little Brown and Company, 1863), 755.
11 Ibid. 757
The Habeas Corpus Act of 1867

Congress would take up the challenge by passing the Habeas Corpus Act of 1867, out of the fear that Southern courts would ignore the liberties given to freedmen. But because of congressional wrangling the final bill made no mention of its purpose to protect former slaves. Rather the bill gave an expansion of habeas corpus to all citizens. Under this act the jurisdiction of federal courts was greatly expanded. The bill was touted as enlarging “the privilege of the writ of habeas corpus and [making] the jurisdiction of the courts and judges of the United States coextensive with all the powers that can be conferred upon them. It is a bill of the largest liberty….” 14 But the bill not only increased the jurisdiction of federal courts it also changed the very nature of the writ. Before this act the writ applied to only detention before convictions, now the writ was a means of finding post-conviction relief. Moreover, the act allowed federal courts to supervise “the administration of criminal justice in state courts.” Now U.S. judges could assert their authority into all decisions relating to individual liberty, including those arising out of state courts.15 Congress, in this act, remedied the problem the Supreme Court alluded to in *Martin v. Hunter’s Lessee.* But the expansion of federal jurisdiction by Congress would not be without points of contention.

*Ex Parte Milligan*

Lamdin P. Milligan was arrested in 1865 for planning an insurrection against the United States. Milligan was a leader in a secret society known as the Order of American Knights or Sons of Liberty16 that planned to open another front in Mid-Western states to distract Sherman’s march through the South and aid the Confederacy. The government’s evidence was damning, for the United States had infiltrated the secret organization and had obtained evidence that Milligan was the ringleader of the society. The government moved to try Milligan under a military commission, but council for Milligan objected and filed a writ of habeas corpus with the Federal District of Indiana on the grounds that the military commission had illegally imprisoned Milligan. The appellate court consisted of two judges, one who was a Supreme Court Justice. Not being able to reach a decision on the matter, the case was referred to the United States Supreme Court.17 Milligan was not a citizen of a rebellious state. He was not a prisoner of war and had never served in the military. The question before the court was whether a military tribunal could try Milligan. The Supreme Court reviewed the case, and concluded that Milligan could not be tried by a military commission because “Martial rule can never exist where courts are open, and in their proper and unobstructed exercise of their jurisdiction.”18 In declaring that military tribunals could not function in areas of the country where civil courts were functioning effectively, the Supreme Court asserted itself as the final arbiter in matters of law.

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15 Ibid. 532.
16 *Ex Parte Milligan, The Supreme Court of the United States,* 71 U.S. 2; 18 L. Ed. 281; 1866 U.S. Lexis 861; 4 Wall. December, 1866, Term [http://www.psci.unt.edu/mootcourt/ex_parte_milligan.htm](http://www.psci.unt.edu/mootcourt/ex_parte_milligan.htm)
Past historians have seen the Reconstruction Era in American history as a period of judicial weakening at the hands of Congress and specifically cite *Ex Parte McCardle* as an example; this contention is unfounded. The process of Congress bestowing upon federal courts more and more power through an expansion of their jurisdictions came to a temporary halt with the case of *Ex Parte McCardle*. However, this case alone does not justify the argument that Congress severely curtailed the power of federal courts in the years following the Civil War. The historical record shows that the Supreme Court in the McCardle case was simply interpreting constitutional law correctly in acknowledging the power of Congress to make exceptions to the Court’s jurisdiction.

In March of 1867, Congress, over the veto of President Johnson, passed a series of Reconstruction acts dividing the South into five military districts, each of which was commanded by a major general. General Ord was in charge of the military district encompassing the state of Mississippi. William H. McCardle, editor of the *Vicksburg Times*, had written editorials in his paper damning the military government under General Ord and had called on the people of Mississippi to not vote in the constitutional state convention.¹⁹

On November 8, 1867, a military commission arrested William H. McCardle and charged him with disturbing the peace, inciting rebellion, libel, and impeding reconstruction. McCardle petitioned the federal circuit court for a writ of habeas corpus, alleging that he had been illegally detained. The circuit court denied his petition and McCardle appealed to the United States Supreme Court under the act of 1867.²⁰ The government argued that the Supreme Court did not have jurisdiction because “the Circuit Court cannot take jurisdiction of a case where a party is in military custody charged with a military offense.”²¹ Congress had declared that there were no legitimate governments in the South. The government of Mississippi was one of Congressional creation. Therefore, the Supreme Court had no right to interfere with the powers of Congress to do what was necessary to establish republican forms in formally insurrectionist states.²² Council for the appellant argued that regardless of whether Mississippi was a state in the Union, the people of any state have rights under the United States government and “therefore, the petitioner, McCardle, is entitled to his release from the military commission which presumed to sit in judgment of him.”²³

The Supreme Court rejected this argument, declaring the Court had jurisdiction in the McCardle case because the Habeas Corpus Act of 1867 was legislation “of the most comprehensive character. It brings within the habeas corpus jurisdiction of every court and of every possible case of privation of liberty contrary to the National Constitution, treaties, or laws. It is impossible to widen this jurisdiction.”²⁴ In this opinion the Court stated that the jurisdiction of federal courts was absolute and—with the writ of habeas corpus—all encompassing to include every other court of the land. But out of fear that the Supreme Court might strike down acts of Reconstruction, Congress took measures to remove the Court’s jurisdiction.

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²⁰ Robert Fridlington, 92.
²² Ibid. 25-29.
²⁴ Ex Parte McCardle, 73 U.S. 318 (1867).
On March 27, 1868, Congress amended the Habeas Corpus Act of 1867:

That so much of the act approved February 5, 1867, entitled An act to amend ‘An act to establish the Judiciary Courts of the United States, approved September 24th 1789’ as authorizes an appeal from the judgment of the circuit court to the Supreme Court, or the exercise of any such jurisdiction by said Supreme Court, which have been or may hereafter be taken, be, and the same is, hereby repealed.25

This act became known as the “McCardle repealer.” The wording of this act is important not only because it removed the Supreme Court’s jurisdiction in *Ex Parte McCardle* but because it only removed the Supreme Court’s jurisdiction. Leaving the appellate jurisdiction of lower federal courts intact, the actions of Congress only affected the jurisdiction of the Supreme Court in appeals involving writs of habeas corpus.

The Supreme Court waited until its next session to declare its opinion, and while the Court could have simply stated that the appeal of the petitioner is dismissed for want of jurisdiction, the Justices took the opportunity to detail the constitutionality of Congress’s actions. The Court, in its opinion, declared, “that the appellate jurisdiction of this court is not derived from Act 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’”26 The exceptions and regulations the Court pointed to come from Article 3, Section 2, Clause 2 of the U.S. Constitution. Under the Constitution, Congress may amend the Supreme Court’s power to decide most cases. Furthermore, Congress bestowed upon the Court its jurisdiction in the Habeas Corpus Act of 1867 to hear such cases as *Ex Parte McCardle*, and therefore Congress may take away what jurisdiction it has given to the Supreme Court. However, the Justices, in a possible act of defiance, pointed out that the Court’s jurisdiction in cases of habeas corpus had not been completely removed. According to the *United States Supreme Court Reports*, “The Act of 1868 does not except from that jurisdiction any case but appeals from circuit courts under the Act of 1867. It does not affect the jurisdiction which was previously exercised.”27 In ending its opinion in this fashion, the Justices made it clear that Congress had not moved the Court to a position of irrelevancy as past historians have argued. The Justices would again assert their relevancy in the case of *Ex Parte Yerger*.

In its decision on *Ex Parte McCardle* the Court presented not an act of capitulation, but rather a well thought out constitutional argument. While Congress under the Constitution may repeal judicial authorization to hear types of cases, the ability of the Supreme Court to strike down laws as unconstitutional is not specified in the U.S. Constitution. Rather, the power of the Court to do so is declared in case precedent from *Marbury v. Madison*. The Constitution is the supreme “Law of the Land,” and overrides case precedent law. Therefore, the legislature may revoke the Court’s jurisdiction at the onset of the Court declaring an act of Congress unconstitutional. The power of Congress in these matters comes from a higher source of authority than does the Court’s. Thus, the Supreme Court in *Ex Parte McCardle* had acted not in

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25 George P. Sanger, *Statutes at Large, Treaties, and Proclamations, of the United States of America, from December1867, to March 1869*, (Boston: Little Brown and Company, 1869), 44.
27 Ibid. 266.
a spineless fashion, but in a rightful constitutional manner. Any questions of cowardice on the part of the Court are dispelled in the Court’s decision in *Ex Parte Yerger*.

**Ex Parte Yerger**

On June 8, 1869, Edward M. Yerger was arrested for stabbing an army officer appointed mayor of Jackson, Mississippi and held by military commission on the charge of murder. Yerger followed the same process as William McCardle, except that Yerger did not rely on the Habeas Corpus Act of 1867. Instead, the council for Yerger took the advice of the Supreme Court in *Ex Parte McCardle* and petitioned the Court for a review, arguing that the Act of 1867 was an amendment to the Judiciary Act of 1789. The council for Yerger continued the argument that when Congress amended the Act of 1867, it did not affect the original jurisdiction of the Supreme Court to hear cases arising out of habeas corpus claims. This was basically the same argument the Court had made in *Ex Parte McCardle*, and the Court agreed to review the case. Again, the government argued that the United States Supreme Court had no jurisdiction, but the Justices decided against the government’s arguments boldly stating “That this court is one to which the power to issue writs of habeas corpus is expressly given by the terms of this section [Judiciary Act of 1789] has never been questioned.” Chief Justice Chase writing the opinion of the Court declared, “the general spirit and genius of our institutions has tended to the widening and enlarging of the habeas corpus jurisdiction of the courts and judges of the United States; except in one recent instance [*Ex Parte McCardle*], has been constant and uniform.” The Court declared that it had jurisdiction to hear the claim of Yerger through a writ of habeas corpus. Agreeing with the petitioner, the Court found that the military commission of Mississippi had illegally held Yerger. Furthermore, the Court ordered that Yerger be tried in a civil court in Mississippi. The Yerger case shows that the Supreme Court was not willing to capitulate to Congressional threats to remove the courts jurisdiction. Rather the Court asserted its position as the highest guardian of civil liberties.

**The Reaction of States to the Expanded Jurisdiction of Federal Courts**

*Ex Parte McCardle* proved to be only a minor impediment in the development of habeas corpus in federal courts. The Habeas Corpus Act of 1867 only applied to the jurisdiction of the Supreme Court and not to any other federal court. The opinion of the Court in *Ex Parte McCardle* left a backdoor open to similar suits and thereby allowed the Court to review *Ex Parte Yerger*. Together these two cases circumvented congressional attempts to pacify the Supreme Court. However, as further proof of the federal Courts expanded role in state criminal proceedings, state courts began to resent the federal power to have state Supreme Court decisions reviewed and overturned by even the lowest of federal courts as citizens convicted in state courts

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29 *Ex Parte Yerger*, 75 U.S. 85 (December 1868 Term).
30 Ibid.
31 Charles Fairman, 589.
began to seek relief by obtaining reviews in federal courts. To remedy this problem, Congress in 1885, repealed the “McCardle repealer”, thereby allowing state Supreme Court decisions to be overturned by federal courts to be appealed all the way to the Supreme Court of the United States.32

Conclusion

The Judiciary Act of 1789 limited the use of writs of habeas corpus by federal courts, allowing state courts to abridge the rights of citizens in violation of federal law, and federal courts were at first powerless to remedy the problem. The Reconstruction Era provided incentive to expand the jurisdiction of federal courts and the writ of habeas corpus. Congressional Republicans, worried that Southern states might attempt to thwart national reconstruction plans increased the power of federal courts to supervise and administer justice though all levels of the judiciary. In expanding the jurisdiction of habeas corpus claims, Congress changed the nature of habeas corpus. But cooperation between the Judiciary and Congress during Reconstruction did not pass without conflict, as *Ex Parte Milligan*, *Ex Parte McCardle*, and *Ex Parte Yerger* demonstrate. Historians have long regarded *Ex Parte McCardle* as proof that the power and prestige of the federal courts declined during Reconstruction, but this belief is in error. The opinions of these cases show a resolute Federal Judiciary that eluded the laws enacted by Congress.

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