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O'Neal Smalls

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HABEAS CORPUS IN THE DISTRICT OF COLUMBIA

*O'Neal Smalls**

In 1970 Congress enacted the District of Columbia Court Reform and Criminal Procedure Act.¹ The Act was designed to streamline the District's historically cumbersome and inefficient court system.² Part of that broad reform included the adoption of a provision, now section 23-110 of the District of Columbia Code,³ which detailed the procedures by which prisoners under

* Associate Professor of Law, American University. S.B., Tuskegee, 1964; J.D., Harvard, 1967.

1. Pub. L. No. 91-358, *revising and amending* Act of Dec. 23, 1963, Pub. L. No. 88-241 (codified at D.C. CODE tit. 11 (1973)).

2. For a detailed discussion of the entire Act, see Rauh & Silbert, *Criminal Law and Procedure: D.C. Court Reform and Criminal Procedure Act of 1970*, 20 AM. U.L. REV. 252 (1971).

3. 84 Stat. 609 (1970), D.C. CODE ANN. § 23-110 (1973) provides:

(a) A prisoner in custody under sentence of the Superior Court claiming the right to be released upon the ground that (1) the sentence was imposed in violation of the Constitution of the United States or the laws of the District of Columbia, (2) the court was without jurisdiction to impose the sentence, (3) the sentence was in excess of the maximum authorized by law, (4) the sentence is otherwise subject to collateral attack, may move the court to vacate, set aside, or correct the sentence.

(b) A motion for relief may be made at any time.

(c) Unless the motion and files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the prosecuting authority, grant a prompt hearing thereon, determine the issues, and make findings of fact and conclusions of law with respect thereto. If the court finds (1) the judgment was rendered without jurisdiction, (2) the sentence imposed was not authorized by law or is otherwise open to collateral attack, (3) there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner, resentence him, grant a new trial, or correct the sentence, as may appear appropriate.

(d) A court may entertain and determine the motion without requiring the production of the prisoner at the hearing.

(e) The court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

(f) An appeal may be taken to the District of Columbia Court of Appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

(g) An application for a writ of habeas corpus in behalf of a prisoner who

custody of the local D.C. courts could collaterally attack their sentences. This article will analyze section 23-110, consider the constitutional questions it raises concerning the suspension of the writ of habeas corpus⁴ in the District of Columbia and the proper role of article III courts with respect to the writ in the District's revamped court system, and will conclude with a suggested interpretation of section 23-110 which would avoid impairment of the writ and subsequent constitutional difficulties.

Before detailing the procedures outlined in section 23-110, it is necessary to describe at least briefly the D.C. court system under the 1970 reorganization. The Superior Court of the District of Columbia was created as the trial court of general jurisdiction. Its decisions are reviewable only by the District of Columbia Court of Appeals, the District's highest court. The Court of Appeals' decisions are subject to review only by the United States Supreme Court in accordance with the usual certiorari procedures.⁵ Although Congress may establish courts under either its article I or article III powers,⁶ the legislative history of the Act⁷ makes clear that Congress was exercising

is authorized to apply for relief by motion pursuant to this section shall not be entertained by the Superior Court or by any Federal or State court if it appears that the applicant has failed to make a motion for relief under this section or that the Superior Court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

4. U.S. CONST. art. I, § 9, cl. 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."

5. See 28 U.S.C. § 1257 (1970).

6. See *Palmore v. United States*, 411 U.S. 389 (1973). In *Palmore*, the Supreme Court rejected the argument that only upon courts established under article III has jurisdiction been conferred over felony prosecutions arising under a federal law. For a discussion of the contention that article III "is the complete catalog of federal judicial power," see 1 J. MOORE, FEDERAL PRACTICE ¶ 0.4[4], at 71 (2d ed. 1953).

The distinction between article I and article III courts and the attendant constitutional questions have been analyzed frequently by judges and commentators. See *Glidden Co. v. Zdanok*, 320 U.S. 530 (1962), *overruling Ex parte Bakelite Corp.*, 289 U.S. 438 (1929) and *Williams v. United States*, 289 U.S. 553 (1933); *National Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 605 (1949); *Rathvon & Keefe, Washingtonians and Roumanians*, 27 NEB. L. REV. 375 (1948); *Watson, The Concept of the Legislative Court: A Constitutional Fiction*, 10 GEO. WASH. L. REV. 799 (1942); *Williams, District of Columbia Court Reorganization, 1970*, 59 GEO. L.J. 477, 491-92 (1971); *Note, The Distinction Between Legislative and Judicial Courts and Its Effect on Judicial Assignment*, 62 COLUM. L. REV. 133 (1962).

7. H.R. REP. NO. 91-907, 91st Cong., 2d Sess. 44 (1970):

This title makes clear that the District of Columbia courts . . . are Article I courts, created pursuant to Art. I, Sec. 8, Cl. 17 of the United States Constitution, and not Article III courts. The authority under which the local courts are established has not been statutorily provided in prior law; the Supreme

its article I powers when it created the Superior Court and the Court of Appeals, pursuant to its plenary authority over the District of Columbia.⁸

Section 23-110 allows a prisoner under sentence of the Superior Court to file a motion to have the sentence vacated, set aside or corrected. It further states that this collateral attack by motion precludes the prisoner's filing for a writ of habeas corpus in any federal court unless he can show that the remedy by motion in the Superior Court is inadequate or ineffective to test the legality of his detention. Given the constitutional prohibition against suspension of the writ, the section needs close examination to determine its constitutionality.

I. THE WRIT OF HABEAS CORPUS

The writ of habeas corpus has been described as "the most celebrated writ in the English Law."⁹ The power to issue the writ was given to federal courts in the Judiciary Act of 1789, the first congressional grant of judicial powers.¹⁰ While granting the power to issue the writ, the Act did not define the purposes for which the writ could be used, and the courts turned to the common law principles which governed the writ in order to define its scope.¹¹

That scope has undergone a long process of development and expansion. The earliest view restricted use of the writ to situations in which the sentencing court had no jurisdiction over the subject matter or person of the prisoner.¹² There followed a period in which quite suspect legal fictions were

Court of the United States has not declared the local system to be either Article I or Article III courts; decisions having indicated that the District of Columbia courts are, in this respect, both fish and fowl. This expression of the intent of Congress clarifies the status of the local courts.

See also *Palmore v. United States*, 411 U.S. 389 (1973), noted in 23 CATH. U.L. REV. 195 (1973).

8. U.S. CONST. art. I, § 8, cl. 17. It has long been established that Congress may exercise within the District all legislative powers that a state legislature may exert within its state, and may vest and distribute the judicial power among courts, and regulate judicial proceedings before them as it thinks fit, so long as its action does not contravene any provision of the Constitution. See *Capitol Traction Co. v. Hof*, 174 U.S. 1, 5 (1899).

9. 3 W. BLACKSTONE, COMMENTARIES *129.

10. Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73.

11. See *Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 201 (1830); *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 93-94 (1807). For a detailed analysis of the common law writ, see 3 W. BLACKSTONE, *supra* note 9, at *129-30; 9 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW (2d ed. 1938). The historical development of the writ in the United States is summarized in *Developments in the Law—Habeas Corpus*, 83 HARV. L. REV. 1038, 1042-72 (1970).

12. See, e.g., *Ex parte Kearney*, 20 U.S. (7 Wheat.) 38 (1822). The Circuit Court for the District of Columbia had held Kearney in contempt and imprisoned him for re-

employed to bring particular facts within the lack-of-jurisdiction standard.¹³ This expansion of the writ culminated in the Supreme Court's decision in *Brown v. Allen*,¹⁴ in which the Court ruled that all federal constitutional questions could be raised in habeas corpus petitions, not simply questions regarding the sentencing court's jurisdiction.¹⁵ So today it is well settled that federal courts have the power to restore liberty to any person within their jurisdictions held in custody in violation of the Constitution or any law of the United States. Unlike appellate review, where the question is whether the judgment is legal or proper, on habeas corpus the question is the detention simpliciter—the lawfulness of the detention itself. As expressed by Justice Brennan, the root principle is that

in a civilized society, government must always be accountable to the judiciary for a man's imprisonment: if the imprisonment cannot be shown to conform with the fundamental requirements of law, the individual is entitled to his immediate release.¹⁶

II. LEGISLATIVE PROVISION FOR HABEAS CORPUS RELIEF

Section 23-110 appears to require a prisoner sentenced by the Superior Court to apply for post-conviction relief by motion in that court, and would seem to prevent such prisoner from seeking habeas corpus relief in any federal court unless he can show that the remedy by motion is inadequate or ineffective. Despite its impact on the scope of habeas corpus relief, there

fusing to answer a question which he thought would tend to incriminate him. Kearney argued that the Supreme Court had the "power to issue the writ of *habeas corpus* in every case where the personal liberty of the citizen is restrained under the judicial authority of the union." *Id.* at 39. Justice Story posited two questions raised by the case: first, whether the Supreme Court has authority to issue the writ where a person is being detained by order of any other federal court; and second, if that power does reside in the Court, whether Kearney's case was one in which it could be properly exercised. *Id.* at 41. Story wrote that it was established that the answer to the first question was in the affirmative, but that equally well established was the principle that the Supreme Court had no authority to consider a writ of error to overturn a criminal conviction attained in a court of competent jurisdiction. Since the lower court's finding of contempt was in effect a conviction, the Court held it was powerless to review the adjudication. *Id.* at 42-43.

13. An excellent example of the approach taken by the federal courts to circumvent the lack-of-jurisdiction requirement is *Johnson v. Zerbst*, 304 U.S. 458 (1938), in which the court entertained the writ under the theory that a trial court has no jurisdiction over a defendant denied assistance of counsel.

14. 344 U.S. 443 (1953).

15. Mr. Justice Reed stated that federal district courts "have the power . . . to hold hearings on the merits, facts or law a second time when [they are not] satisfied that federal constitutional rights have been protected." *Id.* at 464 (dictum).

16. *Fay v. Noia*, 372 U.S. 391, 402 (1963).

was little discussion of this section in the legislative history of the Act. The Senate Report simply states:

Section 23-110 is new. Rather than relying on the inherent power of the Superior Court to review judgments of conviction, the new section provides statutory procedures for post conviction challenges. Section 23-110 is modeled upon 28 U.S.C. § 2255 with only the necessary technical changes.¹⁷

An analysis of section 23-110 must, therefore, start with a review of 28 U.S.C. § 2255.

A. *The Federal Counterpart*

Section 2255 requires a prisoner under sentence of a federal court to seek post-conviction release in the court which sentenced him, through a motion to have the sentence vacated, set aside or corrected. The section applies only to federal prisoners and substitutes one federal court, the sentencing court, for another federal court, the one which has jurisdiction over the custodian of the prisoner or movant. Since a section 2255 motion, in the ordinary case, offers a fully equivalent substantive hearing in a federal court,¹⁸ the section prohibits use of the writ of habeas corpus where it "appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention." This language is nearly identical with that of section 23-110 of the D.C. Code. These two sections are in contrast to the general habeas corpus provision, 28 U.S.C. § 2241, under which federal judges in the jurisdiction where the prisoner is detained may entertain the writ of habeas corpus.

The legislative history of section 2255 indicates that it was designed to remedy a specific problem. In 1944 the Judicial Conference of the United States submitted two bills to Congress. The "judicial bill," upon which section 2255 is patterned, would have required federal prisoners to apply by motion in the sentencing court for post-conviction relief instead of making application for habeas corpus in the district in which they were confined.¹⁹ The Judicial Conference was concerned with the inordinate number of habeas corpus petitions entertained by federal judges in districts in which major federal penal institutions were located. Additionally, habeas corpus petitions

17. S. REP. NO. 91-405, 91st Cong., 1st Sess. 38 (1969). The House Report is to the same effect. See H.R. REP. NO. 91-907, 91st Cong., 2d Sess. 171 (1970).

18. The Supreme Court made clear that the section 2255 motion is the full equivalent of a habeas corpus petition for federal prisoners in *United States v. Hayman*, 342 U.S. 205 (1952). See also *Kaufman v. United States*, 394 U.S. 217 (1969).

19. REPORT OF THE JUDICIAL CONFERENCE OF SENIOR CIRCUIT JUDGES 22 (1944).

were being reviewed and hearings conducted far from the scene of the facts, witnesses and records. For example, in *Walker v. Johnston*²⁰ the petitioner, imprisoned in California, alleged that he was denied counsel and that his guilty plea was coerced by the United States Attorney, his assistant and a deputy marshal, all matters allegedly occurring in the Northern District of Texas. The court on habeas corpus granted an evidentiary hearing in California. Situations like this obviously worked a hardship on the federal system. Moreover, many habeas corpus claims were frivolous, yet federal judges had difficulty disposing of them because the petitions were filed in the districts of confinement, while the relevant records were in the sentencing courts and not readily available. Thus, at the insistence of the Judicial Conference, Congress enacted section 2255 to meet the practical difficulties that had arisen in administering habeas corpus jurisdiction. One federal court was simply substituted for another. Nowhere in section 2255 can one find any purpose to impinge upon a prisoner's right of habeas corpus. The sole purpose was to minimize the difficulties encountered in habeas corpus hearings by affording the same rights in a more convenient forum.²¹ The legislative history of section 2255 confirms this view.²²

B. D.C. Code § 23-110

This brief history would suggest that the rationale behind section 2255 is entirely inapplicable to section 23-110. The mischief which gave birth to section 2255 was simply not a problem confronting the Congress which enacted section 23-110. The burden on the federal district court in the District of Columbia or district courts in neighboring states from habeas corpus petitions filed by prisoners convicted in the Superior Court would seem to be no greater than the burden on any other federal district court which entertains petitions from state prisoners. Moreover, the difficulties which the district court would experience in obtaining records, witnesses and other evidence with respect to prisoners sentenced by the Superior Court would seem to be no greater than those experienced by other federal district courts when reviewing petitions from state prisoners. Thus, while the language of section 23-110 is patterned after that of section 2255, its rationale must be found elsewhere.

It cannot be contended that Congress intended to deprive persons in cus-

20. 312 U.S. 275 (1941).

21. This was also the view of Judge Parker, Chairman of the Judicial Conference Committee on Habeas Corpus, the bill's drafter. See 8 F.R.D. 171, 175 (1948).

22. "This section restates, clarifies and simplifies the procedure in the nature of the ancient writ of error coram nobis. It provides an expeditious remedy for correcting erroneous sentences without resort to habeas corpus." H.R. REP. NO. 2646, 79th Cong., 1st Sess. A 180 (1947).

tody under sentence of the Superior Court of their right to habeas corpus. Neither the Act's legislative history nor its language compels such a conclusion. Nevertheless, section 23-110 can be read as barring habeas corpus in the sense that it may be extremely difficult for prisoners to show that the motion procedure is inadequate or ineffective for purposes of testing the detention's lawfulness. However, this would not be a habeas corpus remedy. Put another way, section 23-110 seems to assume that the motion procedure will be both an adequate and effective way to test the legality of a detention, and only in the extraordinary case will a prisoner be permitted to resort to habeas corpus. If we accept this implicit assumption, then, as a practical matter, local prisoners will not be permitted to resort to federal habeas corpus. This reading would seem to raise constitutional questions regarding suspension of the writ. If another interpretation would avoid the constitutional question, that interpretation should be accepted.²³

It could be argued that the aforementioned interpretation does not raise constitutional problems because the Superior Court, like the federal district court, may entertain motions for habeas corpus, and a section 23-110 motion in effect is a habeas corpus proceeding. Prior to 1970, it was relatively clear that Congress had not authorized local District of Columbia courts to entertain writs of habeas corpus. Congress had then authorized only the United States District Court for the District of Columbia to entertain habeas corpus petitions for any person "committed, detained, confined or restrained from his lawful liberty within the District, under any color or pretense whatever. . . ."²⁴ Moreover, over a century and a half ago the Supreme Court, per Chief Justice Marshall, held that jurisdiction to issue writs of habeas corpus was not an inherent judicial power and must be explicitly conferred by statute.²⁵

However, there have been suggestions that the local District of Columbia

23. See, e.g., *Light v. United States*, 220 U.S. 523 (1911); *Silver v. Louisville & Nashville R.R.*, 213 U.S. 175, 191 (1909).

24. D.C. CODE ANN. § 16-901 (1961). In full, the statute read:

Any person committed, detained, confined or restrained from his lawful liberty within the District, under any color or pretense whatever, or any person in his or her behalf, may apply by petition to the United States District Court for the District of Columbia, or any judge thereof, for a writ of habeas corpus, to the end that the cause of such commitment, detainer, confinement, or restraint may be inquired into; and the court or the judge applied to, if the facts set forth in the petition make a prima facie case, shall forthwith grant such writ, directed to the officer or other person in whose custody or keeping the party so detained shall be, returnable forthwith before said court or judge.

25. *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 93-94 (1807). See *Ex parte McCordle*, 74 U.S. (7 Wall.) 506, 513-14 (1868); *Ex parte Dorr*, 44 U.S. (3 How.) 103, 105 (1845).

courts had the authority to issue writs of habeas corpus. One case often cited for that proposition is *Morrow v. District of Columbia*.²⁶ While the language of the decision is broad and purports to cover all extraordinary writs, the question before the court was a narrow one—whether the District of Columbia Court of Appeals had authority to issue writs of prohibition and mandamus. The circuit court held that the District of Columbia Court of Appeals had inherent power, as well as authority under the All Writs Act,²⁷ to issue writs of prohibition and mandamus. If the court was correct in treating all extraordinary writs alike, then *Morrow* is at odds with the Supreme Court's view that habeas corpus jurisdiction must be explicitly conferred by statute. Whether the language of the All Writs Act, "all courts established by Act of Congress," includes local District of Columbia courts, is not free of doubt.²⁸ However, even if we assume that there are substantial reasons for finding that the local courts have jurisdiction to issue writs of prohibition and mandamus,²⁹ it does not follow that they must likewise have authority to issue writs of habeas corpus. These several writs have very different histories, and they serve very different purposes. The local courts may well need the power to issue writs of prohibition and mandamus in order to protect their jurisdiction, effectuate their judgments, or perform other duties assigned to them by law. In no meaningful sense can it be said that the power to issue writs of habeas corpus is similarly necessary or essential to the courts' jurisdiction. So long as the local courts have the authority to vacate and modify judgments, their legitimate interests are adequately protected.

If section 23-110 is read carelessly, serious questions regarding suspension

26. 417 F.2d 728 (D.C. Cir. 1969).

27. 28 U.S.C. § 1651 (1970): "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdiction and agreeable to the usages and principles of law."

28. In *Burke v. United States*, 103 A.2d 347 (D.C. Mun. App. 1954), the court held that the words "all courts established by Act of Congress" in 28 U.S.C. § 2255 did not include the Juvenile Court of the District of Columbia. The court reasoned that the history of section 2255 did not show that Congress intended to include local courts. Section 2255's predecessor defined "courts of the United States" as courts created by acts of Congress whose judges hold offices during good behavior, *i.e.* article III courts. See 28 U.S.C. § 451 (Supp. V 1952).

29. In *Mike's Mfg. Co. v. Zimzoris*, 66 A.2d 414 (D.C. Mun. App. 1949), the court held that it had implied or inherent power to issue writs of prohibition in aid of its appellate jurisdiction. But here again it is unclear how the court would have responded had it been confronted with all of the specific considerations applicable to habeas corpus. In *Zimzoris*, use of the writ of prohibition was merely an indirect way of setting aside a judgment which the court would have vacated under Rule 60(b) of the Federal Rules of Civil Procedure had the time for vacating a judgment not expired.

of the writ will arise. At least one federal court expressed strong doubt regarding the constitutionality of 28 U.S.C. § 2255, a statute which merely substitutes one article III court for another.³⁰ It seems entirely appropriate to remain vigilant in preventing any impairment of the writ of habeas corpus. Indeed, " 'there is no higher duty than to maintain it unimpaired,' and unsuspended, save only in the cases specified in our Constitution."³¹ "Any statute which might tend to weaken the efficiency [of the writ] or delay its availability or make its use more difficult should be carefully considered and construed liberally in the light of [the writ's] history and its benign purposes."³²

If section 23-110 is read to prevent resort to federal courts except where it is shown that the motion procedure is ineffective or inadequate, then in the great majority of the cases involving local D.C. court prisoners review by an article III court will lie only by writ of certiorari to the United States Supreme Court.³³ Professor Paul A. Freund has pointed out that there are deficiencies in relying solely on direct review by the Supreme Court of state criminal convictions.³⁴ First, the issue of alleged constitutional irregularity is often not disclosed in the record of the trial. Second, state post-conviction review may not be available; and even if such a review is available, the record may be unclear. Third, since certiorari is discretionary, the Supreme Court only takes cases of general importance and will not grant review merely to correct errors in cases.³⁵ Moreover, it cannot be stressed too strongly that the determination of the constitutional claims may turn wholly on the facts. It follows that if a prisoner is to have his constitutional claims fully and fairly considered by a federal court, there must be an opportunity for fact-finding by a federal article III court.³⁶

30. *Hayman v. United States*, 187 F.2d 456, 465 (9th Cir. 1950), *vacated*, 342 U.S. 205 (1952).

31. *Smith v. Bennet*, 365 U.S. 708, 713 (1961), *quoting Bowen v. Johnston*, 306 U.S. 19, 26 (1939).

32. *St. Clair v. Hiatt*, 83 F. Supp. 585, 586 (N.D. Ga. 1949), *aff'd*, 177 F.2d 374 (5th Cir. 1948). *See also Paschal, The Constitution and Habeas Corpus*, 1970 DUKE L.J. 605, 617; *Developments in the Law—Federal Habeas Corpus*, *supra* note 11, at 1272-74.

33. *See D.C. CODE ANN.* § 11-102 (1973).

34. Freund, *Symposium—Habeas Corpus, Proposals for Reform*, 9 UTAH L. REV. 18, 27-30 (1964).

35. *Id.* at 28.

36. *Cf. Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 228 (1908) (Holmes, J.): Whether their property was taken unconstitutionally depends upon the valuation of the property, the income to be derived from the proposed rate and the proportion between the two—pure matters of fact. When those are settled the law is tolerable plain. All their constitutional rights, we repeat, depend upon

In no meaningful sense can one view Supreme Court review of a District of Columbia conviction as the equivalent of habeas corpus. The power of inquiry on federal habeas corpus is plenary.³⁷ If a federal court is unavailable to conduct an evidentiary hearing and try the facts *de novo* where a prisoner alleges facts which, if proved, would entitle him to relief, then it would seem that the writ has been suspended in violation of our Constitution.

The whole history of the writ—its unique development—refutes a construction of the federal courts' habeas corpus powers that would assimilate their task to that of courts of appellate review. The function on habeas is different. It is to test by way of an original civil proceeding, independent of the normal channels or review of criminal judgments, the very gravest allegations. State prisoners are entitled to relief on federal habeas corpus only upon proving that their detention violates the fundamental liberties of the person, safeguarded against state action by the Federal Constitution. Simply because detention so obtained is intolerable, the opportunity for redress, which presupposes the opportunity to be heard, to argue and present evidence, must never be totally foreclosed.³⁸

III. THE FEDERAL COURT/STATE COURT DISTINCTION IN HABEAS CORPUS ANALYSIS

It seems reasonably clear that in creating the Superior Court and the District of Columbia Court of Appeals, Congress intended to create a local and independent court system comparable to that in the states.³⁹ This is reflected in the appellate⁴⁰ and removal procedures⁴¹ for local courts. Judges of the local courts are not article III judges;⁴² they serve only for a term of fifteen years, not life,⁴³ they may be removed from office for a number of reasons⁴⁴

what the facts are found to be. They are not forbidden to try those facts before a court of their own choosing if otherwise competent.

37. See *Townsend v. Sain*, 372 U.S. 293, 311-12 (1963).

38. *Id.* at 311.

39. See H.R. REP. NO. 91-907, 91st Cong., 2d Sess. 23, 34-35 (1970); S. REP. NO. 91-405, 91st Cong., 1st Sess. 4, 18 (1969); *Hearings on S. 1066, S. 1214, S. 1215, S. 1711 and S. 2601 Before the Comm. on the District of Columbia and Subcomm. on Improvements in Judicial Machinery of the Comm. on the Judiciary*, 91st Cong., 1st Sess. pt. 3, at 1140, 1149 (1969).

40. See D.C. CODE ANN. § 11-103 (1973).

41. See *id.* § 11-503. Cases are removable from Superior Court to federal district court in the same manner as from state courts.

42. *Id.* § 11-101.

43. *Id.* § 11-1502.

44. *Id.* § 11-1526. A judge can be removed upon his conviction of a felony, for willful misconduct in office, or for persistent failure to perform official duties. A judge can

and there is no prohibition against reduction of their salaries as there is with article III courts.⁴⁵ The courts are local courts and the judges are local judges; there is no reason to assume that they are federal judges in the article III sense. Indeed, Congress intended otherwise; local courts should no more ignore their statutory origin and history than should state courts discharge the constitutional responsibilities of article III courts. The history of the Act, its language, and experience with the local courts indicate that the District of Columbia Superior Court and Court of Appeals should be treated, at least for habeas corpus purposes, as state courts, subject to the provincial outlook to which such courts stand heir. This is simply a recognition of what has been known throughout our history—manifested by the provision for federal courts with diversity jurisdiction—that states often use varying and unequal weights to measure local concerns against constitutional claims.

In terms of ultimate responsibility, then, the protection of fundamental constitutional rights was entrusted to article III courts. The history of this concept is too well known to repeat at length here.⁴⁶ The Founding Fathers wrote into article III of the Constitution requirements that would insure judicial independence and ability to protect constitutional rights, even in the face of strong public opposition. Surely habeas corpus is one of those rights. All habeas corpus statutes have been written in terms of federal article III courts.⁴⁷ Indeed, in *Holiday v. Johnston*,⁴⁸ the Supreme Court held that the “plain mandate of the statute” requires that a habeas corpus petition be heard by a federal judge and therefore the case could not be referred to a commissioner for findings of fact, conclusions of law and a recommended disposition. Modern habeas corpus jurisdiction is an institutional device for the supervision of the enforcement of constitutional rights. It rests on the dual premises of the need for separate proceedings to ensure that individual rights are protected and the need for a constitutional court to decide constitutional claims to ensure that federal rights are uniformly and fully vindicated.⁴⁹ In *Brown v. Allen*,⁵⁰ it was held that all federal constitutional questions raised by a state prisoner in a federal habeas petition were cognizable—even

be involuntarily retired if he suffers from a physical or mental disability which interferes with the performance of his duties.

45. See U.S. CONST. art. III, § 1.

46. See generally 2 C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 455-97 (rev. ed. 1937).

47. See Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73; Judiciary Act of February 5, 1867, ch. 28, § 1, 14 Stat. 385; 28 U.S.C. §§ 2241, 2254 (1970).

48. 313 U.S. 341 (1941).

49. See *Developments in the Law—Federal Habeas Corpus*, supra note 11, at 1060-62.

50. 344 U.S. 443 (1953).

those questions which have been adjudicated fully in the state court.

[N]o binding weight is to be attached to the state determination. The congressional requirement is greater. The state cannot have the last say when it, though on fair consideration and what procedurally may be deemed fairness, may have misconceived a federal constitutional right.⁵¹

As one distinguished commentator has stated: "[P]erhaps [*Brown*] can be both explained and justified as resting on the principle that a state prisoner ought to have an opportunity for a hearing on a federal constitutional claim in a federal constitutional court, and that, if the Supreme Court in its discretion denies this opportunity on petition for certiorari, it ought to be available on habeas corpus in federal district court."⁵²

Moreover, persons convicted in article III courts are entitled to a full and fair habeas corpus proceeding. "There is no reason to treat federal trial errors as less destructive of constitutional guarantees than state trial errors, nor give greater preclusive effect to procedural defaults by federal defendants than to similar defaults by state defendants."⁵³ Perhaps even more instructive is that even military prisoners enjoy the right to habeas corpus in an article III court, notwithstanding the fact that the scope of review of military detentions is to some extent limited.⁵⁴ Congress, under its plenary authority over the military,⁵⁵ has taken great care in providing a complete system of review within the military for the protection of constitutional rights. Yet it is clear today that military prisoners have the right to petition article III courts for writs of habeas corpus.⁵⁶ It seems clear that there can be no compelling reason for depriving residents of the District of Columbia of the right to the "great writ" in an article III court.⁵⁷

51. *Id.* at 508 (separate opinion of Frankfurter, J.).

52. Hart, *The Supreme Court, 1958 Term—Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84, 106-07 (1959).

53. *Kaufman v. United States*, 394 U.S. 217, 228 (1969).

54. See generally 23 CATH. U.L. REV. 416 (1974).

55. See U.S. CONST. art. 1, § 8.

56. See *Burns v. Wilson*, 346 U.S. 137 (1953). This is so despite the language of 10 U.S.C. § 876 (1970) that military criminal proceedings shall be "final and conclusive" and "binding upon all departments, courts, agencies, and officers of the United States."

57. In *Bland v. Rogers*, 332 F. Supp. 989 (D.D.C. 1971), the court said that section 23-110 "extinguishes the traditional authority of the federal courts to review local judicial actions by the issuance of writs of habeas corpus." *Id.* at 991. This comment can only be viewed as dictum. The petitioner had been indicted in federal district court and thereafter filed a motion in Superior Court to challenge the constitutionality of both the condition of his confinement and the statute under which he was indicted. The Superior Court dismissed the motion without prejudice to its being brought in federal court. Section 23-110 was inapplicable in that proceeding since there was no prisoner "in custody under sentence of the Superior Court." Moreover, the petitioner had been

It is undoubtedly true that Congress has considerable discretion in determining the jurisdiction of federal courts⁵⁸ and it is also true that, as stated in *Palmore v. United States*,⁵⁹ "neither this Court nor Congress has read the Constitution as requiring every federal question arising under federal law, or even every criminal prosecution for violating an Act of Congress, to be tried in an Article III court before a judge enjoying lifetime tenure and protection against salary reduction."⁶⁰ But cases expressing these views ought not to be read for more than they really say. It is important to note, for example, that in *Sheldon v. Sill*⁶¹ the statement regarding the power of Congress to determine the jurisdiction of federal courts was made in the context of a diversity case. Within the context of federal jurisdiction, one could quite rationally treat federal question and diversity cases differently. And, equally important, in the famous case of *Ex parte McCordle*,⁶² the Supreme Court upheld an act of Congress which withdrew the appellate jurisdiction of the Supreme Court in habeas corpus cases included under the Act of 1867. This case has long been read as giving Congress full control over the Supreme Court's appellate jurisdiction.⁶³ Here again, one could rationally treat questions regarding jurisdiction of inferior courts and that of the Supreme Court differently. Moreover, less than a year after *McCordle*, the Supreme Court held that it could still issue original writs of habeas corpus and review a case like *McCordle*'s by certiorari.⁶⁴ The point is that *McCordle* barred only one method of review in the Supreme Court. In that very case other avenues of review by the Court were opened. While the power of Congress to grant, withhold and distribute the judicial powers of the United States is undoubtedly plenary, it is not absolute and unlimited; Congress may not violate the Constitution or impair our constitutional scheme. And the statement quoted above from *Palmore* should be read in its proper context. In *Palmore*, the Court was only concerned with the power of Congress to require residents of the District of Columbia to be "tried" in article I courts, and did not address itself to the habeas corpus issue. Prisoners convicted in those very forums⁶⁵ identified by the Supreme Court to illustrate its point may seek

indicted in federal court and motion procedures and perhaps habeas corpus were available to challenge the federal indictment and condition of pretrial confinement.

58. See *Ex parte McCordle*, 74 U.S. (7 Wall.) 506 (1868); *Sheldon v. Sill*, 49 U.S. (8 How.) 441 (1850); *Cary v. Curtis*, 44 U.S. (3 How.) 236, 245 (1845).

59. 411 U.S. 389 (1973).

60. *Id.* at 407.

61. 49 U.S. (8 How.) 441 (1850).

62. 74 U.S. (7 Wall.) 506 (1868).

63. See, e.g., C.A. WRIGHT, *THE LAW OF FEDERAL COURTS* § 10 (2d ed. 1970).

64. *Ex parte Yerger*, 75 U.S. (8 Wall.) 85 (1868).

65. E.g., state courts, territorial courts or military courts. See 411 U.S. at 402-04.

habeas corpus relief in article III courts. Thus, *Palmore* does not answer the question at hand.

The legislative history of the 1970 Act makes clear that Congress was concerned about the workload of the local federal district court:

The burden is acute in the District of Columbia, the seat of the Federal Government, where, in the absence of inordinately crowded dockets (both civil and criminal), a substantial and greater quantum of genuinely Federal litigation might best and conveniently be brought. Yet, at the present the median time for civil jury trial in the U.S. District Court for the District of Columbia is nearly double the median for Federal district courts nation-wide. In recent years as many as 12 out of 14 judges of the Federal court in the National Capital have been assigned full time to the trial of local felony offenses.⁶⁶

The congressional solution to the inordinate number of cases being tried in the District of Columbia's federal district court was to consolidate the local trial courts into a new court of general local jurisdiction—the Superior Court,⁶⁷ with both criminal⁶⁸ and civil⁶⁹ jurisdictions. At the same time, Congress eliminated the federal district court's trial jurisdiction over local civil matters⁷⁰ and reduced its trial jurisdiction over local criminal offenses to prosecutions involving a federal offense.⁷¹ Additionally, the appellate jurisdiction of the United States Court of Appeals for the District of Columbia Circuit over judgments of the District of Columbia Court of Appeals, with minor exceptions, was eliminated,⁷² and the District of Columbia Court of Appeals was declared to be the highest court of the District of Columbia, whose judgments are reviewable only by the United States Supreme Court.⁷³ This statutory scheme would seem to adequately meet Congress's objective, and neither the Act nor its history clearly show an intent to go beyond this basic scheme.

IV. A PROPOSED INTERPRETATION

How, then, should section 23-110 of the Act be read? It should be interpreted as merely creating a motion procedure whereby a person convicted in Superior Court may collaterally and subsequently challenge his sentence; it is a procedure in the nature of the ancient writ *coram nobis* and

66. S. REP. NO. 91-405, 91st Cong., 1st Sess. 3 (1969).

67. D.C. CODE ANN. § 11-901 (1973).

68. *Id.* § 11-923.

69. *Id.* § 11-921.

70. *Id.* § 11-501.

71. *Id.* § 11-502.

72. *Id.* § 11-301.

73. *Id.* § 11-102.

it is consistent with state procedures for postconviction review after direct review. The motion procedure should be deemed inadequate and ineffective within the meaning of section 23-110 when the habeas corpus petitioner alleges facts and a constitutional claim which, if proved, would entitle him to relief and relief has not been granted by the local courts. A distinction could be drawn between cases where the petitioner failed to make a motion in Superior Court and those cases where the motion was made but denied since, under 28 U.S.C. §§ 2254 and 2255 and habeas corpus common law, the petitioner would be required to exhaust his local remedies.⁷⁴ There is, however, a readymade body of federal law defining when a petitioner has exhausted his state remedies for habeas corpus purposes.⁷⁵ It is normally unnecessary for a prisoner to ask his local courts for collateral relief based on the same evidence and issues already decided on direct review.⁷⁶ Nor should the petitioner be denied the right to petition for habeas corpus where the local procedure is inexhaustible.⁷⁷ The other side is that the district judge may in his discretion deny relief to a prisoner who has deliberately bypassed the orderly procedure in his local court for vindicating federal claims and by so doing has forfeited his local remedies.⁷⁸ The Supreme Court has made it clear that this is not an invitation to inject fictions into our habeas corpus law. "A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege;"⁷⁹ whether there has been an intelligent waiver of a constitutional claim depends on the facts and circumstances of the case, including the background, experience and conduct of the petitioner.⁸⁰

V. CONCLUSION

This article suggests that under our constitutional scheme article III courts have primary responsibility for protection of our constitutional rights. Everyone should have at least one opportunity to air his constitutional claim before an article III court.⁸¹ But, even in those cases in which certiorari is granted

74. See *Stack v. Boyle*, 342 U.S. 1, 6-7 (1951); *Johnson v. Hoy*, 227 U.S. 245, 247 (1913); *Ex parte Royall*, 117 U.S. 241, 252-53 (1886).

75. See *Developments in the Law—Federal Habeas Corpus*, *supra* note 11, at 1093-1112.

76. See *Roberts v. LaValle*, 389 U.S. 40, 42-43 (1967); *Brown v. Allen*, 344 U.S. 443, 447 (1953).

77. See *United States ex rel. Master v. Baldi*, 198 F.2d 113, 116 (3d Cir. 1952); *Ekberg v. McGee*, 191 F.2d 625, 626 (9th Cir. 1951).

78. See *Fay v. Noia*, 372 U.S. 391, 438-39 (1963).

79. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

80. See 21 CATH. U.L. REV. 173 (1971).

81. See generally H. HART & H. WECHSLER, *THE FEDERAL COURTS & THE FEDERAL SYSTEM* 312-40 (1953).

on direct review, the remedy is inadequate because the functions of direct review and habeas corpus are so different⁸² that it may very well take an evidentiary hearing to assess the constitutional claims. The legislative history of section 23-110 shows no reason or intent to deprive residents of the District of their right to habeas corpus—a right enjoyed by all other persons in our country. Before we impute to Congress the intent to bring such a fundamental change to our habeas corpus law, clearer language and legislative history should be required. The interpretation which this article suggests gives the local courts all of the legitimate collateral review power that they need. To read the statute to severely restrict habeas corpus in the District would be insulting to both District of Columbia residents and to the local courts. Equally important, it would impute to Congress a sinister intent wholly at odds with the evidence at hand and its constitutional role.

82. See Hart, *supra* note 52, at 120.