

NOTES AND COMMENTS

EXTRADITION HABEAS CORPUS

I. INTRODUCTION

A man is held pending extradition to a state where he is wanted to stand trial or to finish a prison term from which he escaped. He brings habeas corpus, seeking to avoid extradition, arguing that because of past or prospective deprivations of his constitutional rights by the demanding state he ought not be returned. This is the paradigm fact situation with which this Comment will be concerned. The issue is whether a court in the asylum state¹ should consider such allegations, if proved, ground for relief,² and if so, what relief is appropriate.

The proper resolution of the issue is of obvious interest to the petitioners and to the asylum and demanding states involved; likewise it is of considerable importance to a court called upon both to do justice to the petitioner before it and to accord due weight to institutional limitations upon its authority. The proffered proof of almost unbelievable barbarities, which is the gravamen of the petition in many of the cases, adds to the urgency that the decision reached be the proper one. But the issue, which we shall call that of the proper scope of extradition habeas corpus, is of much wider significance than the situation which gives it birth. Determining the proper scope of a hearing on extradition habeas corpus requires an examination of — and in turn throws light upon — a number of the most important problems of constitutional law and of the political philosophy of federalism. If a petitioner seeks the writ in a federal court in the asylum state, the federalism problem takes the form of the question: what is the proper relationship of the lower federal courts to state judicial processes — to the asylum state courts' responsibility in the extradition process, and to the criminal process of the demanding state? If a petitioner seeks relief in a state court, the federalism problem is that of the proper relationship between the judicial processes of sister states; this seems to be an instance of the application of the spirit of full faith and credit, which precludes one state's courts from inquiring behind the surface validity of a sister state's judicial processes. Underlying the various demands of federalism is the cryptic prescription of the Constitution's extradition clause:

A person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.³

1. "Asylum state" is used throughout this Comment to designate the state in which a petitioner is held pending extradition; the "demanding state" is the state which has requested extradition.

2. While it is logically subsidiary, the issue usually presented in the cases is whether a court in the asylum state should hear evidence on a petitioner's allegations.

3. U.S. CONST. ART. IV, § 2.

In opposition to the institutional demands of federalism is the importance of securing to individuals the national guarantees embodied in the fourteenth amendment. Conflict between these two principles is a recurring theme of American law; but because the conflict is raised in a particularly immediate and clear manner by the issue of the proper scope of extradition habeas corpus, a successful accommodation in that limited context may serve to illuminate a host of analogous and important problems.

The conflict has only recently become a significant one with respect to extradition habeas corpus. Toward the end of the 1940's a substantial number of prisoners awaiting extradition began to seek habeas corpus in asylum states, alleging not that the demand for extradition was technically imperfect — the traditional narrow grounds for relief — but rather that past or prospective deprivations of their constitutional rights by demanding states made extradition inappropriate. With respect to the past deprivations they had suffered, the general theory upon which the petitioners sought relief was that their conviction and confinement in violation of the Constitution afforded no adequate basis for extradition; held in the asylum states for the sole purpose of extradition, their restraint was therefore as invalid as the demand upon which it was predicated. With respect to the future deprivations they would allegedly suffer, the petitioners' theory was that extradition should not be permitted to accomplish unconstitutional ends. For a number of reasons, not the least of which were the injustices and cruelties alleged, courts were disposed to consider these petitions more sympathetically than the history of extradition habeas corpus might have led one to expect. The state and federal courts began to suggest a number of doctrines to cope with this novel problem. Writers in legal periodicals began to analyze the courts' innovations, to criticize what the courts had done, and to propose alternative responses. While this area of law was still in ferment, the Supreme Court delivered two decisions which seemed to foreclose further developments by limiting extradition habeas corpus to its traditional narrow scope. If this was its intent, the Court was immediately successful. But the compelling quality of the allegations thus denied a hearing, the Court's careless handling of the two cases which reached it, and the radical change in the Court's general conception of the role of habeas corpus which has come in the intervening years, all suggest that were a new case presented to it the Court might well reach a different result. Until that happens, it may be possible to persuade the state and lower federal courts to put as narrow a construction upon the Court's decisions as they will bear, or even to refuse to follow them on the ground that they no longer represent the law.⁴ For extradition habeas corpus, as the Supreme Court has left it, is an anomaly. As a general rule, federal habeas corpus has become a remedy always available as a last resort to a man seeking to challenge the constitutionality of his custody. Perhaps the most striking exception to this rule is to be found in extradition habeas corpus, where federal courts, including the Supreme Court,

4. See notes 208-18 *infra* and accompanying text.

have refused to hear claims that they are a petitioner's last resort — that relief upon return to the demanding state will be unavailable, frustrated, or ineffective.

In determining the proper scope of a habeas corpus hearing in extradition proceedings, it is first necessary to place the question in its historical and doctrinal setting. Next, we shall examine in detail the various responses state and federal courts have made to the suggestion that the scope of extradition habeas corpus be broadened to include past and prospective deprivations of constitutional rights as grounds for relief. Against this background, we shall evaluate the Supreme Court's treatment of the two cases which came before it, consider the constructions to which its opinions are susceptible, and see how the decisions were in fact received by the state and federal courts. Finally, a theory of the proper scope of extradition habeas corpus will be suggested, based on the foregoing analysis.

II. A SHORT HISTORY OF HABEAS CORPUS DOCTRINE IN EXTRADITION CASES

In order to appreciate the recent developments with respect to the scope of extradition habeas corpus, it is necessary first to examine in some detail certain aspects of habeas corpus doctrine generally, and their specific application in extradition cases.

1. *Habeas Corpus Doctrine — The Scope of Inquiry*

Until 1867, the scope of federal habeas corpus inquiry remained limited by its common law ancestry to the questions whether the petitioner was detained without judicial process, or pursuant to the order of a court without jurisdiction to issue the order, or without other legal authority.⁵ In the legislative aftermath of the Civil War, Congress extended the writ to *any* prisoner (state or federal) in "custody in violation of the Constitution or laws . . . of the United States."⁶ Despite this mandate to look directly to the constitutionality of challenged custody, however, the federal courts continued to consider themselves bound by the talisman "jurisdiction" until it was abandoned in a series of cases roughly contemporaneous with the developments in extradition habeas corpus with which we are concerned.⁷ Prior to this abandonment, the federal courts

5. *But cf.* *Fay v. Noia*, 372 U.S. 391, 404-06 (1963).

6. 14 Stat. 385 (1867), 28 U.S.C. § 2241(c) (3) (1958). The constitutionality of the extension was recently challenged, and sustained, in *United States ex rel. Elliott v. Hendricks*, 213 F.2d 922 (3d Cir.), *cert. denied*, 348 U.S. 851 (1954).

7. See Note, *The Freedom-Writ — The Expanding Use of Federal Habeas Corpus*, 61 HARV. L. REV. 657, 661 (1948) [hereinafter cited as *Freedom Writ*]; *Sunal v. Large*, 332 U.S. 174 (1947); *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947); *Cochran v. Kansas*, 316 U.S. 255 (1942); *Waley v. Johnston*, 316 U.S. 101 (1942). *Cf. In re Riddle*, 57 Cal. 2d 848, 851, 372 P.2d 304, 305 (1962):

The allegations of the petition stated a good cause for relief by habeas corpus. The California courts have used the writ not only to test jurisdiction, but also to protect the fundamental basic rights of prisoners. Thus the writ has been used to

achieved almost the same results as would have flowed from a direct consideration of constitutionality by expanding the concept of "jurisdiction" beyond theretofore recognizable limits.⁸ Thus, besides the formal requirements of jurisdiction over the person and subject matter, and jurisdiction to impose the particular detention complained of, the concept that a court could lose "jurisdiction" by depriving the defendant of fundamental rights at trial came into being.⁹ The constitutionality of the statute proceeded under¹⁰ also came to be considered "jurisdictional" and hence subject to collateral attack by federal habeas corpus. This vast expansion of the scope of the writ came perilously close to overthrowing the basic rule that habeas corpus is an extraordinary remedy to be reserved for extraordinary problems — in particular that, as a collateral attack (and one with the special virtue that the normal principle of *res judicata* does not apply¹¹), it must not be allowed to usurp the function of the normal process of appeal. Only the rule that habeas corpus will not lie if the petitioner has not exhausted his state remedies has prevented the writ from becoming an alternative route of appeal for any error at a state trial which a federal court deems of constitutional dimension.¹²

Simultaneous with the expansion and ultimate abandonment of the talisman "jurisdiction," the scope of inquiry on habeas corpus was being deepened. While at common law the validity of detention was determined on habeas corpus on

examine allegations by prisoners that they were beaten . . . or denied religious freedom . . . or prevented from effectively communicating with counsel . . . or the courts. . . . If it were a fact that cruel, inhuman, or excessive punishment had been inflicted on petitioner it would have been an invasion of his fundamental constitutional rights, entitled to protection under both the federal and state Constitutions.

See, for incredible confusion in the period of transition, *Bowen v. Johnston*, 306 U.S. 19 (1939).

8. See *Dorsey v. Gill*, 148 F.2d 857, 871-72 (D.C. Cir.), *cert. denied*, 325 U.S. 890 (1945), and cases cited therein. See also *In re Bonner*, 151 U.S. 242 (1894), for the analysis of "jurisdiction" which led to the expansion.

9. See, e.g., *Johnson v. Zerbst*, 304 U.S. 458 (1938); *Moore v. Dempsey*, 261 U.S. 86 (1923); *Frank v. Mangum*, 237 U.S. 309 (1915).

10. See *Ex parte Royall*, 117 U.S. 241 (1886); *Ex parte Siebold*, 100 U.S. 371 (1879).

11. See *Fay v. Noia*, 372 U.S. 391, 422-23 (1963); *Darr v. Burford*, 339 U.S. 200, 214 (1950). *But cf.* 28 U.S.C. § 2244 (1958); *Freedom Writ* 669-70.

12. See, e.g., *Rogers v. Richmond*, 365 U.S. 534 (1961), holding that the use of an incorrect *test* for the competence of a confession — without a finding that the proper test would have excluded the confession — is a sufficient denial of due process that habeas corpus will lie. See generally, for a fuller discussion of the matter covered in this paragraph, *Freedom Writ*. See *Fay v. Noia*, *supra* note 11, for a further expansion: failure to take an available state remedy — unless willful — is not an adequate state ground supporting a conviction challenged on federal habeas corpus. There had been some authority to the effect that if the petitioner had had his claim fully litigated in the state courts, and had thus received the fundamental fairness to which he was entitled by the fourteenth amendment, the writ would not lie. See *Freedom Writ* 667-68; *Frank v. Mangum*, 237 U.S. 309 (1915). *But cf.* *Moore v. Dempsey*, 261 U.S. 86 (1923); *Brown v. Allen*, 344 U.S. 443 (1953).

the basis of the adequacy of the return to the writ — that is, the allegations of fact in the return could not be controverted and the question of “jurisdiction” was determined from the sufficiency of the formal papers alone¹³ — the Supreme Court gradually substituted a review which “cuts through all forms and goes to the very tissue of the structure.”¹⁴ The habeas corpus hearing has thus become a full-dress factual inquiry whenever the alleged deprivation turns upon disputed facts.¹⁵ As part of the same trend toward maximizing the availability of the writ, the courts have developed very liberal standards of pleading in habeas corpus cases.¹⁶

In still a third direction, habeas corpus was being infused with a new and radical potency. Traditionally, the only remedy a court could grant a petitioner was full release.¹⁷ Despite a federal statute and several Supreme Court cases

13. See Revisers' Note to 28 U.S.C. § 2248 (1958); *Frank v Mangum*, 237 U.S. 309, 330 (1915).

14. Mr. Justice Holmes, dissenting, in *Frank v. Mangum*, *supra* note 13, at 346. The majority did not disagree; it pointed out that for the “bare legal review” of the common law writ had been substituted

a more searching investigation, in which the applicant is put upon his oath to set forth the truth of the matter respecting the causes of his detention, and the court, upon determining the actual facts, is to “dispose of the party as law and justice require.”

Id. at 330-31. See also *Hawk v. Olson*, 326 U.S. 271 (1945); *Cochran v. Kansas*, 316 U.S. 255 (1942). This deepened scope is now incorporated in 28 U.S.C. § 2248 (1958). It is part of a general trend toward scrutiny of the facts involved in a constitutional claim. See, e.g., *Chambers v. Florida*, 309 U.S. 227 (1940).

15. *Walker v. Johnston*, 312 U.S. 275 (1941), held that *ex parte* affidavits are not enough to support a factual determination against petitioner. Issues of law may be summarily disposed of on the basis of the petition and return (*id.* at 284); but if an issue of fact is raised, a hearing must be held at which competent evidence is introduced, and witnesses must be subject to cross-examination (*id.* at 285-87). “The Government’s contention that [petitioner’s] allegations are improbable and unbelievable cannot serve to deny him an opportunity to support them by evidence. On this record it is his right to be heard.” *Id.* at 287. 28 U.S.C. § 2246 (1958) codifies a rule somewhat different from the *Walker* rule: affidavits are admissible in the court’s discretion, but if admitted the opposing party has a “right to propound written interrogatories to the affiants, or to file answering affidavits.” A petitioner has a right to be present at the hearing if facts are in dispute. 28 U.S.C. § 2243 (1958). *Cf.* *United States v. Hayman*, 342 U.S. 205 (1952).

16. See, for discussion, *Dorsey v. Gill*, 148 F.2d 857, 862-63, 867-69 (D.C. Cir.), *cert. denied*, 325 U.S. 890 (1945). See, as examples, *Coffin v. Reichard*, 143 F.2d 443, 444 (6th Cir. 1944), *on appeal from remand*, 148 F.2d 728, *cert. denied*, 325 U.S. 887 (1945); *In re Brabson’s Petition*, 167 F. Supp. 619 (S.D.N.Y. 1958).

17. See Comment, *Habeas Corpus — Relief Other Than Release*, 10 OHIO ST. L.J. 370-71 (1949). The deadening effect of this limitation upon efforts to liberalize the availability of the writ, and upon the willingness of courts to grant it, is obvious. The limitation had a less obvious, but equally important impact: only if the detention itself was unauthorized could the writ be granted — it did not extend to important situations in which release would not be appropriate: unauthorized treatment during lawful detention, detention in an unauthorized place, or to such things as the validity of a sentence which a petitioner was not currently serving, but which, by extending the total period of his prospective detention, made him ineligible for parole. See *Williams v. Steele*, 194 F.2d

suggesting that relief less than release was permissible,¹⁸ it was not until *Dowd v. Cook*,¹⁹ decided in 1951, that the Supreme Court made absolutely clear that the federal courts are not faced with the dilemma "of having to choose between ordering an absolute discharge of the prisoner and denying him all relief. The District Court has power in habeas corpus proceedings to 'dispose of the matter as law and justice require.'"²⁰ In the interim, some courts, notably the Sixth Circuit in *Coffin v. Reichard* (1944),²¹ had come out strongly for relief other than release, arguing that unauthorized treatment during lawful custody can be considered on habeas corpus.²² There are, of

32 (8th Cir.), *rehearing denied*, 194 F.2d 917, *cert. denied*, 344 U.S. 822 (1952); *Morton v. Steele*, 217 F.2d 13 (8th Cir. 1954), *cert. denied*, 348 U.S. 974 (1955); *Kemmerer v. Benson*, 165 F.2d 702 (6th Cir.), *cert. denied*, 334 U.S. 849 (1948) [*but see In re Kemmerer*, 309 Mich. 313, 15 N.W.2d 652 (1944), *cert. denied sub nom. Kemmerer v. Michigan*, 329 U.S. 767 (1946)]; *McNally v. Hill*, 293 U.S. 131 (1934). *But cf.* for the modern rule on parole eligibility, *United States ex rel. Smith v. Jackson*, 234 F.2d 742, 749 (2d Cir. 1956); *United States ex rel. Donahue v. LaVallee*, 213 F. Supp. 439, 440 (N.D.N.Y. 1963). This traditional limitation had been anomalous since 1874, when Congress provided that a habeas corpus case be disposed of "as law and justice require." (This language seems first to have occurred in REV. STAT. § 761 (1873-74), now 28 U.S.C. § 2243 (1958).) Nor had the tradition been consistently followed, at least since the 1890's. In a number of cases, the Supreme Court itself had granted what amounted to relief less than release without discussing the issue. In *In re Bonner*, 151 U.S. 242 (1894), the Supreme Court ordered the petitioner released because part of the sentence imposed was not within the jurisdiction of the sentencing court; but the Court stated that when error is in the sentence only, there is no reason why the sentencing court cannot resume jurisdiction over a petitioner released on habeas corpus and resentence him. In a case the same year, *United States v. Pridgeon*, 153 U.S. 48 (1894), involving another partially void, but separable, sentence, the Court remanded to the court of appeals to decide whether to dismiss the petition for habeas corpus and let the petitioner seek a writ of error, or to allow the writ and remand the petitioner to prison with directions to enforce only the legal part of the sentence. Almost unnoticed, the entering wedge of relief less than release developed. See also *Mahler v. Eby*, 264 U.S. 32 (1924). *Cf. Rogers v. Richmond*, 365 U.S. 534 (1960) (remand of petitioner to the court of appeals with directions to hold him pending retrial by the state in accordance with the Court's decision — in default whereof, petitioner to be discharged).

18. See note 17 *supra*.

19. *Dowd v. United States ex rel. Cook*, 340 U.S. 206 (1951).

20. *Id.* at 209-10. The Court occasionally manifests continuing confusion on the point. See dictum of Brennan, J., in *Fay v. Noia*, 372 U.S. 391, 427 n.38 (1963). See also, for post-*Dowd* confusion, *Williams v. Steele*, 194 F.2d 32 (8th Cir.), *rehearing denied*, 194 F.2d 917, *cert. denied*, 344 U.S. 822 (1952); *Morton v. Steele*, 217 F.2d 13 (8th Cir. 1954), *cert. denied*, 348 U.S. 974 (1955); *Hodge v. Heinze*, 165 F. Supp. 726 (N.D. Cal. 1958).

21. 143 F.2d 443 (6th Cir. 1944), *on appeal from remand*, 148 F.2d 278, *cert. denied*, 325 U.S. 887 (1945). See also *Louie Yung v. Coleman*, 5 F. Supp. 702 (S.D. Idaho 1934).

22. Any unlawful restraint of personal liberty may be inquired into on habeas corpus . . . [citing *Bonner*]. This rule applies although a person is in lawful custody. His conviction and incarceration deprive him only of such liberties as the law has ordained he shall suffer for his transgressions.

143 F.2d at 445. The court reversed a dismissal of the petition and remanded for a hearing on the merits of the claim of unauthorized, cruel and unusual punishment. Remand

course, two problems: whether relief less than release is permissible when release itself would be proper if it were the exclusive remedy available; and whether the availability of relief less than release enables the courts to consider questions on habeas corpus which do not go to the validity of the custody *per se*, but only to issues (*e.g.* cruel treatment) arising out of legitimately imposed custody. The Supreme Court has only clearly answered the former in the affirmative; *Coffin* answered the latter in the affirmative also, and were the question presented to the Court today, it seems almost certain that it would agree.²³

2. Habeas Corpus Doctrine — Exhaustion and Comity

While the scope of a habeas corpus inquiry was being broadened in terms of the concept of "jurisdiction," deepened in terms of the nature of the hearing, and expanded to cover the nature as well as the validity of custody, the availability of the writ was being severely restricted from an entirely different direction — procedure. In *Ex parte Royall* (1886),²⁴ shortly after the 1867 extension of the scope of federal habeas corpus to include state prisoners whose custody is in violation of the Constitution, laws and treaties of the United States,²⁵ the Court announced the "exhaustion of state remedies" doctrine. The relief sought by the petitioner made the Court's decision nearly inevitable: Royall sought federal relief from detention pending state trial for an offense under state law. The Court rightly apprehended that if the new grant of habeas corpus jurisdiction were taken to permit unrestrained federal interlocutory attacks upon state criminal processes, results intolerable to the federal system and to the states' administration of criminal justice would quickly follow.²⁶

to prison with directions that petitioner's rights be respected, or to the Attorney General with instructions to transfer the petitioner to another institution, were suggested by the court as appropriate relief. Such remand subject to a condition is the most frequent mode of relief other than release. See *United States v. Pridgeon*, 153 U.S. 48 (1894) (apparently the first such case); cases cited in notes 23 & 193 (multiple offender cases) *infra*; *Dorsey v. Gill*, 148 F.2d 857 (D.C. Cir.), *cert. denied*, 325 U.S. 890 (1945) (remand with directions to release unless the court's order that petitioner be given a medical reexamination as to his sanity be carried out is the *exclusive* remedy when petitioner seeks release from a mental hospital).

23. See *In re Riddle*, 57 Cal. 2d 848, 372 P.2d 304 (1962); *Miller v. Overholser*, 206 F.2d 415 (D.C. Cir. 1953); *Thompson v. Cavell*, 158 F. Supp. 19 (W.D.Pa. 1957); *Evans v. Madigan*, 154 F. Supp. 913 (N.D.Cal. 1957). *Cf.* *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 472 (1947) (Burton, J., dissenting); *United States ex rel. Smith v. Jackson*, 234 F.2d 742, 749 (2d Cir. 1956). *But see* the *Williams, Morton and Hodge* cases, *supra* note 20. *In re Brabson's Petition*, 167 F.Supp. 619, 621 (S.D.N.Y. 1958), contains an exhaustive list of cases to the effect that habeas corpus does not lie where full release would not be an appropriate remedy.

24. 117 U.S. 241 (1886).

25. 14 Stat. 385 (1867); now 28 U.S.C. § 2241(c)(3) (1958).

26. Congress, apparently, had been oblivious to the disaster which the change might have wrought:

Congress seems to have had no thought . . . that a state prisoner would abide

If federalism is to retain any vitality, the states, through their courts, should in general have the first opportunity to appraise the constitutionality of their own conduct. The Court stated that "it is clear that, if the local statute under which Royall was indicted be repugnant to the Constitution, the prosecution against him has nothing upon which to rest, and the entire proceeding against him is a nullity,"²⁷ and that a court is without jurisdiction to try a defendant under an unconstitutional statute.²⁸ Nonetheless, the Court went on to sanction the exercise of discretion by the lower federal courts in considering when to hear petitions from state prisoners, "that discretion, however, to be subordinated to any special circumstances requiring immediate action."²⁹ The Court emphasized that this discretion not to issue the writ before trial, or after trial but before appeal, was to be exercised always in light of the needs of federal-state comity.³⁰ The irony of the *Royall* case is that a rule which ultimately became a mandatory requirement of abstention originated with the holding

state court determination of his constitutional defense — the necessary predicate of direct review by this Court [which was by right at the time] — before resorting to federal habeas corpus. Rather, a remedy almost in the nature of *removal* from the state to the federal courts of state prisoners' constitutional contentions seems to have been envisaged.

Fay v. Noia, 372 U.S. 391, 416 (1963). The Court, faced with more *power* than it felt was wise for it and the federal courts in general to exercise, was forced to create a rule of self-restraint. *Id.* at 417-18.

27. 117 U.S. at 248.

28. *Ibid.*

29. *Id.* at 253. The Court said that although there may be such special circumstances justifying federal intervention before a state trial, the petition shows no reason why the state courts should not hear the claims raised (*id.* at 252); the federal courts may not presume that state courts will not give petitioners fair hearings on their constitutional claims (*ibid.*).

30. *Id.* at 253. The origin of the exhaustion rule as one of *postponement* of the federal right to habeas corpus is emphasized in *Fay v. Noia*, 372 U.S. 391, 418 (1963). Two routes were open to the Court in *Royall*: to hold that detention pending trial under an allegedly unconstitutional statute is not "custody in violation of the Constitution . . . of the United States" because every state law is presumed to be constitutional until found otherwise, and that the petitioner had ample opportunity to challenge the statute in the state courts; in the alternative, the Court could hold that notwithstanding the custody was in violation of the Constitution, a federal court had discretion to decline to issue the writ. The former course, because it would have couched the matter in terms of the propriety of the detention, would have been more consistent with the mandatory language of the habeas corpus statute and the tradition of habeas corpus, in which the writ had been conceived of as the *right* of a person improperly detained. Without considering this possibility, however, the Court embraced the latter alternative. See, for the traditional conception of habeas corpus, DICEY, *THE LAW OF THE CONSTITUTION* 214 (10th ed. 1959). See also *Fay v. Noia*, *supra*, at 438-39 & n.44, for a clearly manifested intent on the part of the Court to limit the notion of the writ as discretionary. REV. STAT. § 755 (1875), now, with minor changes in phraseology, 28 U.S.C. § 2243 (1958):

A court . . . shall forthwith award the writ . . . unless it appears from the application that the applicant or person detained is not entitled thereto. [emphasis added]

that federal courts have discretion *not* to issue the writ:³¹ the exception soon became the rule.

In *Whitten v. Tomlinson* (1895),³² the Court stated the rule in its positive form: except in "peculiar and urgent cases, the courts of the United States will not discharge the prisoner by *habeas corpus* in advance of a final determination of his case in the courts of the State . . ." and even then, a petitioner should normally be left to "the usual and orderly course of proceeding by writ of error from this court."³³ Gradually, the rule became hardened until in *Ex parte Hawk* (1944)³⁴ the Court made clear that in the absence of special circumstances the lower federal courts *must* refuse the writ unless the petitioner has exhausted the remedies available to him in the state courts, including such collateral remedies as *habeas corpus*. Finally, in 1948, the judicially developed rule was codified in what is now 28 U.S.C. section 2254:

An application for a writ of *habeas corpus* in behalf of a person in custody pursuant to the judgment of a State Court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.³⁵

But although the exhaustion rule itself may be said to have come, at least temporarily, to the end of its development at about the same time as the problem of the scope of extradition *habeas corpus* arose, some of its facets were very much in flux. Immediately before the enactment of section 2254, the Court had held that only one route of state review of a petitioner's claim need be exhausted.³⁶ At the time of the Supreme Court decisions stifling the development of a broad-scope inquiry on extradition *habeas corpus*, it was not clear that the same rule would apply despite the second paragraph of section

31. The lower court had dismissed the writ for want of jurisdiction. In affirming, the Court emphasized that the decision below could be justified as a proper exercise of discretion to postpone a federal hearing. An "original" petition presented to the Supreme Court on the same facts was dismissed on grounds that in the circumstances it was not appropriate for the Court, assuming it had the power, to exercise it. *Ex parte Royall*, 117 U.S. 254 (1886). See *Ex parte Fonda*, 117 U.S. 516 (1886), for application of the *Royall* doctrine to an attempt to bring federal *habeas corpus* prior to appeal of a state conviction. See also *Cook v. Hart*, 146 U.S. 183, 194-95 (1892), for another early example of the concept of discretion not to issue the writ before state proceedings have terminated.

32. 160 U.S. 231 (1895).

33. *Id.* at 242. Once again, the petitioner was seeking federal relief in advance of his state trial — this time on double jeopardy grounds — and the Court pointed out that the extremely messy and obscure character of his allegations was an example of one reason for non-intervention. *Id.* at 242-47.

34. 321 U.S. 114 (1944).

35. 62 Stat. 960 (1948), 28 U.S.C. § 2254 (1958).

36. *Wade v. Mayo*, 334 U.S. 672 (1948).

2254.³⁷ Whether full exhaustion required, in every case, a petition for certiorari to the Supreme Court from an adverse state court decision was also a very doubtful question.³⁸ Likewise, it was not clear whether, if petitioner's failure to take a timely appeal meant that state remedies otherwise available were foreclosed to him, he would be held not to have exhausted his state remedies.³⁹ One area of clarity, going to the essence of the federalism rationale of the exhaustion doctrine, lay in the principle that any constitutional claim petitioner sought to advance in the federal courts must first have been presented to the state courts.⁴⁰ It was also clear that the exhaustion rule does not apply in cases where state remedies are "sham,"⁴¹ in situations where normal state remedies are not available to a petitioner⁴² or are ineffective to protect his rights, or in other extraordinary circumstances.⁴³

37. *Brown v. Allen*, 344 U.S. 443 (1953). In the interim, the Chief Judge of one circuit had gone so far as to suggest that under § 2254, in a state which attaches no res judicata significance to a denial of habeas corpus, a petitioner could never exhaust his state remedies because he could always petition again for state habeas corpus. *Parker, Limiting the Abuse of Habeas Corpus*, 8 F.R.D. 171, 176 (1948).

38. Immediately before the cases concerning the scope of extradition habeas corpus, the Court had held that the lower federal courts could weigh a failure to seek certiorari against other factors, such as the futility of seeking it and the injustice that would result from a denial of relief, in determining whether the petitioner had adequately exhausted his state remedies. *Wade v. Mayo*, 334 U.S. 672 (1948). During the period of judicial consideration of the question of the proper scope of extradition habeas corpus, the Court held that a petition for certiorari is a necessary element of exhaustion, in the absence of "circumstances of peculiar urgency." *Darr v. Burford*, 339 U.S. 200, 217-19 (1950), overruled by *Fay v. Noia*, 372 U.S. 391 (1963).

39. At least one commentator at the time thought that this was the rule, on the basis of the import of *Sunal v. Large*, 332 U.S. 174 (1947). See *Freedom Writ 666-67* & nn. 77-79. The issue was conclusively settled by *Fay v. Noia*, *supra* note 38: only currently available state remedies need be exhausted, and failure to take a timely state appeal is not an adequate and independent state ground sufficient to support custody unless the failure was wilful.

40. See *Davis v. Burke*, 179 U.S. 399 (1900), cited with approval in *Darr v. Burford*, 339 U.S. 200, 203 (1950); *Downs v. Hudspeth*, 75 F. Supp. 945, 952 (D.Kan. 1948) (new claims, not passed on by the state courts, must be presented to them before a federal court will hear them); Beverly, *Federal-State Conflicts in the Field of Habeas Corpus*, 41 CALIF. L. REV. 483, 489 (1953). *But cf.* *Fay v. Noia*, 372 U.S. 391 (1963): it would seem that the rule now applies only if state remedies currently exist by which the petitioner can raise his claim.

41. See, *e.g.*, *Marino v. Ragen*, 332 U.S. 561 (1947) (concurring opinion); *Freedom Writ 664* & n. 54.

42. See, *e.g.*, *United States ex rel. Turpin v. Snyder*, 183 F.2d 742 (2d Cir. 1950). See note 193 *infra* for discussion of this and similar cases.

43. See *Davis v. Burke*, 179 U.S. 399, 402 (1900); *Bacom v. Sullivan*, 194 F.2d 166 (5th Cir. 1952). The burden, of course, is on the petitioner to show any such bases for an exception, and the remoteness of chances of success in the state courts is no excuse for a failure to exhaust, because it is to be presumed that the state courts will uphold federal law. See Beverly, *supra* note 40, at 489; *Freedom Writ 665* n.72. *Cf.* *Sunal v. Large*, 332 U.S. 174, 180-81 (1947).

3. *The Special Nature of Habeas Corpus in Extradition Proceedings*

In 1793, Congress, although given no express power to do so, implemented the extradition clause, setting out the specific requisites for extradition.⁴⁴ Because it is only compliance by the demanding state with the requirements of a valid demand which authorizes the executive authority of the asylum state to have an alleged fugitive arrested,⁴⁵ and because important personal rights

44. 1 Stat. 302 (1793), 18 U.S.C. § 3182 (1958):

Whenever the executive authority of any State or Territory demands any person as a fugitive from justice, of the executive authority of any State, District or Territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the State or Territory from whence the person so charged has fled, the executive authority of the State, District or Territory to which such person has fled shall cause him to be arrested and secured, and notify the executive authority making such demand, or the agent of such authority appointed to receive the fugitive, and shall cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within thirty days from the time of the arrest, the prisoner may be discharged.

The validity of the legislation was upheld in *Roberts v. Reilly*, 116 U.S. 80 (1885). Both the extradition clause and the statutory implementation speak in mandatory terms; the Supreme Court held, however, in *Kentucky v. Dennison*, 24 How. (65 U.S.) 66 (1860), that although the duty of the asylum state's governor is an absolute, ministerial one — once a proper demand has been made — it is nonetheless a "moral" one, not enforceable in the federal courts. It is not entirely clear whether the Court thought Congress could provide for enforcement: the Court found no authority for federal mandamus either in the extradition clause or in the statute (*id.* at 107); but it went on to say, "[W]e think it clear, that the Federal Government, under the Constitution, has no power to impose on a State officer, as such, any duty whatever, and compel him to perform it. . . ." *Ibid.* Whether, since the Civil War and its aftermath, the Court would be of the same opinion is doubtful. Congress has in any case achieved a similar result, for certain named crimes, by making it a federal offence to cross state lines to avoid a state's justice; the trial is held in the state from which the defendant fled (so that, being removed there for trial, he need not be extradited). Fugitive Felon Act, 48 Stat. 787 (1934), as amended, 18 U.S.C. § 1073 (1958).

45. See *Compton v. Alabama*, 214 U.S. 1, 6 (1909); *Roberts v. Reilly*, 116 U.S. 80, 94-95 (1885); *Ex parte Reggel*, 114 U.S. 642, 651 (1885); *Robb v. Connolly*, 111 U.S. 624, 638 (1884); *Kentucky v. Dennison*, 24 How. (65 U.S.) 66, 104 (1860); *Ople v. Weinbrenner*, 285 Mo. 365, 373-74, 266 S.W. 256 (1920); *Taft v. Lord*, 92 Conn. 539, 103 Atl. 644 (1918); *United States ex rel. McCline v. Meyering*, 75 F.2d 716, 717 (7th Cir. 1934).

Pierce v. Creecy, 210 U.S. 387, 400-01 (1908), appears to be the only case in which the Court considered the validity of a state statute less strict than the federal requirements — held: since the demand and arrest actually involved were stated to be pursuant to the federal, rather than the state requirements, the question need not be decided. The Court has held that state legislation not inconsistent with the federal requirements is valid. *Innes v. Tobin*, 240 U.S. 127, 133-35 (1916). Although, in *Hyatt v. Corkran*, 188 U.S. 691 (1903), the Court held that mere "constructive presence" in the demanding state at the time of the alleged crime does not suffice to make petitioner extraditable as a fugitive from that state's justice (see also *Taft v. Lord*, *supra*), even though a crime by "constructive presence" might be permissible *qua* crime, some state courts have held valid

secured by the Constitution depend upon a strict observance of those requirements by demanding and asylum state alike,⁴⁶ the Supreme Court held, soon after the extension of federal habeas corpus jurisdiction to persons held by the states in violation of the Constitution,⁴⁷ that an extraditee has the right to

inconsistent state legislation, patterned on § 6 of the Uniform Criminal Extradition Act, 9 U.L.A. 297 (1957), which excludes the requirement of fugitivity in limited situations. See cases cited at 9 U.L.A. 299-300 (1957); Comment, *Interstate Rendition: Executive Practices and the Effects of Discretion*, 66 YALE L.J. 97, 100 n.18, 105 n.44 (1956) [hereinafter cited as *Executive Practices*]. See also Commonwealth *ex rel.* Houser v. Seip, 5 Pa. D.&C.2d 577 (C.P., Dauphin Co. 1955), *aff'd on opinion below*, 385 Pa. 545, 124 A.2d 110 (1956) [fugitivity not required under § 5, Uniform Reciprocal Enforcement of Support Act, 9C U.L.A. 23 (1957)]; Harrison v. State, 38 Ala. App. 60, 77 So.2d 384 (1954), *cert. denied*, 262 Ala. 701, 77 So.2d 387 (1955) (same).

46. See Robb v. Connolly, 111 U.S. 624, 638 (1884); United States *ex rel.* McCline v. Meyerling, 75 F.2d 716, 717 (7th Cir. 1934); In the Matter of Waterman, 29 Nev. 288, 292, 89 Pac. 291 (1907). However, petitioners who have sought habeas corpus in the demanding state, alleging their forcible return there deprived them of their rights under the extradition clause and implementing statute, have been uniformly unsuccessful. See, *e.g.*, Frisbie v. Collins, 342 U.S. 519 (1952); Ker v. Illinois, 119 U.S. 436 (1886). *Cf.* Mahon v. Justice, 127 U.S. 700 (1888) (erstwhile asylum state brought habeas corpus on behalf of kidnapped ex-fugitive). The theory of these denials is that the manner in which a defendant is brought to trial does not affect a state's right to try him. Since *Frisbie*, however, there has been the development of the idea of pre-trial due process [see, *e.g.*, Mapp v. Ohio, 367 U.S. 643 (1961)], and the Court may well abandon the *Frisbie* doctrine, since it allows kidnapping to deprive a petitioner of the procedural and substantive rights he would have in the extradition process. *Cf.* Note, *Bailbondsmen and the Fugitive Accused — The Need for Formal Removal Procedures*, 73 YALE L.J. 1098 (1964). Both under the federal kidnapping statute, 47 Stat. 326 (1932), as amended, 18 U.S.C. § 1201 (1958), and under the law of some states (see *Executive Practices* 103 n.36), kidnapping as an alternative to extradition is a criminal offense.

47. Why this development did not come until after the extension of federal habeas corpus is a revealing question. One would have supposed that since extradition is pursuant to federal law — Hyatt v. Corkran, 188 U.S. 691, 709 (1903); Roberts v. Reilly, 116 U.S. 80, 94-95 (1885) — an extraditee would be considered *pro tanto* a federal prisoner, eligible for federal habeas corpus as a matter of course. Indeed, until Robb v. Connolly, 111 U.S. 624 (1884), there was serious question whether a state court could proceed on habeas corpus to inquire into the validity of the detention of an extraditee, once the return to the writ set up the federal authority under which the petitioner was held. *Robb* held that the habeas corpus jurisdiction of state and federal courts in such cases is concurrent, rejecting the argument that an agent of a demanding state appointed to receive an extraditee is *pro hac vice* a federal officer. *Id.* at 630-35. See also Kentucky v. Dennison, 24 How. (65 U.S.) 66 (1860). But *Robb* explicitly recognized that the detention of an extraditee is pursuant to federal authority, pointing out that this is not decisive since state courts have jurisdiction to determine federal questions. 111 U.S. at 635-36. Merely because the *custodian* is not a federal officer would not seem to change the character of the *custody*. Federal prisoners, for example, may be incarcerated in state prisons [see 62 Stat. 847 (1948), 18 U.S.C. § 4002 (1958); Rosenberg v. Carroll, 99 F. Supp. 630 (S.D.N.Y. 1951); Rena v. United States, 58 F.2d 624 (5th Cir. 1932)], without prejudice to their rights to federal habeas corpus. See, *e.g.*, *In re Birdsong*, 39 Fed. 599 (D.Ga. 1889). See also notes 117-20 *infra* and accompanying text.

challenge his custody pending extradition by habeas corpus.⁴⁸ However, until the 1940's the federal courts did not apply the exhaustion of state remedies rule to extradition habeas corpus; they allowed an extraditee to initiate court proceedings to vindicate his rights under the extradition clause and federal extradition statute either in the federal or state courts of the asylum state.⁴⁹ Regardless of the forum, the Court has always insisted that the questions involved in extradition habeas corpus cases are federal questions, and that the decisions of state courts are ultimately reviewable by it.⁵⁰ The same scope of

48. *Roberts v. Reilly*, 116 U.S. 80, 94-95 (1885) (federal habeas corpus); *Illinois ex rel. McNichols v. Pease*, 207 U.S. 100, 109 (1907) (state habeas corpus). But a petitioner does not have a right to a hearing before the asylum state's governor. *Munsey v. Clough*, 196 U.S. 364, 372 (1905); *Marbles v. Creecy*, 215 U.S. 63, 68 (1909). He does, however, have a right to insist that the governor's decision as to his fugitivity be made "in some legal mode" and upon "competent proof." *Ex parte Reggel*, 114 U.S. 642, 652 (1885). Evidence independent of the requisition papers is not required. *Marbles v. Creecy*, 215 U.S. 63, 67-68 (1909). Thus the function of a court, reviewing the governor's decision, is to determine whether, as a matter of law, it could have been reached on the basis of the evidence before him — not to weigh the evidence *de novo*. *Ex parte Reggel*, *supra* at 653. See *Executive Practices* for discussion of the actual practices of governors. The narrow scope hearing described above has been departed from somewhat by allowing in extrinsic evidence, particularly with respect to fugitivity.

49. The theory of concurrent jurisdiction was announced in *Robb v. Connolly*, 111 U.S. 624 (1884), discussed in note 47 *supra*. For examples of cases not requiring exhaustion, see, e.g., *United States ex rel. Darcy v. Superintendent*, 111 F.2d 409 (3d Cir.), *cert. denied*, 311 U.S. 662 (1940); *United States ex rel. McCline v. Meyering*, 75 F.2d 716 (7th Cir. 1934); *Hale v. Crawford*, 65 F.2d 739 (1st Cir.), *cert. denied*, 290 U.S. 674 (1933); *Collins v. Traeger*, 27 F.2d 842 (9th Cir. 1928); *Hogan v. O'Neill*, 255 U.S. 52 (1921); *Biddinger v. Commissioner*, 245 U.S. 128 (1917); *Drew v. Thaw*, 235 U.S. 432 (1914); *Marbles v. Creecy*, 215 U.S. 63 (1909); *Pierce v. Creecy*, 210 U.S. 387 (1908); *Appleyard v. Massachusetts*, 203 U.S. 222 (1906); *In the matter of Strauss*, 197 U.S. 324 (1905); *United States ex rel. Brown v. Cooke*, 209 Fed. 607 (3d Cir. 1913). *Cf. Note, Prisoners' Remedies for Mistreatment*, 59 YALE L.J. 800, 802-03 (1950); *Executive Practices* 103 n.36. The new rule — requiring exhaustion in extradition cases also — was announced in *Kauffman v. Mount*, 131 F.2d 112 (5th Cir. 1942); *Powell v. Meyer*, 147 F.2d 606 (3d Cir. 1945) [implicitly overruled in *Johnson v. Dye*, 175 F.2d (3d Cir.), *rev'd per curiam*, 388 U.S. 864 (1949)]; *Lyon v. Harkness*, 151 F.2d 731 (1st Cir. 1945), *cert. denied*, 327 U.S. 782 (1946); *Morgan v. Horrall*, 175 F.2d 404 (9th Cir.), *cert. denied*, 338 U.S. 827 (1949).

Petitioners had occasionally even been allowed to bring federal habeas corpus after having begun, but failed to follow up their state court route. See, e.g., *United States ex rel. McCline v. Meyering*, *supra*; *United States ex rel. Brown v. Cooke*, *supra*. *But cf. Morgan v. Horrall*, *supra*; *Executive Practices* 103 n.36.

50. See *South Carolina v. Bailey*, 289 U.S. 412 (1933); *Innes v. Tobin*, 240 U.S. 127 (1916); *Compton v. Alabama*, 214 U.S. 1 (1909); *Illinois ex rel. McNichols v. Pease*, 207 U.S. 100 (1907); *Munsey v. Clough*, 196 U.S. 364 (1905); *Hyatt v. People ex rel. Corkran*, 188 U.S. 691 (1903). Thus in the *Bailey* case, *supra*, the Court reversed a state court for releasing a petitioner who had failed to meet the federal standards for release on extradition habeas corpus; and the Seventh Circuit has overridden a prior denial of habeas corpus by a state court which failed to release a petitioner when release was warranted by federal law. *United States ex rel. McCline v. Meyering*, 75 F.2d 716 (7th Cir. 1934). The *Bailey* case may indicate that the Supreme Court's stifling of the development

inquiry and the same standards of proof apply to federal and state extradition habeas corpus: a petitioner is entitled to release unless the federal prerequisites to extradition have been met.⁵¹

The traditional "narrow scope" extradition habeas corpus proceeding,⁵² based on the extradition clause and the statute of 1793, countenances four avenues of attack upon the validity of custody in the asylum state pending extradition: (1) that the extradition papers are not in order, or are without proper authentication by the demanding state's executive authority;⁵³ (2) that the charge, whether by indictment or affidavit, is inadequate to support extradition, or is insubstantial;⁵⁴ (3) that the petitioner is not the person named in the extradition papers;⁵⁵ (4) that the petitioner is not a fugitive from the demanding state's justice because he was not within the demanding state at the time of the alleged offense.⁵⁶ (1) and (2) are questions of law, "always open upon the face of the papers to judicial inquiry" on habeas corpus;⁵⁷ but these constitutional and statutory requirements are to be liberally

of a broad-scope of inquiry on extradition habeas corpus in the federal courts precludes any similar liberalization in the state courts. The Pennsylvania courts so understood the situation. See Commonwealth *ex rel.* Henderson v. Baldi, 372 Pa. 463, 93 A.2d 458 (1953), and the cases following it, discussed in note 172 *infra*. *But cf.* Koch v. O'Brien, 101 N.H. 11, 12, 131 A.2d 63, 64 (1957).

51. *But cf.* People *ex rel.* Jackson v. Ruthazer, 90 N.Y.S.2d 205, 213, 196 Misc. 34, 42-43 (Sup. Ct.), *aff'd mem.*, 93 N.Y.S.2d 729, 276 App. Div. 832 (1949), *motion for leave to appeal denied*, 300 N.Y. 762, 90 N.E.2d 69 (1950) (scope of review on extradition habeas corpus in New York courts not necessarily controlled by federal rule). This holding is criticized as violating the supremacy clause in Horowitz & Steinberg, *The Fourteenth Amendment — Its Newly Recognized Impact on the "Scope" of Habeas Corpus in Extradition*, 23 So. CAL. L. REV. 441, 447-48 (1950). *Cf.* notes 45 & 50 *supra*. See notes 182-97 *infra* and accompanying text for an argument that the scope of extradition habeas corpus should be broader in the federal courts.

52. See, for general statements of the elements of the "narrow-scope" inquiry, Note, 8 U. CHI. L. REV. 342 (1941); Comment, *The Limits of Constitutional Inquiry on Habeas Corpus in Interstate Rendition*, 21 U. CHI. L. REV. 735, 737-38 (1954); *Executive Practices* 104 nn.39, 40 (1956); Drew v. Thaw, 235 U.S. 432, 440 (1914).

53. See, *e.g.*, *Ex parte* Reggel, 114 U.S. 642 (1885) (papers must include adequate basis for asylum governor to decide that prerequisites for extradition are present); Roberts v. Reilly, 116 U.S. 80 (1885); Collins v. Traeger, 27 F.2d 842 (9th Cir. 1928).

54. See, *e.g.*, United States *ex rel.* McCline v. Meyering, 75 F.2d 716 (7th Cir. 1934) (mere warrant is not a sufficient charge; petitioner released); *In re* Waterman, 29 Nev. 288, 89 Pac. 291 (1907) (charge insufficient — indictment fails to allege essential elements of the crime). *Cf.* also cases cited in notes 60-62 & 66 *infra*.

55. See Raftery *ex rel.* Huie Fong v. Bligh, 55 F.2d 189, 193 (1st Cir. 1932); United States *ex rel.* Austin v. Williams, 12 F.2d 66, 67 (5th Cir. 1926).

56. See, *e.g.*, Hyatt v. People *ex rel.* Corkran, 188 U.S. 691 (1903) (state court properly ordered petitioner discharged since he was not in the demanding state at the time of the crime). *Cf.* cases cited in note 63 *infra*, and discussion of fugitivity at note 45 *supra*. Intent to flee the justice of the demanding state is not an element of fugitivity. Appleyard v. Massachusetts, 203 U.S. 222 (1906); Roberts v. Reilly, 116 U.S. 80 (1885).

57. Roberts v. Reilly, *supra* note 56, at 95.

construed in favor of the demanding state,⁵⁸ the finding of the asylum's governor that the papers are in order and the charge sufficient is cloaked with a presumption of regularity not to be upset by picayune objections,⁵⁹ and, most important, the sufficiency of an indictment or affidavit as a charge of crime is not to be tested by the technical requirements of criminal pleading⁶⁰ — the charge is adequate if it plainly alleges a crime⁶¹ and if the facts it alleges are not impossible.⁶² (3) and (4) are questions of fact, as to which the finding of the asylum's governor will be overridden only if petitioner can make a clear and convincing or even conclusive case in rebuttal of the prima facie case against him.⁶³ This construction of the extradition clause and the implementing

58. See *Biddinger v. Commissioner*, 245 U.S. 128, 133 (1917). See, for examples of such liberal construction, *Compton v. Alabama*, 214 U.S. 1 (1909) (notary is a "magistrate" within the meaning of the federal statute requiring an affidavit by a magistrate); *In the matter of Strauss*, 197 U.S. 324 (1905) (affidavit of committing magistrate a sufficient charge); *Appleyard v. Massachusetts*, 203 U.S. 222 (1906) (intent to flee not an element of fugitivity); *Roberts v. Reilly*, 116 U.S. 80 (1885) (same). See also note 65 *infra*.

59. *Collins v. Traeger*, 27 F.2d 842 (9th Cir. 1928); *Compton v. Alabama*, *supra* note 58. See note 48, *supra*, for the rights of an extraditee before a governor.

60. See, e.g., *Commonwealth ex rel. Raucci v. Price*, 409 Pa. 90, 100-01, 185 A.2d 523, 528-29 (1962); *Hogan v. O'Neill*, 255 U.S. 52, 55 (1921); *Pierce v. Creecy*, 210 U.S. 387, 401-02 (1908); *Munsey v. Clough*, 196 U.S. 364, 373 (1905); *United States ex rel. Darcy v. Superintendent*, 111 F.2d 409, 412 (3d Cir.), *cert. denied*, 311 U.S. 662 (1940). The sufficiency of the indictment as a charge cannot be attacked on the ground that the statute defining the crime is unconstitutional. See note 66 *infra* and accompanying text.

If indictments which fail to allege the time and date at which the crime was committed are nonetheless deemed sufficient charges, a petitioner is necessarily deprived of his right to show he was not in the demanding state at the time of the crime. *Cf. People ex rel. McNichols v. Pease*, 207 U.S. 100, 110 (1907) (dictum: demanding state not necessarily bound by specific date of crime set forth in extradition papers); *Pearce v. Texas*, 155 U.S. 311 (1894) (indictment a sufficient charge, though it omitted the time and place of the crime).

61. See, e.g., *Pierce v. Creecy*, *supra* note 60, at 402-05: the indictment, "whether good or bad, as a pleading, unmistakably describes every element of the crime . . . as it is defined in the Texas Penal Code . . ." *Id.* at 404. The Constitution does not require a good indictment, or any indictment, just a charge. There is some authority that the crime charged must in fact be a crime in the demanding state. See *In re Varona*, 38 Wash. 2d 833, 232 P.2d 923 (1951). Indeed, this is the implication of *Pierce*, *supra*. But the line between this question and that of the sufficiency of the indictment as a pleading is very thin.

62. See *Roberts v. Reilly*, 116 U.S. 80, 96 (1885).

63. For cases in which extraditees have shown their non-fugitivity, see, e.g., *Hyatt v. People ex rel. Corkran*, 188 U.S. 691, 710-12, 719 (1903) ("without contradiction and upon conceded facts"); *Commonwealth ex rel. Dronsfield v. Hohn*, 390 Pa. 434, 135 A.2d 757 (1957) ("overwhelmingly"); *People ex rel. Higley v. Millspaw*, 281 N.Y. 441, 24 N.E.2d 117 (1939) ("conclusive"). For cases in which allegations of non-fugitivity have been rejected for failure to overcome the presumption that the asylum governor's finding of fugitivity is correct, see, e.g., *South Carolina v. Bailey*, 289 U.S. 412, 422 (1933); *Hogan v. O'Neill*, 255 U.S. 52, 56 (1921); *People ex rel. McNichols v. Pease*, 207 U.S. 100, 109-11 (1907); *Munsey v. Clough*, 196 U.S. 364, 372 (1905); *Roberts v. Reilly*, 116 U.S. 80, 95 (1885); *Ex parte Reggel*, 114 U.S. 642, 653 (1885); *People ex rel. Hauptmann*

statute⁶⁴ in favor of the demanding state and the liberal presumptions of regularity in the proceedings have traditionally been thought to flow from the need for an efficient extradition system and from the presumption that every demanding state can be counted upon to treat extraditees fairly.⁶⁵

v. Hanley, 153 Misc. 61, 63, 274 N.Y.S. 813, 816 (Sup. Ct.), *aff'd*, 242 App. Div. 257, 274 N.Y.S. 824 (1934); *Ex parte* Ople v. Weinbrenner, 285 Mo. 365, 378-79, 226 S.W. 256, 260 (1920), *cert. denied*, 256 U.S. 695 (1921).

Contentions which go to the innocence of the fugitive will not be considered, unless conclusive as to his non-fugitivity. See *South Carolina v. Bailey*, 289 U.S. 412, 420 (1933) ("It was wholly beyond the province of the judge to speculate, as he seems to have done, concerning the probable outcome of any trial which might follow rendition to the demanding state."); *Biddinger v. Commissioner*, 245 U.S. 128, 135 (1917) (defenses — including the statute of limitations — cannot be heard); *Drew v. Thaw*, 235 U.S. 432, 439-40 (1914) (petitioner alleges he could not have committed a crime because he was insane; but the "constitutionally required surrender is not to be interfered with by the summary process of *habeas corpus* upon speculations as to what ought to be the result of a trial [in the demanding state]."); *Commonwealth ex rel. Flower v. Superintendent*, 220 Pa. 401, 411, 69 Atl. 916, 919 (1908); *Commonwealth ex rel. Raucci v. Price*, 409 Pa. 90, 96-100, 185 A.2d 523, 526-28 (1962). *But cf.* Note, *Scope of a Habeas Corpus Hearing on Interstate Extradition of Criminals*, 53 YALE L.J. 359, 360 n.7 (1944) (if petitioner can show indisputably he is innocent, he is not a fugitive from justice); *People ex rel. Pahl v. Pollock*, 174 Misc. 981, 22 N.Y.S.2d 413 (Sup. Ct. 1940), noted in 8 U.CHI. L. REV. 342 (1941). There are some recent cases to the effect that if petitioner can show he was released from custody by the demanding state, he is not a fugitive. See *Commonwealth ex rel. Wadley v. Baldi*, 88 Pa.D.&C. 165 (C.P., Phila. Co. 1953). *Cf.* the issues raised by California's system of parole into the custody of another state in *In re Kimler*, 37 Cal. 2d 568, 233 P.2d 902, *cert. denied*, 342 U.S. 898 (1951); *In re Bailleaux*, 47 Cal. 2d 238, 302 P.2d 801 (1956). *But compare* *United States ex rel. Jackson v. Ragen*, 150 F.2d 190 (7th Cir. 1945).

64. For the view that the only question on extradition habeas corpus is the conformity of the demand to the constitutional and statutory requirements, see *United States ex rel. Brown v. Cooke*, 209 Fed. 607, 608 (3d Cir. 1913), *appeal dismissed*, 238 U.S. 613 (1915) (although it may be permissible for the executive authority of the asylum state to consider other matters, a court may consider only whether petitioner has been "lawfully demanded from the asylum state").

65. Courts have been free to give this [liberal] meaning to the Constitution and statutes because in delivering up an accused person to the authorities of a sister State they are not sending him for trial to an alien jurisdiction, with laws which our standards might condemn, but are simply returning him to be tried, still under the protection of the Federal Constitution, but in the manner provided by the State against the laws of which it is charged that he has offended.

Biddinger v. Commissioner, 245 U.S. 128, 133 (1917).

If more were required [of indictments] it would impose upon courts, in the trial of writs of *habeas corpus*, the duty of a critical examination of the laws of [demanding] States with whose jurisprudence and criminal procedure they can have only a general acquaintance. Such a duty would be an intolerable burden, certain to lead to errors in decision, irritable to the just pride of the States and fruitful of miscarriage of justice. The duty ought not to be assumed unless it is plainly required by the Constitution, and, in our opinion, there is nothing in the letter or spirit of that instrument which requires or permits its performance.

Pierce v. Creecy, 210 U.S. 387, 405 (1908). *Cf.* *Pearce v. Texas*, 155 U.S. 311, 314 (1894).

Over the years petitioners have repeatedly tried to persuade the courts to extend the inquiry on extradition habeas corpus to include the validity of the proceedings in the demanding state which led up to the demand for extradition, or the nature of the conduct by the demanding state which allegedly will follow extradition. Attempts to induce the courts to consider the constitutionality of the statute upon which the demanding state's charge was based, on the theory that an unconstitutional statute is absolutely void and cannot support

For a somewhat different emphasis, see *In re Waterman*, 29 Nev. 288, 292, 89 Pac. 291, 292 (1907):

If a defendant is unjustly accused, or illegally charged, or restrained of his liberty, certainly justice demands that he should not be deprived of his liberty or removed hundreds or thousands of miles, as the case may be, there to wait or be put on trial on an illegal charge. The sooner his detention, if it be illegal, is so ascertained, the better.

Compare *Hyde v. Shine*, 199 U.S. 62, 85 (1905) (dissenting opinion). Query whether the presumption of regularity is not even stronger in a removal case — from one federal judicial district to another. Yet a defendant in such a case is entitled to a probable cause hearing. See *Tinsley v. Treat*, 205 U.S. 20, 32 (1907); Comment, *Race Discrimination and Interstate Rendition — The Crawford Case*, 43 YALE L.J. 444, 452-53 (1934). See *Hale v. Crawford*, 65 F.2d 739, 743 (1st Cir. 1933), for use of the removal-extradition analogy, arguing that because the validity of an indictment found by an improperly selected grand jury is not impeachable in a removal case, it should not be in extradition cases. For criticism of the court's use of the analogy, on the ground that the function of the indictment in an extradition case is to show probable cause, whereas on removal a court finds probable cause independently and need not rely on the indictment, see Comment, *supra*, at 451.

A few courts have allowed a scope of inquiry slightly broader than that sanctioned by the extradition clause and implementing statute. The Oklahoma courts for many years allowed a petitioner to challenge the motives of the prosecution in the demanding state, on the theory that a "substantial charge" could not be found if extradition was sought for some purpose (*e.g.* to gain jurisdiction for a civil suit) other than to put the petitioner to his trial. In *Ex parte Offutt*, 29 Okla. Crim. 401, 405, 234 Pac. 222, 224 (1925), the "Oklahoma rule" was stated to be that, "In every extradition case the question of the good faith of the prosecution is always open to inquiry on habeas corpus." See Note, *Habeas Corpus in Interstate Rendition*, 47 COLUM. L. REV. 470, 472 (1947). The rule was apparently followed only in Oklahoma and North Dakota. See *In re Cohen*, 23 N.J. Super. 209, 218-19, 92 A.2d 837, 841-42 (1952), *aff'd on opinion below*, 12 N.J. 362, 96 A.2d 794 (1953) (containing a good collection and discussion of the cases and holding that comity precludes consideration of the motivation for the demand). Most courts refused to entertain such allegations. See, *e.g.*, *Kentucky v. Dennison*, 24 How. (65 U.S.) 66, 106 (1860); *United States ex rel. Darcy v. Superintendent*, 111 F.2d 409, 412 (3d Cir.), *cert. denied*, 311 U.S. 662 (1940); *Collins v. Traeger*, 27 F.2d 842, 846 (9th Cir. 1928); *Commonwealth ex rel. Flower v. Superintendent*, 220 Pa. 401, 409-10, 69 Atl. 916, 919 (1908). The "Oklahoma rule" was abandoned by Oklahoma in *Ex parte Scott*, 91 Okla. Crim. 345, 219 P.2d 249 (1950) on the ground that the Uniform Criminal Extradition Act, which had been adopted in Oklahoma, precludes it.

Some courts have been more strict in their scrutiny of the indictment than the Supreme Court's holdings would seem to sanction. See *In re Waterman*, 29 Nev. 288, 89 Pac. 291 (1907); *In re Varona*, 38 Wash. 2d 833, 232 P.2d 923 (1951) (relying on decisional law of demanding state to the effect that what petitioner was charged with was not a crime).

a charge of crime have been uniformly rebuffed.⁶⁶ A similar fate has met attacks on the validity of the indictment on the ground it was procured by a grand jury selected in violation of the petitioner's constitutional rights.⁶⁷ Until recently the courts refused to receive and consider proffered evidence concerning the treatment petitioner would receive after extradition: whether he would receive a fair trial⁶⁸ and whether he would be protected from mob violence⁶⁹ were held beyond the scope of extradition habeas corpus.⁷⁰ The scope of inquiry was thus kept fairly within the bounds of the tradition of habeas corpus. Since extraditees are detained pursuant to a governor's warrant, rather than a court order, the traditional question on extradition habeas corpus was not that of "jurisdiction" but whether the governor had "authority" to detain the petitioner. And since the habeas corpus inquiry was traditionally limited to the face of the papers, the governor's "authority" was determined only on the basis of the sufficiency of the official documents required for extradition;⁷¹ the realities behind the papers were largely beyond the purview of the courts. When habeas corpus generally was extended to the realities behind the formalities and the talisman of jurisdiction was abandoned, it was to be expected that pressure would quickly arise to extend extradition habeas corpus in a similar way — to develop a broader scope of inquiry.⁷²

66. See *Pearce v. Texas*, 155 U.S. 311 (1894); *Collins v. Traeger*, 27 F.2d 842 (9th Cir. 1928); *People ex rel. Gilbert v. Babb*, 415 Ill. 349, 354-57, 114 N.E.2d 358, 361-63 (1953). See, for an argument in support of this doctrine, Comment, *The Limits of Constitutional Inquiry on Habeas Corpus in Interstate Rendition*, 21 U.CHI. L. REV. 735, 743, 749-52 (1954). The theory that a state could legitimately refuse extradition because the demanding state's statute has no counterpart in the asylum state, and the crime is not *malum in se*, was rejected in *Kentucky v. Dennison*, 24 How. (65 U.S.) 66, 102 (1860).

67. See *Hale v. Crawford*, 65 F.2d 739 (1st Cir. 1933); *Commonwealth ex rel. Johnson v. Thomas*, 50 Pa. D.&C. 626 (C.P. 1944). For a critical discussion of the *Crawford* case, see Comment, 43 YALE L.J. 444 (1934).

68. See *United States ex rel. Brown v. Cooke*, 209 Fed. 607 (3d Cir. 1913), *appeal dismissed*, 238 U.S. 613 (1915). See also cases cited in note 69 *infra*. *But cf.* *People ex rel. Pahl v. Pollack*, 174 Misc. 981, 22 N.Y.S.2d 413 (Sup. Ct. 1940), noted in 8 U.CHI. L. REV. 342 (1941).

69. See *Marbles v. Creecy*, 215 U.S. 63, 69-70 (1909); *Ex parte Ople v. Weinbrenner*, 285 Mo. 365, 226 S.W. 256 (1920), *cert. denied*, 256 U.S. 695 (1921).

70. See, for further discussion, *Executive Practices* 108 n.58, 115 n.97; Note, *Scope of a Habeas Corpus Hearing on Interstate Extradition of Criminals*, 53 YALE L.J. 359-60 (1940); Note, *The Case of the Fugitive from the Chain Gang*, 2 STAN. L. REV. 174, 181 (1949).

71. See *Commonwealth ex rel. Flower v. Superintendent*, 220 Pa. 401, 405, 69 Atl. 916, 917 (1908) (a court on extradition habeas corpus cannot go beyond the "jurisdictional facts authorizing the extradition of the accused"); note 64 *supra*. Fugitivity is only a partial exception. The court's essential function is to see whether the governor was presented with enough evidence to be able, as a matter of law, to conclude that the petitioner is a fugitive. See note 48 *supra*. The courts have not kept the fugitivity inquiry "pure," however, and petitioners are allowed to introduce their own evidence.

72. See Comment, *The Limits of Constitutional Inquiry on Habeas Corpus in Interstate Rendition*, 21 U.CHI. L. REV. 735, 736 (1954). This was early done with respect to fugitivity. For a collection of state cases on the scope of extradition habeas corpus, see

III. EXPANSION OF THE SCOPE OF EXTRADITION HABEAS CORPUS

The courts initially resisted the pressure to expand the scope of extradition habeas corpus. *Marbles v. Creecy* (1909),⁷³ appears to have been the first major case in which a petitioner sought to avoid extradition by trying to persuade the court hearing him on extradition habeas corpus that he would be improperly treated if delivered to the demanding state. Petitioner was a Negro, held for extradition to Mississippi where he was under indictment for assault with intent to kill. His allegations seem to have been of a very general character, the crux of which was an asserted danger of mob violence and lynching. The Supreme Court said:

It is clear that the executive authority of a State . . . need not be controlled in the discharge of his duty [of rendition] by considerations of race or color, nor by a *mere suggestion* — *certainly not one unsupported by proof, as was the case here* — *that the alleged fugitive will not be fairly and justly dealt with* in the State to which it is sought to remove him nor be adequately protected, while in the custody of such State, against the action of lawless and bad men.⁷⁴

For many years the *Marbles* approach was generally followed by those courts which considered the issue.⁷⁵

1. *The Mattox Case*

The first significant case which permitted a broad-scope inquiry on extradition habeas corpus was *Commonwealth ex rel. Mattox v. Superintendent* (1943).⁷⁶ Mattox, an adolescent Negro, was sought by Georgia from Pennsylvania to stand trial on a charge of assault with intent to kill — the victim having been a white boy. The facts that Mattox' attorney brought to the attention of the court showed first that Mattox was probably being framed; thus the natural hesitancy of any court to release a probable criminal was largely neutralized. Next, the attorney sought to bring Mattox within the exception implicit in the holding in *Marbles v. Creecy* — that if a petitioner could *prove*,

Brief for the State of Georgia as Amicus Curiae, *Sweeney v. Woodall*, pp. 15-21, 344 U.S. 86 (1952).

73. 215 U.S. 63 (1909).

74. *Id.* at 69-70 (emphasis added).

75. See, e.g., United States *ex rel.* *Brown v. Cooke*, 209 Fed. 607 (3d Cir. 1913), appeal dismissed, 238 U.S. 613 (1915); *Ex parte Ople v. Weinbrenner*, 285 Mo. 365, 226 S.W. 256 (1920), cert. denied, 256 U.S. 695 (1921).

76. 152 Pa. Super. 167, 31 A.2d 576 (1943). Many of the details in the discussion of the *Mattox* case are taken from Mattox' lawyer's account of the case. Alexander, *The Thomas Mattox Extradition Case*, 2 NAT. B.J. 1 (1944).

Only one court, and that in ambiguous circumstances, seems to have released a petitioner on grounds he would not be properly treated if returned, prior to the *Mattox* case which initiated the development of a doctrine supporting a broader-scope inquiry on extradition habeas corpus. *People ex rel. Pahl v. Pollack*, 174 Misc. 981, 22 N.Y.S.2d 413 (Sup. Ct. 1940). Petitioner was a New Yorker, on parole in New York from a Pennsylvania conviction. The accusations of parole violation were admittedly false, and petitioner convinced the New York court that he would not be fairly treated by the Pennsylvania parole board. See Note, 8 U.CHI. L. REV. 342 (1941).

rather than merely allege, great danger of mob violence and lynching, he could be released. Convincing testimony was introduced in support of Mattox' contention that prejudice was so strong against him in Georgia that he could not possibly receive a fair trial and would be in grave danger of being lynched. Although Georgia officials also testified, and affidavits in support of extradition were presented, the persuasiveness of this evidence was seriously undermined by a tactical blunder. Georgia sought to have the judge disqualified, saying, in a letter to a Pennsylvania District Attorney which came to the attention of the court, "we have noticed that this judge has sponsored anti-lynch legislation and if he is sold on the subject we believe that he would be biased in this case against the state of Georgia, and should be disqualified to sit on the same."⁷⁷ The Pennsylvania courts took this to be an indication of such a complacent attitude toward lynching as substantially to buttress Mattox' case. On the basis of this and other material, the trial and appellate court were convinced of the validity of Mattox' factual allegations.

The real problem, however, was to justify the inquiry at all. The trial court, noting that there was no precedent in support of a broad-scope inquiry and that dicta in some earlier cases seemed to oppose it, undertook to distinguish those cases on the ground that although proper conduct by the demanding state is strongly to be presumed, the presumption is not an irrebutable one. The superior court agreed, reasoning from the United States Supreme Court's independent evaluation of the facts of state cases in which constitutional rights are at stake.⁷⁸ Further, a Pennsylvania statute provided that a court on habeas corpus should inquire into "the facts of the case." The superior court took this as a grant of power to consider, not guilt or innocence, but all legitimate reasons against delivering an extraditee to the demanding state.⁷⁹ The court held that dangers that a petitioner would not receive a fair trial, or would be subjected to mob violence or lynching, were adequate reasons to justify a refusal to deliver.⁸⁰

The superior court affirmed the trial court's order of release, thus initiating the doctrine that danger of irreparable injury upon return to a demanding state is ground for relief on extradition habeas corpus. Neither the trial court nor the superior court dealt with the serious questions of federalism raised by their decisions. An excellent Note in the *Yale Law Journal* attempted to supply some of the missing analysis. It found support for the decision in cases involving federal injunction of state criminal prosecutions; in those cases, as in *Mattox*, there is an inescapable conflict between the right of an individual to constitutional treatment, and the right of a state to try persons for crime without disruptive intervention from another judicial system:

The federal courts have reconciled this conflict by saying that a state criminal trial will be enjoined only when the individual's constitutional

77. Alexander, *supra* note 76, at 7.

78. *Id.* at 9-12; 152 Pa. Super. at 173-74, 31 A.2d at 578-79.

79. 152 Pa. Super. at 172, 31 A.2d at 578.

80. *Id.* at 172-73, 31 A.2d at 578.

rights are in great and immediate danger of being irreparably impaired. In the *Mattox* case the relator clearly showed that he was in great and immediate danger of being irreparably lynched, and the Pennsylvania court would seem, therefore to have come within the rule of the federal injunction cases, assuming that *Mattox* had a constitutional right not to be lynched capable of being infringed.⁸¹

81. Note, *Scope of a Habeas Corpus Hearing on Interstate Rendition of Criminals*, 53 YALE L.J. 359, 362-63 (1944). Some of the federal injunction cases are collected. *Id.* at 363 n.31. The author does fail to note the crucial difference that in the injunction cases it is a federal court which interferes with a state's judicial process. See notes 182-97 *infra* and accompanying text, where the power of state courts is distinguished from that of federal courts in extradition proceedings. The tension in the injunction cases is, as the Note-writer suggests, between the theory that state courts should have the first opportunity to construe state statutes and appraise their constitutionality, on the one hand, and the feeling that this abstract proposition of deference to the states should not promote irreparable deprivations of constitutional rights, on the other hand. See generally Warren, *Federal and State Court Interference*, 43 HARV. L. REV. 345 (1930), and Taylor & Willis, *The Power of Federal Courts to Enjoin Proceedings in State Courts*, 42 YALE L.J. 1169 (1933), for general discussions of federal injunctions of state court proceedings. With certain limited exceptions, an injunction will lie only prior to the commencement of state proceedings. This result was reached in *Ex parte Young*, 209 U.S. 123 (1908), by statutory construction, but might equally well have been derived directly from comity: once actual proceedings have begun, no greater harm will come from testing the constitutionality of the state law in the state courts than from doing so in the federal courts. Analogously, in extradition habeas corpus, the interference with the demanding state's criminal justice is only warranted *before* the petitioner has been able to secure a hearing in that state's courts — *i.e.*, before he has been extradited.

Some of the more important injunction cases (involving criminal proceedings) are: *AFL v. Watson*, 327 U.S. 582 (1946); *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943); *Watson v. Buck*, 313 U.S. 387 (1941); *Hague v. CIO*, 307 U.S. 496 (1935); *Spielman Motor Sales Co. v. Dodge*, 295 U.S. 89, 95-96 (1935); *Matthews v. Rodgers*, 284 U.S. 521 (1932); *Tyson & Brother v. Banton*, 273 U.S. 418 (1927); *Packard v. Banton*, 264 U.S. 140 (1924); *Terrace v. Thompson*, 263 U.S. 197 (1923). *Mattox* would meet any of the tests set forth in these cases, except perhaps *Tyson & Brother* and *Packard*, which appear to limit the irreparable injury doctrine to property cases. The similarity of the injunction tests to the exceptions to the exhaustion rule of 28 U.S.C. § 2254 (1958) is striking.

The civil provisions of the original civil rights act, 42 U.S.C. § 1983 (1958), providing for equitable relief from deprivations of federal rights under color of state law, have engendered some cases strikingly similar to the injunction cases cited above. See *Douglas v. City of Jeannette*, 319 U.S. 157 (1943) (injunction against deprivation of free speech already held unconstitutional denied); *Stefanelli v. Minard*, 342 U.S. 117 (1951) (injunction against use of evidence secured by illegal search and seizure denied); *Snowden v. Hughes*, 321 U.S. 1, 11-12, 16-17 (Frankfurter, J., concurring, citing *Royall*), 17 (Douglas, J., dissenting) (1944) (isolated illegal behavior of state official not denial of equal protection; therefore 14th amendment is not violated until such behavior becomes "state action" by being approved by a state court; injunction denied); *Cooper v. Hutchinson*, 184 F.2d 119 (3d Cir. 1950), noted in 60 YALE L.J. 720 (1951) (injunction refused "at least until it has become apparent that state procedure cannot avert irreparable harm to these appellants." *Id.* at 124). See also Note, *Exhaustion of State Remedies as Prerequisite to Invoking Jurisdiction of Federal Court Under Civil Rights Acts*, 14 WASH. &

The author argued that *Mattox* did have a constitutional right not to be lynched — or, at least, a right to be protected against lynching.⁸² The author maintained, however, that the mere probability of an unfair trial would not be an irreparable injury, since any errors of constitutional dimension could be appealed, and a petitioner who could show only such a danger should be left to his remedies in the demanding state.⁸³ The Note argued that the Supreme Court cases expanding habeas corpus to include a broader and deeper inquiry into the substance — as opposed to the form — of detention “suggest a characterization of habeas corpus jurisdiction which would seem to support the *Mattox* decision.”⁸⁴

2. *Johnson v. Dye*⁸⁵

The *Mattox* decision lay virtually dormant for five years⁸⁶ until the Third Circuit infused the doctrine with new life in the landmark decision of *Johnson v. Dye*. The petitioner, Johnson, had been convicted in Georgia for murder, sentenced to life imprisonment, and confined on a chain gang. Within a few months he escaped, along with 175 others, and went to Pennsylvania where he was arrested and held pending extradition on an executive warrant issued by the Governor.⁸⁷ Johnson brought habeas corpus in a Pennsylvania court, where he alleged that his conviction was void and that he had been cruelly treated while on the chain gang. The trial court heard Johnson's evidence, which was uncorroborated, and dismissed the petition for failure to meet the requisite burden of proof. On appeal, the superior court affirmed.⁸⁸ Although

LEE L. REV. 266 (1957); 1 EMERSON & HABER, POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES 88 (2d ed. 1958).

82. Note, *Scope of a Habeas Corpus Hearing on Interstate Rendition of Criminals*, *supra* note 81, at 363-64.

83. *Id.* at 364.

84. *Id.* at 362. Another author thought the *Mattox* decision's reading of *Marbles v. Creecy* as establishing a *rebuttable* presumption was correct, but argued that only rarely — as in *Mattox*, where Georgia inadvertently corroborated the petitioner's case by seeking to disqualify the trial judge — will a petitioner be able to overcome the presumption by providing anything more than a basis for speculation. Note, 17 TEMPLE L.Q. 469 (1943). Cf. *In re Dukes*, 26 N.J. Super. 173, 97 A.2d 507, *petition for certification denied*, 13 N.J. 293, 99 A.2d 452 (1953), *cert. denied*, 347 U.S. 914 (1954), discussed in note 178 *infra*.

85. 175 F.2d 250 (3d Cir.), *rev'd per curiam*, 338 U.S. 864, *rehearing denied*, 338 U.S. 896 (1949).

86. The only significant cases were Commonwealth *ex rel. Johnson v. Thomas*, 50 Pa. D.&C. 626 (C.P. 1944) (same result as *Mattox* on nearly identical facts); and People *ex rel. Reid v. Warden*, 63 N.Y.S.2d 620 (Sup. Ct. 1946) (even were *Mattox* rule proper, petitioner failed to meet his burden of proof). Reid was the first petitioner whose extradition was sought not to put him to his trial, but to return him to confinement under a sentence. The case also involved the first allegations of cruel and unusual punishment made to a court as grounds for relief from extradition.

87. The facts of his case are found in Commonwealth *ex rel. Johnson v. Dye*, 71 F. Supp. 262 (W.D.Pa. 1947); and *Johnson v. Dye*, 175 F.2d 250 (3d Cir. 1949).

88. Commonwealth *ex rel. Johnson v. Dye*, 159 Pa. Super. 542, 49 A.2d 195 (1946).

Johnson does not seem to have alleged danger of future ill-treatment,⁸⁹ which had been the gravamen of Mattox' complaint, the implication of the superior court's opinion is that had he made out his claims of *past* deprivation—denial of due process at trial and cruel and unusual punishment on the chain gang — he could have been released. The case is the first to suggest that past deprivations of this kind could be grounds for release on extradition habeas corpus.⁹⁰ Johnson did not seek review of the adverse decision.

Johnson's next move was to bring habeas corpus in a federal district court. This time his case was better presented; the American Civil Liberties Union, considering the proceedings a test case, gave his attorney assistance.⁹¹ Johnson made the same allegations respecting past deprivations, and added a new allegation: if returned, he would be subjected to further cruel and unusual punishment and to the danger of mob violence and risk of death. Johnson presented a wealth of evidence,⁹² but no testimony was offered on behalf of Georgia. The district court found that there was evidence Johnson had been subjected to cruel and unusual punishment but held that this did not establish custody in violation of the Constitution since the eighth amendment is inapplicable to the states. It also held that there was no evidence in support of Johnson's allegations concerning his trial, and that his allegations of prospective cruel treatment and of danger of mob violence and death were not sustained by credible evidence. The writ was discharged without prejudice to Johnson's right to pursue other remedies in the Pennsylvania courts or to apply for habeas corpus upon his return to Georgia.⁹³

Johnson appealed to the Third Circuit, which heard the case *en banc*. That court unanimously reversed the lower court's holding that the principle of the eighth amendment is inapplicable to the states.⁹⁴ The court maintained that

89. *But see* Petition for Writ of Certiorari, pp. 2-3, *Dye v. Johnson*, 338 U.S. 864 (1949), where it is asserted that Johnson's petition for state habeas corpus also alleged danger to his life if he were returned.

90. Only one previous case seems to have turned on past deprivations (although in *Reid*, *supra* note 86, such allegations were made). See *Hale v. Crawford*, 65 F.2d 739 (1st Cir. 1933), reversing an order of release which had been granted because the indictment on which the demand was made had been returned by a grand jury from which Negroes were concededly excluded. For discussion of the case see Comment, *Race Discrimination and Interstate Rendition — The Crawford Case*, 43 *YALE L.J.* 444 (1934).

91. See Petition for Rehearing, pp. 4-5, *Dye v. Johnson*, 338 U.S. 864 (1949).

92. See *Johnson v. Dye*, 175 F.2d 250 (3d Cir. 1949).

93. *Johnson v. Dye*, 71 F. Supp. 262 (W.D. Pa. 1947). The dismissal "without prejudice" was unnecessary, of course, since *res judicata* does not apply to habeas corpus proceedings. See note 11 *supra* and accompanying text.

94. The validity of this holding will be assumed throughout this Comment. *Robinson v. California*, 370 U.S. 660 (1962), makes it clear that the court's position was correct. For an ingenious argument that protection against cruel and unusual punishment of the unauthorized sort involved in *Johnson v. Dye* is an "anomalous type of due process" since it is neither procedural nor substantive, see Note, *The Case of the Fugitive from the Chain Gang*, 2 *STAN. L. REV.* 174, 175-76 (1949). Georgia conceded that the fourteenth amendment precludes the states from inflicting cruel and unusual punishment. See Brief of State of Georgia as Amicus Curiae, p. 10, *Dye v. Johnson*, 338 U.S. 864 (1949).

the court below had found that Johnson had been subjected to cruel and unusual punishment, but held that in any case an appeal from a denial of habeas corpus is technically *de novo* and that

no other conclusion would be possible in view of the known facts concerning the workings of the Georgia penal system at the time of the petitioner's sentence and in consideration of the circumstance that the State of Georgia offered no testimony whatsoever in contradiction to that given by Johnson and his witness.⁹⁵

Without passing on Johnson's allegations as to the *future* treatment he would suffer if returned, the court held that

the obligation of a State to treat its convicts with decency and humanity is an absolute one and a federal court will not overlook a breach of that duty . . . [Because Georgia] has failed signally in its duty as one of the sovereign States of the United States to treat a convict with decency and humanity . . . [Johnson must be released].⁹⁶

Thus the court affirmed two propositions: that *past* cruel and unusual punishment is ground for release on habeas corpus,⁹⁷ and that release can appropriately be ordered by a court of the asylum state even in the absence of a finding that petitioner could not secure adequate relief in the courts of the demanding state.

Judge O'Connell, concurring in part and dissenting in part, disagreed with the first proposition. He thought that *past* cruel treatment should not be ground for release. He argued, however, that despite the drawbacks of loosing

95. 175 F.2d at 255-56. Of the cruelties it held Johnson had shown, the court would only say:

We shall not set out in this opinion the revolting barbarities which Johnson and his witnesses state were habitually perpetrated as standard chain gang practice. To perpetrate these atrocities in an opinion is to be unfair to the American scene as a whole and to reflect little credit on this generation for posterity. It is enough to state that leg-irons and most frequent beatings were among the "minor" constant cruelties.

Id. at 256 n.12.

96. *Id.* at 256.

97. Perhaps because of the posture of the case, the court did not consider relief less than release — *e.g.*, remand to the prison authorities on the condition that petitioner be properly treated — which might have been appropriate if the case had not arisen in an extradition context. *But cf.* notes 226-33 *infra* and accompanying text for the possibilities of such relief even in the extradition context. See, for the pros and cons of relief less than release for cruel and unusual punishment not authorized by statute or sentence, Note, *The Case of the Fugitive from the Chain Gang*, 2 STAN. L. REV. 174, 176-78 (1949) (relief less than release appropriate); Horowitz & Steinberg, *The Fourteenth Amendment — Its Newly Recognized Impact on the "Scope" of Habeas Corpus in Extradition*, 23 So. CAL. L. REV. 441, 453 (1950) (when cruelty infects the penal system of a state it must be considered implicit in a sentence of imprisonment in that state, hence full release is appropriate). This issue of the relief appropriate for cruel and unusual punishment will not be considered in this Comment. See notes 17-23 *supra* and accompanying text for discussion of the development of the availability of relief other than release on habeas corpus.

a convicted murderer on the citizenry of an asylum state, it would be better to let Johnson go free than to leave him unprotected against *future* cruel and unusual punishment; he thought it was clear that the federal courts have the power on habeas corpus to protect petitioners in that way. If Georgia would now treat Johnson properly, he should be returned. Judge O'Connell would have remanded for findings by the district court on the likelihood of future treatment of the sort Johnson had already endured. It is not entirely clear whether he would also have disagreed with the second proposition; the logic of his argument suggests, however, that even had he accepted the court's holding that past systematic cruel and unusual punishment is grounds for relief, he would nonetheless have maintained that unless the unavailability of Georgia relief could be shown, Johnson should be left to his Georgia remedies. That is, he seems to have accepted the position that what justifies a broad-scope inquiry on extradition habeas corpus is the prospect of an irreparable deprivation of constitutional right.⁹⁸

There was a final issue in the case — one which the district court had not even mentioned — on which the court of appeals was unanimous: that exhaustion of the remedies in the asylum state's courts is not a prerequisite to federal *extradition* habeas corpus, even when a petitioner has initially sought state habeas corpus. There was precedent for this holding, though the recent decisions were in conflict.⁹⁹

Pennsylvania sought certiorari to the decision, alleging that the Third Circuit had erred in holding the exhaustion doctrine inapplicable to extradition habeas corpus. Pennsylvania argued that Johnson should have been required to pursue his Pennsylvania remedies to a final conclusion before seeking fed-

98. Most of the law review commentary on *Johnson v. Dye* that accepted the permissibility of the broad scope inquiry, considered Judge O'Connell's limitation of relief to prospective injuries the better view. See 23 TEMPLE L.Q. 234 (1950); Note, 23 SO. CAL. L. REV. 86 (1949); Horowitz & Steinberg, *supra* note 97 at 455-56; Note, *The Case of the Fugitive From the Chain Gang*, 2 STAN. L. REV. 174, 182-83 (1949); Comment, *The Limits of Constitutional Inquiry on Habeas Corpus in Interstate Rendition*, 21 U.CHI. L. REV. 735, 751-52 (1954). Cf. Note, *Habeas Corpus in Interstate Rendition*, 47 COLUM. L. REV. 470, 475-76 (1947); Note, *Scope of a Habeas Corpus Hearing on Interstate Extradition of Criminals*, 53 YALE L.J. 359 (1944). *But cf.* Sutherland, *Due Process and Cruel Punishment*, 64 HARV. L. REV. 271 (1950) and Note, *Habeas Corpus in Extradition Proceedings*, 1 DUKE L.J. 188 (1951) for positions closer to that of the majority in *Johnson v. Dye*.

For commentary disapproving the Third Circuit's action altogether, see deGraffenried, *The Law of Extradition*, 2 ALA. L. REV. 207 (1949); Comment, *Interstate Rendition*, 1 J. PUB. L. 463 (1952).

99. Not until 1942 had any circuit applied the exhaustion doctrine to extradition cases. Both the Third and Seventh Circuits had allowed petitioners to change court systems in mid-stream. The Third Circuit had inconsistent holdings as precedent. See note 49 *supra* and accompanying text. *Morgan v. Horrall*, 175 F.2d 404, 407 (9th Cir.), *cert. denied*, 338 U.S. 827 (1949), went the other way from *Johnson v. Dye* on the mid-stream changing of systems issue.

eral relief.¹⁰⁰ Georgia filed an amicus brief which made it absolutely plain that Georgia took a quite different view of the issue in the case:

The legal position of the State of Georgia differs from that of the petitioner upon the question of application of the doctrine of exhaustion of state remedies in habeas corpus cases arising from extradition proceedings.¹⁰¹

Georgia disagreed with Pennsylvania's position that only the asylum state's remedies need be exhausted and argued that the exhaustion of state remedies rule as applied to extradition habeas corpus requires exhaustion of the demanding state's remedies. Thus, a federal court in the asylum state should be precluded from entertaining a broad-scope inquiry. The essence of the federalism rationale for the exhaustion doctrine — the concept that a state court should have the first opportunity to adjudicate a claim arising out of its criminal process — necessitates that Georgia's remedies be exhausted before *any* federal court, in asylum or demanding state, adjudicates claims such as Johnson presented. Only if the exceptions to the rule — lack of Georgia remedies, or circumstances rendering them ineffective — were present would federal intervention have been justified, but the Third Circuit had expressly declined to make such findings.¹⁰²

On the exhaustion issue alone, then, the Supreme Court was presented with five possible decisions, assuming it granted certiorari: (1) it could affirm, agreeing that the exhaustion doctrine is inapplicable to extradition habeas corpus; (2) it could reverse on the ground that although the exhaustion rule does not apply in full force to extradition habeas corpus, a petitioner is precluded from starting in a state court and changing in mid-stream to the federal courts; (3) it could reverse on the ground that the exhaustion rule is applicable and requires the exhaustion of the *asylum state's* remedies (Pennsylvania's position); (4) it could reverse on the ground that the exhaustion rule is applicable and requires the exhaustion of the *demanding state's* remedies (Georgia's position); (5) it could reverse on the ground that the ex-

100. Petition for Writ of Certiorari, *Dye v. Johnson*, 338 U.S. 864 (1949).

101. Brief of State of Georgia as Amicus Curiae, p. 4, *Dye v. Johnson*, 338 U.S. 864 (1949).

102. Brief of State of Georgia, *supra* note 101, at 8-10, 15. Georgia raised other lesser objections: that the Third Circuit denied Georgia's motion to intervene and Pennsylvania's motion to file a petition for rehearing out of time, despite Georgia's claim that it had failed to receive the invitation to appear in the federal court proceedings (*id.* at 6, 13); that the evidence did not support the Third Circuit's findings of fact (*id.* at 10-14); that the Third Circuit in effect presumed *against* Georgia simply because it failed to appear, and that it is most unreasonable to force Georgia to appear all over the country to avoid such presumptions (*id.* at 13, 15). Georgia was most offended by the decision:

The opinion of the Court of Appeals, in effect, holds that the remedy available at the hands of the judicial system of Georgia is worthless. Thus the Court of Appeals not only holds that the penal system of Georgia permits the perpetration of crimes upon its prisoners; it holds, in effect, that the judiciary of Georgia provide no relief for such crimes.

Id. at 15.

haustion rule is applicable and requires the exhaustion of *both* the asylum and demanding states' remedies.¹⁰³

Since Johnson's attorneys conceived of the proceedings as a test case and therefore desired a Supreme Court determination of the issues, they decided not to file a brief in opposition to the petition for certiorari.¹⁰⁴

The Court granted certiorari,¹⁰⁵ and reversed the decision below:

Per Curiam: The petition for writ of certiorari is granted and the judgment is reversed. *Ex parte Hawk*, 321 U.S. 114. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this case.¹⁰⁶

The case so cryptically cited by the Court, *Ex parte Hawk*, had culminated the development of the exhaustion rule from a discretionary into a mandatory one;¹⁰⁷ it had nothing to do with extradition habeas corpus. The Court's decision was a masterpiece of ambiguity; but 32 words in length, it was sus-

103. These alternatives are stated pristinely to emphasize the absurdity of the Court's decision. The Court could also have found the exhaustion rule inapplicable, but designed a rule of comity requiring the same result as any of options (2)-(5), with or without exceptions; or it could have accepted (1) basically, but reversed for failure to use a remedy other than release (see notes 226-33 *infra* and accompanying text); or it could have basically accepted (1) but reversed for failure to apply the proper test (*e.g.* the prospective injury test of Judge O'Connell). The outcomes available to the Court were almost infinitely varied.

104. Petition for Rehearing, pp. 2, 4-5, *Dye v. Johnson*, 338 U.S. 896 (1949).

105. In considering whether the case was an appropriate one for the Court to grant certiorari — whether the legal problems involved were ripe for Supreme Court adjudication — two district court decisions rendered in the interim between the Third Circuit's action, and the Court's reversal, should be mentioned. They indicate that the only trial judge who had had an opportunity to apply the Third Circuit doctrine was construing it quite narrowly — that no radical disruption of the extradition process would have resulted from a postponement of Supreme Court action. In *Ex parte Marshall*, 85 F.Supp. 771 (D.N.J. 1949), the petitioner relied upon the Third Circuit rule in seeking relief on the basis of past cruel and unusual punishment; the district judge denied relief, distinguishing *Johnson v. Dye* on the ground that there was no reason to suppose that the prison where Marshall was being incarcerated was not taking steps to comply with its constitutional obligations. The same judge, in *Harper v. Wall*, 85 F.Supp. 783 (D.N.J. 1949), released the petitioner, distinguishing *Ex parte Marshall* on the ground that in that case there was reason to believe that the conditions complained of had been corrected, whereas here the petitioner's allegations of danger of future ill-treatment carried conviction. The district judge seems to have been limiting the Third Circuit's doctrine to *future* deprivations; he seems to have come close to treating Judge O'Connell's position as the rule of *Johnson v. Dye*.

Perversely enough, the Third Circuit itself later indicated in dictum that its decision in *Johnson v. Dye* rested upon proof of past deprivations, and that allegations of future irreparable injury are insufficient to warrant relief. *United States ex rel. Mills v. Reing*, 191 F.2d 297, 299 (3d Cir. 1951). Petitioner was held as a fugitive felon under 18 U.S.C. § 1073 (1958), and brought habeas corpus to avoid removal for trial to the Northern District of Alabama, whence he had fled while under indictment for a state offense. The court distinguished *Johnson v. Dye* primarily on the ground that the petitioner was being removed into federal custody.

106. *Dye v. Johnson*, 338 U.S. 864, rehearing denied, 338 U.S. 896 (1949).

107. See note 34 *supra* and accompanying text.

ceptible of either of four interpretations — options (2), (3), (4), or (5) discussed above. Since the major alternatives had been squarely presented to the Court, the ambiguity of its opinion should have been patent. The opinion was one which Mr. Justice Frankfurter might have characterized as an example of Supreme Court adjudication at its worst: an important case decided basically *ex parte*, with little and totally inadequate briefing,¹⁰⁸ no oral argument, and no apparent effort by the Court to think about what it was doing.¹⁰⁹ Neither the briefs nor the Court considered the problem in the context of habeas corpus doctrine generally, nor of extradition habeas corpus doctrine in particular. In this way a unanimous Third Circuit, sitting *en banc*, was reversed.¹¹⁰

The fact that the Court felt that the exhaustion doctrine of *Ex parte Hawk* called for reversal — that the case was not decided on the theory that the scope of extradition habeas corpus is absolutely limited to the traditional narrow inquiry — might be significant. It could indicate that the exceptions to the exhaustion rule are applicable, that if Johnson had proved the non-availability or ineffectiveness of his remedies in Pennsylvania or in Georgia the Third Circuit's decision would have been upheld. And if it indicated that, it might also mean that the Supreme Court had accepted the basic premise of the broad-scope inquiry in extradition habeas corpus: that the realities behind the forms of extradition may be considered. The Court could be taken, in short, to have endorsed the *Mattox* rule. The difficulty of attributing this much significance to the Court's action is that one can feel quite confident the Court was not aware of the implication that might be drawn from its citation of *Ex parte Hawk*. The briefs before the Court had dealt with the case as though exhaustion alone were involved. On the other hand, the Court's opinion, based solely on the exhaustion doctrine, cannot be taken to foreclose the broad-scope inquiry of the *Mattox* case.

Another important problem is that of deciding which remedies the Court felt Johnson had failed to exhaust. It would appear that the Court did not

108. Georgia's brief was acceptable as far as it went. Pennsylvania's should be a source of shame to the Commonwealth: its argument was unintelligent, based upon misstatements of fact [*e.g.*, it alleged that the Third Circuit held the exhaustion rule inapplicable whenever constitutional guarantees are involved — a patent absurdity in any case, since habeas corpus itself only lies in such a situation — see *Petition for Writ of Certiorari*, p. 8, *Dye v. Johnson*, 338 U.S. 864 (1949)] and miscitations of cases that were, to be charitable, uncraftsmanlike. An opposing brief did not exist, of course.

109. For Mr. Justice Frankfurter's views on Supreme Court adjudication at its best — basically the opposite of all that happened in *Dye v. Johnson* — see *Adamson v. California*, 332 U.S. 46, 59-60 (1947) (concurring opinion). For law review commentary on the decision, uniformly critical, see Frank, *The United States Supreme Court: 1949-50*, 18 U.CHI. L. REV. 1, 39-40 (1950); Note, *Prisoners' Remedies for Mistreatment*, 59 YALE L.J. 800, 803 (1950); Note, *The Case of the Fugitive from the Chain Gang*, 2 STAN. L. REV. 174, 183 (1949); President's Page, 2 STAN. L. REV. 255 (1950).

110. The Court did not do the First, Fifth, and Ninth Circuits the courtesy of citing their decisions which had held the exhaustion rule applicable in forms (2) and (3); nor were the decisions of the Third and Seventh Circuits holding the exhaustion rule inapplicable cited. See note 49 *supra*.

adopt option (4), the position of Georgia, since it did not remand for findings as to the availability or effectiveness of Georgia remedies.¹¹¹ *A fortiori*, option (5) must be rejected as a plausible construction of the Court's opinion.¹¹² Thus, it seems that either option (2) or option (3) is the best interpretation of the opinion. For Johnson himself, the difference between (2) and (3) was immaterial; since he had begun in the Pennsylvania courts, either would require him to exhaust his Pennsylvania remedies. Option (3) seems the less likely interpretation since many cases, unmentioned in the opinion, had allowed petitioners to seek extradition habeas corpus initially in the federal courts. The anti-mid-stream rule, option (2), thus appears to be the least implausible interpretation. As the least significant holding of the alternatives, it is most reconcilable with the Court's careless disposition of the case; as between it and option (3) far fewer precedents would be overruled without citation.¹¹³ There is, moreover, no reason for opposing an anti-mid-stream rule and considerations of comity between the federal and state courts of the asylum state would seem to support it.¹¹⁴

A third significant feature of the opinion is that *Ex parte Hawk*, rather than 28 U.S.C. section 2254, which had codified the exhaustion rule, was cited. Did the Court accept the view that section 2254 is inapplicable to extradition cases? There are at least three good reasons supporting such an interpretation. First, section 2254 itself begins, "An application for a writ of habeas corpus in behalf of a person in *custody pursuant to the judgment of a State Court* shall not be granted unless . . ." (emphasis added). An extraditee is, of course,

111. Judge O'Connell's concurrence specifically raised the ineffectiveness issue. Query whether Georgia would also have to have remedies adequate to afford Johnson relief for the *past* ill-treatment he has suffered. The questions are very similar in *Johnson v. Dye* since the problem was whether, from a chain gang, one can get into court at all. There is this much difference: Georgia remedies might be available — but not until *after* the chain gang officials would have had another chance to torture Johnson. Query whether such a remedy is "effective." Cf. notes 200-04 *infra* and accompanying text.

112. The Court may have meant (4) or (5), but that in the extradition context no opportunity to show the exceptions to the exhaustion rule are to be afforded. It is hard to believe that such a cryptic opinion could have been intended to carry such a powerful meaning.

113. See note 49 *supra*.

114. See note 115 *infra* for an additional justification for option (2) and cf. notes 219-21 *infra*. See Note, *Prisoners' Remedies for Mistreatment*, 59 YALE L.J. 800, 803 (1950), for a tentative suggestion to the same effect as the construction of the Supreme Court's decision proposed herein. One feature of the case which cuts against the theory that the Supreme Court adopted either (2) or (3) is the fact that, as the exhaustion doctrine stood in 1949, Johnson perhaps *had* adequately exhausted Pennsylvania's remedies. Appeal to the Pennsylvania Supreme Court did not lie as of right, and the scope of review was in any case very narrow. A federal court could well have concluded that such an appeal would have been nearly futile. Failure to seek certiorari, under the rule of *Wade v. Mayo*, 334 U.S. 672 (1948), was not an absolute requisite of exhaustion, *Darr v. Buford*, 339 U.S. 200 (1950), not having been decided. See *Petition for Rehearing*, pp. 26-29, *Dye v. Johnson*, 338 U.S. 864 (1949).

in custody pursuant to a warrant issued by the *executive authority* of the asylum state.¹¹⁵ Second, the inapplicability of section 2254 which appears on its face is not fortuitous: Congress seems to have intended that custody pursuant to executive warrants not be covered.¹¹⁶ Third, the federal courts are explicitly given habeas corpus jurisdiction of prisoners "in custody under or by color of the authority of the United States."¹¹⁷ Since, as we have seen, it is the extradition clause and the implementing federal statute which constitute the authority of the executive of an asylum state to issue a warrant for the arrest of a fugitive, an extraditee is clearly in custody "under or by color of the authority of" the federal government.¹¹⁸ The exhaustion rule, and its culmination in section 2254, was designed to cope with the problems arising from the extension of federal habeas corpus jurisdiction to state prisoners,¹¹⁹ not to cut into the basic habeas corpus jurisdiction of the federal courts over prisoners incarcerated by authority of federal law.¹²⁰ If, then, section 2254 is inapplicable to extradition proceedings, the federal courts are free to fashion a rule of abstention, based upon the same principles as the exhaustion rule, which will meet the peculiar circumstances of extradition habeas corpus.¹²¹ To characterize the rule of abstention which should apply in extradition cases simply as "exhaustion" is misleading since it tends to obscure the important differences between ordinary habeas corpus and extradition habeas corpus. The Court's failure to appreciate the distinctive nature of extradition habeas corpus is at least partly responsible for the ambiguity of its opinion in *Johnson v. Dye*. The problem should be approached directly in terms of what the proper scope of inquiry should be, what should constitute adequate grounds for relief, and what relief should be on extradition habeas corpus.

115. One might justify option (2) in the *Johnson* case — the anti-midstream-change rule — on the ground that once a petitioner has been refused release on habeas corpus by a state court he *is* in custody pursuant to the judgment of a state court within § 2254: *i.e.*, the judgment that he is not entitled to release.

116. The House draft of § 2254 included executive warrants, but they were dropped at Conference. See Note, *Prisoners' Remedies for Mistreatment*, 59 *YALE L.J.* 800, 802 n.11 (1950).

117. 28 U.S.C. § 2241 (c) (1) (1958).

118. See notes 45-47 *supra* and accompanying text.

119. See text accompanying notes 24-35 *supra*.

120. See note 47 *supra*.

121. Even were § 2254 deemed applicable to the extradition habeas corpus situation, and even were it interpreted to require exhaustion of the demanding state's remedies, when irreparable deprivations of constitutional rights are threatened in an extradition proceeding, the "ineffective" remedy exception to § 2254 is clearly relevant. And even without that exception, the courts have held that § 2254 codifies a rule of comity — a principle of the proper exercise of power — not a rule of jurisdiction. See *Fay v. Noia*, 372 U.S. 391, 419-20 (1963); *United States ex rel. Cuomo v. Fay*, 257 F.2d 438, 441 (2d Cir. 1958), *cert. denied*, 358 U.S. 935 (1959). As a principle of the proper exercise of power, it does not necessarily override competing principles — as, here, the principle that constitutional rights be afforded effective protection. *Cf.* Taylor & Willis, *The Power of Federal Courts to Enjoin Proceedings in State Courts*, 42 *YALE L.J.* 1169-72 (1933).

3. *The Aftermath of Johnson v. Dye in the Federal Courts*

Johnson v. Dye was immediately followed by a rash of similar cases,¹²² and within three years five other circuits were faced with the task of deciding what the Supreme Court's disposition of the case should be taken to mean and whether to follow the lead of the Third Circuit by allowing a broad scope of inquiry on extradition habeas corpus.

The Second Circuit faced this problem in *United States ex rel. Jackson v. Ruthazer* (1950).¹²³ Interpreting the Supreme Court's reversal in *Johnson v. Dye* to require exhaustion of remedies in the asylum state only, the court held that Jackson had adequately exhausted his New York remedies. It disposed of the case on the ground that Jackson had already received a full and fair hearing on the merits of his claim from the New York courts, which had decided that his allegations were not believable.¹²⁴ Thus the court did not reach the ultimate question whether, assuming Jackson's allegations had been proved, the Third Circuit's doctrine was correct.

Next the Court of Appeals for the District of Columbia was confronted with the problem. In *Johnson v. Matthews* (1950)¹²⁵ the petitioner had been ordered returned to Georgia for trial. He sought habeas corpus in the district court, alleging that he had been subjected to brutal treatment, endangering his life, while held pending trial in Georgia; that he would suffer more of the same if returned; and that he might never be brought to trial nor have an opportunity to seek relief from the state and federal courts in Georgia. The district court dismissed the writ, refusing to hear evidence on petitioner's allegations of past and future treatment in the demanding state. On appeal, the District of Columbia Circuit affirmed, Judge Bazelon dissenting. The court held that extradition habeas corpus tests only the validity of detention in the asylum state — not the validity of past or prospective detention in the demanding state — and hence is limited to the traditional narrow-scope inquiry. The court took the Supreme Court's citation of *Ex parte Hawk* in *Johnson v. Dye* to mean that the remedies of a *demanding* state must be exhausted as to claims arising out of custody *in that state*.¹²⁶ But without discussing the ex-

122. Johnson himself went back to the Pennsylvania courts, was denied relief by the Pennsylvania Supreme Court, and did not seek certiorari. He returned to the District Court which, interpreting the Supreme Court's reversal in *Johnson v. Dye* to require exhaustion of the asylum state's remedies, held that Johnson had failed to exhaust his Pennsylvania remedies because he had not sought certiorari. He sought and was denied certiorari, reopened his case in the district court, which heard evidence on the merits, but he died in 1950 before a decision was rendered. See *Johnson v. Dye*, 94 F. Supp. 113 (W.D. Penn. 1950); *Pennsylvania ex rel. Johnson v. Dye*, 341 U.S. 911 (1951) (certiorari denied, Douglas, J., dissenting); Brief for the State of Georgia as Amicus Curiae p. 3. n.3, *Sweeney v. Woodall*, 344 U.S. 86 (1952).

123. 181 F.2d 588 (2d Cir.), *cert. denied*, 339 U.S. 980 (1950).

124. *People ex rel. Jackson v. Ruthazer*, 90 N.Y.S.2d 205, 196 Misc. 34 (Sup. Ct.), *aff'd mem.*, 93 N.Y.S.2d 729, 276 App. Div. 832 (1949), *motion for leave to appeal denied*, 300 N.Y. 762, 90 N.E.2d 69 (1950).

125. 182 F.2d 677 (D.C. Cir.), *cert. denied*, 340 U.S. 828 (1950).

126. 182 F.2d at 683 n.22.

ceptions to the exhaustion rule — the absence or ineffectiveness of state remedies — the court held that petitioner could not even be allowed to show that he would be unable to get into court in Georgia.¹²⁷ The Court maintained that it is the Supreme Court which has authority over Georgia's state and federal courts, not the courts of another jurisdiction.¹²⁸ Since petitioner did not allege that the Georgia courts, state or federal, would be the cause of his inability to get relief if returned, the relevance of this point is unclear; the court could hardly have believed that the Supreme Court is so omnipotent it can protect the constitutional rights of petitioners even though they can never bring their plight to the Court's attention. The court assumed as fact precisely what petitioner sought to challenge, positing the availability and effectiveness of Georgia remedies in order to deny the need for relief in the District of Columbia. Extradition, the court said, is merely procedural; it does not affect substantive constitutional rights.¹²⁹

Judge Bazelon delivered a scathing dissent:

The obvious importance of the federal system, and the desire to facilitate its workings, should not obscure the fact that action in pursuance of one constitutional power may run afoul of another. Unless the Constitution is read as a whole, there is grave danger that the extradition process will be executed in unduly mechanistic fashion and in complete disregard of the fundamental considerations of humanity and decency which are reflected in the Bill of Rights. Certainly, the interest of the various governments of our federal system in the orderly workings of the extradition machinery is a factor of moment. And in such interest, it may ordinarily be desirable to limit the inquiry on habeas corpus to the three or four traditional questions posed in such cases. But where one constitutional purpose must be weighed against another — one promoting efficiency and comity between states, the other protecting fundamental rights of the individual against state infringement — our system of government will be better served by assessing greater weight to the latter. Serious doubt concerning the effectiveness of future guarantees of such fundamental rights ought not to be resolved by speculation or presumption that somehow, somewhere, but not here, some court will be able to prevent a repetition of past abuses.¹³⁰

Under the majority's view, he pointed out, even if petitioner were able to show he would never get into a Georgia court, he could not be given a hear-

127. In support of this position the court made a number of curiously irrelevant arguments. The court thought the following is a *reductio ad absurdum*: a fugitive has no greater right than an incarcerated person who does not escape; therefore petitioner must seek the same Georgia remedies that such a person would have to pursue; if petitioner's argument as to the practical impossibility of securing relief in Georgia were accepted, it would follow that these non-escapees also cannot get into court, therefore cannot bring habeas corpus, and are wholly without protection. *Id.* at 682. It is obscure why the court thought this argument a *reductio* and why it thought the conclusion an *absurdum*.

128. *Id.* at 681.

129. *Id.* at 682. The court also claimed that the rule of *Johnson v. Dye* would plunge law enforcement into "chaos" (*id.* at 684), encourage fabricated stories of brutality (*id.* at 683), and "nullify" the extradition clause (*id.* at 680).

130. *Id.* at 685.

ing on habeas corpus. Allowing petitioner to attempt to rebut the presumption that the Georgia courts would be available to him upon his return would not be disrespectful to the Georgia courts, but would merely be taking into account the fact that those courts might never have an opportunity to deal with the case. The proper disposition of the case would be that proposed by Judge O'Connell in *Johnson v. Dye*: allow a hearing on the merits of petitioner's allegations, insofar as they relate to the incapacity of the courts of Georgia to protect petitioner from prospective cruel treatment.¹³¹ Petitioner sought, and was denied, certiorari.¹³²

In *Davis v. O'Connell* (1950)¹³³ the Eighth Circuit considered a case presenting issues substantially the same as those in *Johnson v. Matthews*, and reacted in the same way. The court particularly emphasized that the validity of past or prospective detention in the demanding state is beyond the *jurisdiction* of a federal court in the asylum state.¹³⁴

In *Ross v. Middlebrooks* (1951)¹³⁵ petitioner sought to avoid extradition from California to Georgia, on the ground that his sentence to a chain gang was void because inherently a cruel and unusual punishment. He alleged he would be unable to present his claim in the courts of Georgia. After exhausting his California remedies, he sought habeas corpus in a federal district court, which ordered his release, agreeing with his contention that the assignment to a Georgia chain gang constituted a cruel and unusual punishment in violation

131. Part of petitioner's claim was that he would be held indefinitely pending trial. Assuming he were properly treated in other respects, query whether the logic of Judge Bazelon's opinion would not require release nonetheless by the asylum court, if petitioner could show he would not be able to secure a hearing on habeas corpus if returned.

132. *Johnson v. Matthews*, 340 U.S. 838 (1950). The American Civil Liberties Union represented petitioner. The question it saw presented was whether the courts below should have afforded petitioner a hearing on his claims of constitutional deprivations in Georgia. It was urged that the Circuit Court below had incorrectly interpreted the reversal of *Johnson v. Dye*, had construed the limits of extradition habeas corpus so narrowly that extradition would be required even when the result would be to defeat fundamental constitutional rights, and had failed to balance clashing constitutional provisions. Petition for Writ of Certiorari, *Johnson v. Matthews*, 340 U.S. 828 (1950). The respondent alleged that petitioner had admitted the availability of the Georgia courts, and that he would have access to them, before the District Court — and that this admission was the basis of the dismissal; that while *Johnson v. Dye* was inconsistent "in principle," it was distinguishable on its facts because there, unlike here, there were "exceptional circumstances" justifying a failure to exhaust the demanding state's remedies. Memorandum of Respondent, *Johnson v. Matthews*, 340 U.S. 828 (1950).

133. 185 F.2d 513 (8th Cir. 1950).

134. This statement was apparently by way of dictum. The district court had dismissed the petition for want of jurisdiction on grounds petitioner had failed to exhaust his asylum state remedies. Georgia — the demanding state — had intervened and urged dismissal on grounds the petitioner sought to attack Georgia proceedings collaterally, and had failed to exhaust his Georgia remedies. The Eighth Circuit affirmed on the ground petitioner had failed to exhaust the asylum state's remedies, but went on to argue that the inquiry urged by the petitioner was beyond the jurisdiction of a court in the asylum state.

135. Application of Middlebrooks, 88 F. Supp. 943 (S.D. Cal. 1950), *rev'd sub nom.* *Ross v. Middlebrooks*, 188 F.2d 308 (9th Cir. 1951).

of the fourteenth amendment.¹³⁶ As justification for imputing the impermissibility of the Georgia detention to the detention in California, the court adopted a "state action" rationale. Since California could not be *compelled* to extradite petitioner, its action in doing so was "state action"; and since petitioner would be returned to unconstitutional punishment with very little likelihood of relief in the Georgia courts, the participation of California in the proceedings would be impermissible "state action" in furtherance of a deprivation of petitioner's constitutional rights. Neither the extradition clause nor the implementing statute, the court said, can be used to negate another constitutional provision.¹³⁷ On appeal to the Ninth Circuit, petitioner's counsel conceded that petitioner would be able to get a hearing in the courts of Georgia; reversing on the basis of this concession the court held that the exhaustion rule requires that Georgia's courts be afforded the first opportunity to consider the serious questions presented by petitioner's allegations.¹³⁸

The next case, which arose in the Sixth Circuit, was *Woodall v. Sweeney* (1952),¹³⁹ which culminated in a critical Supreme Court decision. Up to this point three circuits had entertained allegations of misconduct by the demanding state. One (the Third, *Johnson v. Dye*) had held *past* cruel and unusual punishment grounds for relief. Two had been presented with claims of *prospective* ill-treatment and had not protested their lack of competence; one (the Second, *Ruthazer*) had declined to reach the merits, the other (the Ninth, *Middlebrooks*) had relied on a concession that the demanding state's courts would be available. Two circuits (the District of Columbia, *Johnson v. Matthews*, and the Eighth, *Davis v. O'Connell*) and a district court in a third (the First)¹⁴⁰ had distinctly held that a petitioner could not be heard on any claim as to misconduct by the demanding state.

IV. THE (NEARLY) FATAL BLOW: SWEENEY V. WOODALL¹⁴¹

1. *The Sweeney Case*

The *Sweeney* case involved two escapees from an Alabama chain gang, Quillian and Woodall, who sought to avoid extradition from Ohio. The alle-

136. 88 F. Supp. at 948, 951-52.

137. *Id.* at 953-54. The central arguments used by the District Court — that when cruelty infects a state's penal system it can be imputed to the sentences imposed, thus rendering them void; and that extradition to impermissible punishment is unconstitutional "state action" — were both derived from Horowitz & Steinberg, *The Fourteenth Amendment — Its Newly Recognized Impact on the "Scope" of Habeas Corpus in Extradition*, 23 So. CAL. L. REV. 441 (1950).

138. See also *Gerrish v. New Hampshire*, 97 F. Supp. 527 (D. Maine 1951) for consideration of the issues raised in *Johnson v. Dye* by a court in the First Circuit. Petitioner alleged that cruel and unusual punishment (use of drugs and confinement incommunicado in a mental hospital) was used by officials of the demanding state to prevent him from seeking relief in its courts. *Johnson v. Matthews* was followed.

139. 194 F.2d 542 (6th Cir.), *rev'd*, 344 U.S. 86, *rehearing denied*, 344 U.S. 916 (1952).

140. See note 138 *supra*.

141. 344 U.S. 86, *rehearing denied*, 344 U.S. 916 (1952), *reversing*, 194 F.2d 542 (6th Cir. 1952).

gations they made before the Ohio courts are unclear; the Ohio Court of Appeals characterized their claim as one that Alabama "is violating . . . [their] Constitutional rights." The court held that the petitioners could make such a claim only in the courts of the demanding state. The court reasoned that the traditional principle that on pre-trial extradition the courts of the asylum state will not consider the validity of the charge against the extraditee requires the analogous principle that on post-conviction extradition the courts of the asylum state will not consider the validity of the conviction and detention in the demanding state.¹⁴² The Supreme Court of Ohio dismissed petitioners' appeal, "for the reason that no debatable constitutional issue is involved."¹⁴³ The petitioners unsuccessfully sought certiorari to the Supreme Court.¹⁴⁴

Quillian and Woodall next sought relief in the federal courts. The district court, after hearing oral argument but refusing to hear proffered evidence concerning prison treatment in Alabama, dismissed the petition for habeas corpus on the basis of *Johnson v. Matthews*.¹⁴⁵ Woodall pursued his relief to the Sixth Circuit. That court, without opinion, ordered the dismissal by the district court set aside and the cause remanded for the taking of evidence on the merits.¹⁴⁶

Ohio immediately sought certiorari, pointing to the ambiguity of the Court's disposition of *Johnson v. Dye* and the conflict among the circuits on the proper interpretation of that case. The Court agreed to hear the case. In its brief, Ohio argued that issues arising out of custody in Alabama "do not come within the jurisdiction of a state or federal court of another state to which . . . [a] fugitive has fled."¹⁴⁷ The only issue in the case, Ohio urged, was one of jurisdiction, and the district court had properly decided it. Woodall could get relief in Alabama's courts; Alabama was not represented, nor did it have funds to provide for representation in suits such as this; the Ohio state and federal courts cannot presume, on the basis of petitioner's "wholly unwarranted statement," that he would be killed if returned to Alabama. Furthermore, Ohio does not relish the idea of being a penal colony for other states.¹⁴⁸

142. *In re* Quillian [sic], *In re* Woodall, 88 Ohio App. 202, 89 N.E.2d 493 (1949). The court also observed that the only relief an asylum state could give would be full release, "thus in effect commuting their sentences for serious crimes of which they have been found guilty." The court stated that one purpose of the extradition clause is to prevent an asylum state from becoming, willy-nilly, a refuge for the criminals of other states.

143. *Ex parte* Quillian v. Sweeney, *Ex parte* Woodall v. Sweeney, 152 Ohio St. 368, 89 N.E.2d 494 (1949), cert. denied, 339 U.S. 945 (1950). This was followed in *State ex rel. Toht v. McClure*, 87 Ohio App. 520, 96 N.E.2d 308 (1950).

144. *Quillian v. Sweeney, Woodall v. Sweeney*, 339 U.S. 945 (1950). Mr. Justice Douglas was of the opinion that certiorari should be granted.

145. See Petition for Writ of Certiorari and Brief for Petitioner, pp. 6-7, *Sweeney v. Woodall*, 344 U.S. 86 (1952).

146. *Woodall v. Sweeney*, 194 F.2d 542 (6th Cir.), reversed, 344 U.S. 86 (1952).

147. Petition for Writ of Certiorari and Brief for Petitioner, p. 19, *Sweeney v. Woodall*, 344 U.S. 86 (1952).

148. *Id.* at 16-18. Ohio also argued that the Supreme Court's denial of certiorari to the Ohio Supreme Court's decision should have precluded a lower federal court from

Georgia filed a brief as *amicus curiae*, stating that its interest in the case was due to the fact that it was the demanding state in so many other similar situations. Georgia urged the Court to clear up the ambiguity of its disposition of *Johnson v. Dye* by holding that the exhaustion rule of section 2254, as strictly construed in *Darr v. Burford*,¹⁴⁹ precludes a broad-scope inquiry on extradition habeas corpus.¹⁵⁰ The exhaustion rule, Georgia argued, when applied in an extradition case, is of far more significance than the mere principle of *forum non conveniens*, although the severe inconvenience and humiliations to which Georgia has been subjected by having to defend itself in distant forums against all manner of charges, covering many years in varying places, make *forum non conveniens* itself a strong reason in favor of the traditional narrow scope.¹⁵¹ Exhaustion is more basic, as "it grows out of the delicate nature of our dual sovereignty and as such 'It is a principle of right and of law and, therefore of necessity.'"¹⁵²

Woodall's brief in the Supreme Court was so appallingly bad¹⁵³ that the presentation to the Court must be deemed in effect *ex parte*. Though obscured by pages of irrelevancies and illegibilities, what did come across in Woodall's brief was the nature of the cruel treatment to which he allegedly had been and would be subjected. If believed, the proffered testimony of Woodall and of two other Alabama ex-prisoners whose depositions were liberally quoted in the brief established beyond all doubt that Woodall had suffered a variety of

injecting itself into the extradition process. *Id.* at 18. See *Darr v. Burford*, 339 U.S. 200 (1950); and *Brown v. Allen*, 344 U.S. 443 (1953), on this problem. The year after the Sweeney case, the Court held in *Brown* that the denial of certiorari to the final stage of state court proceedings is without significance as to the power of a lower federal court to entertain habeas corpus.

149. 339 U.S. 200 (1950).

150. Brief for the State of Georgia as *Amicus Curiae*, pp. 11-12, *Sweeney v. Woodall*, 344 U.S. 86 (1952).

151. *Id.* at 7, 13.

152. *Id.* at 13.

153. That it was typewritten is understandable, but the typing was so bad that significant parts of the brief were nearly illegible. Miscitations and typing errors were rampant. The brief was replete with trivial errors whose primary significance lies in their revelation of legal illiteracy. See, e.g., in the table of contents, "Ex. [sic] parte v. [sic] Hawk." Brief for Respondent, *Sweeney v. Woodall*, 344 U.S. 86 (1952). The writing was so poor, and organization so utterly lacking, that the arguments were usually almost indiscernible. The brief abounded in statements and requests calculated to raise judicial doubts about the petitioner's case: e.g., the Court was asked to take judicial notice of the fact that Alabama prisons treat prisoners cruelly (*id.* at 40) and was told that the sentence imposed by the Alabama courts on Woodall was "revolting, and can not even with difficulty be conceived in our Democracy and under the American Flag." (*Ibid.*) In short, Woodall's biggest handicap before the Court was the brief submitted by his attorney. Query whether, confronted by such a brief, the Court did not have an obligation to request an *amicus* brief in support of Woodall, or to order additional counsel to represent him. The American Civil Liberties Union, which had been involved in both *Johnson v. Dye* (see note 91 *supra* and accompanying text) and *Johnson v. Matthews* (see note 132 *supra*) would have been an obvious choice.

barbaric treatments, with ever-present risk of death; that if returned he would suffer more of the same; that however good the Alabama courts might be, Woodall would never be able to present his grievances before them.¹⁵⁴ As the "question presented" the brief asked whether a federal court in an asylum state should have heard petitioner's claims if petitioner alleged a lack of corrective process in Alabama or circumstances rendering such process ineffective — the traditional exceptions to the exhaustion rule.¹⁵⁵ The brief also asked this rhetorical question of the Court:

May we inquire of this Court as to what remedy is available to Respondent to protect him from being subjected to cruel, inhuman and barbaric treatment or the taking of his life by the jailers, guards and prison officials of the Alabama prison if Respondent is turned over to them. If Respondent is denied the relief he is seeking, he will be immediately released to the jailers, guards and prison officials of the Alabama Prison the very ones whom Respondent fled from, by reason of the cruel, inhuman and barbaric treatment he received at their hands, to inflict such punishment, as they in their judgment deem befitting to satisfy them and their thirst for blood, even if it is the taking of the life of the Respondent. The sad thing and the irony of it all, is that Respondent will be helpless and be at their complete mercy.¹⁵⁶

Read hastily and narrowly, Woodall's brief might with great difficulty be construed — as the Supreme Court in fact did construe it — to allege that the proof he intended to submit would go only to the non-availability of Alabama remedies.¹⁵⁷ But the proffered evidence clearly included the allegation that notwithstanding the theoretical availability of Alabama remedies, Woodall would in fact be unable to get into a court at all; Woodall's statement that he would gladly seek relief in the Alabama courts if he could remain in the custody of a United States Marshal while doing so¹⁵⁸ seems to refute any contention that he complained only of the non-availability of Alabama remedies.

Again as in *Johnson v. Dye* the Supreme Court disposed of the case per curiam, without hearing oral argument.¹⁵⁹ The Court accepted the claim of the Ohio and Georgia briefs that Woodall did not seek to show that he would be unable to obtain a hearing in Alabama. Assuming the availability of Alabama relief upon Woodall's return, the Court said:

Considerations fundamental to our federal system require that the prisoner test the claimed unconstitutionality of his treatment by Alabama in the courts of that State. Respondent should be required to initiate his suit

154. Brief for Respondent, *Sweeney v. Woodall*, pp. 3-5, 8, 10-18, 21-39, 344 U.S. 86 (1952).

155. *Id.* at 2.

156. *Id.* at 38-39.

157. See, in particular, *id.* at 8, where the allegation made is susceptible of construction as one claiming only that Alabama provides no remedy.

158. *Id.* at 39.

159. Letter from John F. Davis, Clerk, United States Supreme Court, to the YALE LAW JOURNAL, March 30, 1964.

in the courts of Alabama, where all parties may be heard, where all pertinent testimony will be readily available and where suitable relief, if any is necessary, may be fashioned.¹⁶⁰

The Court made passing reference to all the justifications for such a rule. Thus the argument was made that just because he is an escapee, Woodall should not have the privilege of making his claim in a court unavailable to his non-escapee fellow Alabamans, with the additional twist that Woodall's "self-help" should not affect the authority of the Alabama courts to determine the validity of imprisonment in Alabama.¹⁶¹ The *forum non conveniens* argument pressed by Georgia's brief was accepted.¹⁶² The limited scope of relief available to an asylum court, as compared with the freedom a court in the demanding state would have, was hinted at.¹⁶³ But as the quotation above shows, the Court bottomed its opinion in the needs of federalism. Significantly, the Court did not seek to justify its decision in exhaustion terms; at least the Court approached the problem of the proper scope of extradition habeas corpus directly.¹⁶⁴

Mr. Justice Frankfurter, concurring, emphasized that the Court's opinion rested on the absence of any "suggestion" in the petition for habeas corpus that Woodall would not have an opportunity to resort to the Alabama courts for protection.¹⁶⁵ With the case in that posture, he said,

We cannot assume unlawful action of the [Alabama] prison officials which would prevent the petitioner from invoking the aid of the local courts nor [*can we*] readily open the door to such a claim. . . . Our federal system presupposes confidence that a demanding state will not exploit the action of an asylum state by indulging in outlawed conduct to a returned fugitive from justice.¹⁶⁶

The italicized language is mysterious, since it seems both a tacit admission that the allegations said to be absent from Woodall's petition were in fact involved in the case, and a hint that even if clearly made such allegations might not necessarily afford a basis for a hearing.

Mr. Justice Douglas dissented, pointing out — as had Judge Bazelon in *Johnson v. Matthews* — that the Court's opinion simply assumed what Woodall sought to challenge in order to deny him an opportunity to present some other challenge which he admittedly was not entitled to make in an asylum court:

The Court allows him to be returned to Alabama on the theory that he can apply to the Alabama courts for relief from the torture inflicted on him. That answer would suffice in the ordinary case. For a prisoner caught in the mesh of Alabama law normally would need to rely on Alabama law to extricate him. But if the allegations of the petition are true, this Negro

160. *Sweeney v. Woodall*, 344 U.S. 86, 90 (1952).

161. *Id.* at 89.

162. *Id.* at 90.

163. *Ibid.*

164. See notes 115-21 *supra* and accompanying text.

165. 344 U.S. at 91 (1952).

166. *Ibid.* (emphasis added).

must suffer torture and mutilation and risk death itself to get relief in Alabama.¹⁶⁷

Justice Douglas, as had Judges Bazelon and O'Connell, thought that the limits of comity and of the automatic functioning of the extradition process are reached when prospective irreparable injury is involved:

I am confident that enlightened Alabama judges would make short shrift of sadistic prison guards. But I rebel at the thought that any human being . . . should be forced to run a gamut of blood and terror in order to get his constitutional rights. That is too great a price to pay for the legal principle that before a state prisoner can get federal relief he must exhaust his state remedies. The enlightened view is indeed the other way. See *Johnson v. Dye* . . . (which unhappily the Court reversed . . .) . . . [Judge Bazelon dissenting in *Johnson v. Matthews; Mattox*].¹⁶⁸

It is possible, then, that the conflict between the Court and Mr. Justice Douglas concerned only the proper construction of the petition for habeas corpus. If this is all that *Sweeney* stands for, it is of little import except to warn lawyers in the future to draft their petitions carefully so that prospective irreparable injury, and that alone, is the ground alleged for relief.¹⁶⁹ On this view of the case, however, it is hard to explain why the case was not remanded with instructions to limit the proceedings to future irreparable injury or to the impossibility of getting into court in Alabama. Another view of the case would see a greater gulf between Mr. Justice Douglas and the majority: Justice Douglas did not predicate his opinion on the impossibility of *ever* getting into court in Alabama, but on the irreparable suffering Woodall would have to endure at the hands of his jailors *before* he could get into court; the majority may have disagreed that such interim suffering is sufficient ground for relief in an asylum state. On this reading, only allegations such as those in *Mattox* would have satisfied the Court — the probability of the murder of the petitioner before he could get into court, or some other circumstance which would render it absolutely impossible for him ever to secure judicial consideration of his claims.¹⁷⁰

167. *Id.* at 92.

168. *Id.* at 92-93. Mr. Justice Douglas, unlike the majority, couched his opinion in "exhaustion" terms.

169. On this issue, Mr. Justice Douglas was plainly correct, particularly in view of the rule that habeas corpus petitions are very liberally construed to preserve their sufficiency. See note 16 *supra*. Habeas corpus is a civil action, and the Federal Rules of Civil Procedure apply to amendments of petitions. See 28 U.S.C. § 2242 (1958); FED. R. CIV. P. 81(a)(2). See FED. R. CRV. P. 15 for the liberal amendment rules applicable. To the extent that irreparable injury was not sufficiently clearly alleged, the petition could easily have been amended to conform to the evidence Woodall sought to introduce. Thus what should have been important was not the formal allegations of the petition, but the proof that Woodall intended to submit.

170. Presumably a petitioner who is able to secure the services of an attorney in an asylum state could have that attorney bring habeas corpus on his behalf in the demanding state — thus even the worst of state prison officials probably could not prevent a court hearing altogether, except by killing the extraditee. See note 200 *infra* and accompanying text.

Sweeney v. Woodall, although it did not descend to the adjudicatory depths of *Johnson v. Dye*, is another example of the kind of decision which results when the arguments presented to the Court fail to place a case in its historical and doctrinal setting, and when the Court itself fails to fill the void left by the parties. One thing can be stated with certainty: for all its ambiguity, *Sweeney v. Woodall* was clearly intended to exert a conservative influence upon the development of extradition habeas corpus law.¹⁷¹

2. Judicial Interpretation of *Sweeney v. Woodall* in Pennsylvania

This conservative import of the *Sweeney* decision soon manifested itself in a series of Pennsylvania decisions.¹⁷² The culmination of these cases came in *Commonwealth ex rel. Brown v. Baldi*,¹⁷³ a 1954 decision in which the Pennsylvania Supreme Court eliminated the last shreds of the *Mattox* broad-scope inquiry from Pennsylvania law. The petitioner alleged as grounds for relief that he had been, and if returned would be, subjected to cruel and unusual punishment in Georgia. The trial judge found that Brown had in fact suffered, and would suffer, cruel and unusual punishment in Georgia,¹⁷⁴ but refused to consider evidence that "as a practical matter, resort to the State or federal courts in Georgia for protection will not be available to relator,"¹⁷⁵ although

171. Query why certiorari was not denied, or the case dismissed as one in which it had been improvidently granted, and Supreme Court action postponed until the lower courts had had an opportunity to explore the ramifications of their decisions one way or the other.

172. In *Commonwealth ex rel. Henderson v. Baldi*, 372 Pa. 463, 93 A.2d 459 (1953), an escapee from Georgia sought release because, he said, he had been and would be subjected to cruel and unusual punishment in Georgia. The court below had excluded the evidence petitioner offered in support of his allegations. The Pennsylvania Supreme Court held that *Sweeney v. Woodall* was on all fours, and precluded the inquiry petitioner demanded. Only the validity of the extradition proceedings can be challenged on extradition habeas corpus, the court held. Thus *Mattox* was effectively emasculated. In *Commonwealth ex rel. Hatton v. Dye*, 373 Pa. 502, 96 A.2d 127 (1953), petitioner alleged, *inter alia*, that he had and would suffer cruel and unusual punishment in Mississippi — from whence he had escaped nine years before — and that his life would be in danger were he returned. The trial judge had found that petitioner's allegations were true, and ordered him released. The Pennsylvania Supreme Court held that *Henderson* and *Sweeney v. Woodall* limit the jurisdiction of Pennsylvania courts to the traditional narrow scope extradition habeas corpus inquiry. Even the strictest interpretation of *Sweeney v. Woodall* would not support this conclusion, since petitioner clearly alleged facts which would have precluded judicial consideration of his claims were he returned to Mississippi. In *Commonwealth ex rel. Huey v. Dye*, 373 Pa. 508, 96 A.2d 129 (1953), petitioner made allegations substantially identical to those in *Hatton* concerning the danger to his life were he to be returned to South Carolina. Citing *Hatton*, the allegations were rejected as beyond the power of the Pennsylvania courts to consider.

173. 378 Pa. 504, 106 A.2d 777 (1954), *cert. denied*, 348 U.S. 939, *rehearing denied*, 348 U.S. 977 (1955).

174. *Id.* at 507, 106 A.2d at 778.

175. Petition for Writ of Certiorari, p. 11, *Brown v. Baldi*, 348 U.S. 939 (1955).

the record was apparently filled with evidence to that effect.¹⁷⁶ Notwithstanding its findings of past and prospective cruel and unusual punishment, the court dismissed Brown's petition on the ground that it was precluded from granting the relief sought. On appeal to the Pennsylvania Supreme Court, Brown attempted to distinguish *Sweeney* on the ground that he had clearly alleged that Georgia's remedies would be unavailable to him. The court rejoined:

[T]he testimony thus presented and the apprehensions thus expressed cannot be accepted . . . as proof that if relator were now returned to Georgia he would be prevented from recourse to the courts of that State or to the Federal courts for the protection of his constitutional rights. . . . [His allegations to that effect] must be rejected.¹⁷⁷

There is thus a nice symmetry in the fact that Pennsylvania, which had given birth to the broad-scope inquiry in *Mattox*, interred it ten years later, at

176. *Id.* at 5-6, 11. Commonwealth *ex rel.* Brown v. Baldi, 378 Pa. 504, 511-12, 523-26, 106 A.2d 777, 780, 785-87 (1954).

177. *Id.* at 511-12; 106 A.2d at 780. Judge Musmanno dissented, eloquently and movingly, arguing that *Sweeney v. Woodall* was clearly distinguishable because Brown's proof that Georgia remedies would be unavailable overcame the grounds for the Supreme Court's reversal in that case. *Mattox* clearly governed, he argued. *Id.* at 521, 106 A.2d at 784. He concluded by arguing that even if its decision was correct, even had the court correctly interpreted *Sweeney v. Woodall*, some protection for the petitioner should have been fashioned. *Id.* at 535-38, 106 A.2d at 791-92. Certiorari was sought, and denied. Brown v. Baldi, 348 U.S. 939 (1955). In his petition for certiorari, Brown sought to distinguish *Sweeney v. Woodall* on the same grounds he had argued before the Pennsylvania Supreme Court. Pennsylvania argued that the issue in the case was *jurisdiction*, not exhaustion, and that the courts of one state are wholly without power to review the actions of a sister state — whether that state affords relief or not: "a sovereign State shall be answerable only to the Union." This argument would suggest that the irremediable injury doctrine, if allowed in the federal courts, is beyond the power of state courts. Brief for the Commonwealth of Pennsylvania in Opposition to Petition for Writ of Certiorari, pp. 3-4, Brown v. Baldi, 348 U.S. 939 (1955). Georgia agreed with Pennsylvania's jurisdictional argument, suggesting that the principle of full faith and credit was involved. Brief for Respondent [Georgia] in Opposition to Petition for Writ of Certiorari, pp. 10-19, Brown v. Baldi, 348 U.S. 939 (1955).

In 1955, two more cases came to the Pennsylvania courts, in both of which the facts of *Brown v. Baldi* were stipulated. Commonwealth *ex rel.* Dunn v. Ruch, 380 Pa. 152, 110 A.2d 240 (1955); Commonwealth *ex rel.* Davis v. Ruch, 380 Pa. 155, 110 A.2d 394 (1955). *Brown v. Baldi* was cited to dispose of both. See also Commonwealth *ex rel.* Heaton v. Harvey, 21 Pa. D.&C.2d 763, 766-67 (C.P.), *aff'd on opinion below*, 193 Pa. Super. 315, 164 A.2d 123 (1960) (allegations of danger to life and well-being rejected). In Commonwealth *ex rel.* v. Kelley, 6 Pa. D.&C.2d 306 (C.P. 1955), the trial court refused to hear allegations of cruel and unusual punishment in Georgia, citing *Brown v. Baldi*, but released the petitioner because the extradition papers were not in strict conformity with the requirements of the Uniform Criminal Extradition Act, in force in Pennsylvania (the receiving agent for Georgia was not the person named in the papers, and the papers were not in order, being carbon copies with erasures, additions, etc.).

least temporarily, in *Brown v. Baldi*.¹⁷⁸ During its brief life, the doctrine of *Mattox* seems to have released only three petitioners: *Mattox* himself, another Pennsylvania extraditee,¹⁷⁹ and one federal petitioner.¹⁸⁰

V. CONCLUSION

As has already been noted, one need not read *Sweeney v. Woodall* as narrowly as have the Pennsylvania courts. Indeed, their reading seems an unpersuasive one, in view of the fact that the Court attempted to base its decision upon an alleged absence of any claim that relief in the Alabama courts would be precluded by Alabama penal officials. Since *Sweeney* need not be read to foreclose entirely a broad-scope inquiry, the question of the permissible scope of inquiry on extradition habeas corpus remains an open one. Within the bounds set by *Sweeney* and *Johnson v. Dye*, and keeping in mind habeas corpus and extradition doctrine, what situations should justify relief in state or federal courts in an asylum state?

"Jurisdiction," or, when the detaining authority claims a power to act independently of a court order, "authority," is the touchstone of traditional

178. *Sweeney v. Woodall* has also been followed even as to prospective deprivations in *Malory v. McGettrick*, 318 F.2d 816 (6th Cir. 1963), and *Lathan v. Reid*, 280 F.2d 66 (D.C. Cir. 1960).

A number of state courts have considered the scope of extradition habeas corpus since *Sweeney v. Woodall*:

(1) *New Jersey*: In *In re Dukes*, 26 N.J. Super. 173, 97 A.2d 507, petition for certification denied, 13 N.J. 293, 99 A.2d 452 (1953), cert. denied *sub nom.* *Dukes v. Hanna*, 347 U.S. 914 (1954), petitioner alleged danger of prospective cruel and unusual punishment, and sought to distinguish *Sweeney v. Woodall* on the ground that although he did not deny the availability of the demanding state's courts, prison officials would frustrate any attempt at access to them. Without deciding whether *Sweeney v. Woodall* left this issue open, the court held that petitioner's proffered (but excluded) proof was inadequate since, based as it was on past experience, it amounted merely to conjecture that past treatment would be repeated (which, of course — though the court did not note this — is always the case when a prediction is attempted). In opposing certiorari, New Jersey argued that its state courts have no power to intervene in the federal process of extradition once a proper demand is made. Brief of Respondent, p. 10 *Dukes v. Hanna*, 347 U.S. 914 (1954). In *In re Lee*, 62 N.J. Super. 29, 161 A.2d 759 (1960), the court held that *Sweeney v. Woodall* barred petitioner's attempt to avoid extradition on the ground that the demanding state's prisons were segregated.

(2) *New York*: *Sweeney v. Woodall* was followed as to past deprivations in *People ex rel. Gadson* on behalf of *Morgan v. Hoy*, 285 App. Div. 974, 138 N.Y.S.2d 704, motion for leave to appeal denied, 308 N.Y. 1053, cert. denied, 350 U.S. 829 (1955), and *People ex rel. Reid v. Ruthazer*, 4 App. Div. 2d 164, 163 N.Y.S.2d 716 (1957).

(3) *New Hampshire*: *Koch v. O'Brien*, 101 N.H. 11, 131 A.2d 63 (1957), held that, although it may have power, an asylum state court is not required by due process to hear allegations of prospective unconstitutional treatment in a demanding state, citing *Sweeney v. Woodall*.

(4) *Connecticut*: *McPheters v. Pollard*, 146 Conn. 509, 152 A.2d 632 (1959), followed *Sweeney v. Woodall* as to past deprivations.

179. See note 86 *supra*.

180. See note 105 *supra*.

habeas corpus inquiry. In order to broaden the scope of habeas corpus the courts over the years stretched the concept of jurisdictional error to the breaking point, until they finally abandoned it in favor of a direct investigation of whether a petitioner is being held in violation of his constitutional and other federal rights. When no court proceeding precedes detention, "jurisdiction" is not relevant; but one would expect a similar development to apply to the concept of "authority." It is easy, of course, to dismiss both concepts as conclusionary rather than as starting points of an investigation. Whether the governor of an asylum state does, or does not, have "authority" to arrest a fugitive who has suffered or will suffer cruel and unusual punishment, for example, might be considered to depend upon whether the demanding state has forfeited its right to demand him, and whether the act of returning him would enable the demanding state to continue its unconstitutional treatment of the fugitive. It is a mere *petitio principii* to assert that once the procedural requirements for extradition are met the governor has authority, and hence habeas corpus will not lie. If a fugitive has a right not to be returned to a state which has treated or will treat him improperly, that right becomes an element in considering whether the asylum state has authority to extradite him, and — since the authority to extradite is the only basis for holding him pending extradition — whether it has the authority to detain him.¹⁸¹

On the other hand, there is a significant difference between the limited investigation that governors have traditionally been expected to make — an investigation which does not involve casting aspersions upon sister states¹⁸² — and the deeper and more delicate investigation contemplated by broad-scope extradition habeas corpus. Yet to justify a broad-scope habeas corpus inquiry on grounds that a governor has no "authority" to extradite to states which misbehave would place upon governors a new, quite different, and probably undesirable responsibility.¹⁸³ Similarly, it would place upon state courts a responsibility which might better be limited to the federal courts. In short, unlike the traditional narrow-scope inquiry in extradition proceedings, the proposed broader-scope investigation, whatever its specific contours might be, would — if couched in terms of the "authority" of the asylum state — involve asylum governors and courts in a delicate undertaking which they probably do not want to assume,¹⁸⁴ and which would violate the principle that "a sovereign

181. See, for an analysis in this vein, Comment, *The Limits of Constitutional Inquiry on Habeas Corpus in Interstate Rendition*, 21 U.CHI. L. REV. 735, 745-47 (1954).

182. See *Executive Practices* for a full discussion of the very damaging effects upon interstate harmony that such investigations by governors can have. *Kentucky v. Dennison*, 24 How. (65 U.S.) 66 (1860), arose out of such an investigation.

183. Unless, that is, one could speak of a governor as having no *authority* to do a thing, but as having no *responsibility* not to do it. To argue in that manner would be to deprive both words of any recognizable meaning.

184. It is noteworthy that the only state whose courts fully accepted the broad scope inquiry was Pennsylvania (*Mattox*) — though New York made a gesture in that direction, see *People ex rel. Pahl v. Pollack*, 174 Misc. 981, 22 N.Y.S.2d 413 (Sup. Ct. 1940). Cf. *People ex rel. Reid v. Warden*, 63 N.Y.S.2d 620 (Sup. Ct. 1946); *People ex rel.*

state shall be answerable only to the Union."¹⁸⁵ Ordinary habeas corpus has outgrown the concept of "jurisdiction;" there seems no reason why extradition habeas corpus should be limited by the concept of "authority."

The federal courts, in any event, need not be concerned with an asylum state's "authority" to extradite. Extradition is a federal matter, and the federal courts have the power — normally foreclosed to the state courts — to determine whether a person is properly detained by authority of the United States.¹⁸⁶ Federal "habeas corpus cuts through all forms and goes to the very tissue of the structure;"¹⁸⁷ one form the federal courts could cut through is that of extradition. They need not be bound by the myth that extradition is merely procedural, without effect on substantive rights.¹⁸⁸ They can go beyond the narrow-scope inquiry's reliance merely upon the adequacy of the extradition demand, and consider the underlying facts from which the demand de-

Jackson v. Ruthazer, 276 App. Div. 832, 93 N.Y.S.2d 729 (1949), *motion for leave to appeal denied*, 90 N.E.2d 69, 300 N.Y. 762 (1950).

185. Brief for Commonwealth of Pennsylvania in Opposition to Petition for Writ of Certiorari, p. 4, *Brown v. Baldi*, 348 U.S. 939 (1955).

One theory that has been proposed in order to give substance to the argument that a governor is without authority to deliver a fugitive to a state in which he would suffer irreparable injury either before he could secure judicial relief, or because he could not secure such relief, is that of "state action." Since an asylum state cannot be forced to extradite, the theory runs, it assumes responsibility for the actions of the demanding state if it does extradite. If the demanding state's actions will be both unconstitutional and irreparable, then the asylum becomes a party to the unconstitutionality. No state has authority to act unconstitutionally; therefore authority to detain petitioner being wanting, habeas corpus lies. *Kentucky v. Dennison*, 24 How. (65 U.S.) 66 (1860), however, upon which the argument that extradition is not *mandatory* relies, did not so hold; the case held only that extradition is not federally *mandamusable*. Chief Justice Taney's opinion discussed at length, and rejected, the notion that extradition is discretionary; he described the asylum governor's function as follows:

He has no right to look behind [the extradition papers] . . . , or to question them, or to look into the character of the crime specified in this judicial proceeding [i.e. of the demanding state]. The duty which he is to perform is, as we have already said, merely ministerial

Id. at 106. The asylum governor, then, has no more authority *not* to extradite than he has, on the state action theory, authority to extradite. The state action theory seems quickly to resolve itself into a paradox. It tells us nothing about the "authority" of the asylum state to extradite, and therefore does not require the uncomfortable conclusion that the executives and courts of the asylum state must judge and, if necessary, condemn the executives and courts of sister states. See, for a full statement of the theory, Horowitz & Steinberg, *The Fourteenth Amendment — Its Newly Recognized Impact on the "Scope" of Habeas Corpus in Extradition*, 23 So. CAL. L. REV. 441, 455-57 (1950). The theory was adopted in *Application of Middlebrooks*, 88 F. Supp. 943, 953 (S.D. Cal. 1950), *reversed on other grounds sub nom. Ross v. Middlebrooks*, 188 F.2d 308 (9th Cir. 1951).

186. See, e.g., 28 U.S.C. § 2241(c) (1), (3) (1958); see note 47 *supra*.

187. *Frank v. Mangum*, 237 U.S. 309, 346 (1915) (Holmes, J., dissenting); see note 14 *supra* and accompanying text.

188. See, for an example of this myth in action, *Johnson v. Matthews*, 182 F.2d 677, 682 (D.C. Cir.), *cert. denied*, 340 U.S. 828 (1950).

rives.¹⁸⁹ Having cut through the form of extradition, the federal courts can properly consider whether the demanding state should be allowed to take advantage of the federal extradition process to perpetrate irreparable deprivations of constitutional right. As federal courts, they are in the business of testing state institutions against the requirements of the Constitution, and need feel no special compunction about doing so in the extradition context, if the exigencies of the situation demand such federal intervention.¹⁹⁰ The analogy from federal injunctions of state criminal prosecutions is instructive: the federal courts have felt such intervention, though undesirable, the lesser evil when irreparable injuries are involved.¹⁹¹ The exhaustion rule — with its exception for cases in which there is an absence of state remedies or circumstances rendering available remedies ineffective — is the product of another accommodation analogous to that of the injunction cases. A fact which distinguishes extradition cases from the exhaustion and injunction situations is that the federal court which considers the validity of a demanding state's treatment of its prisoners is not a federal court whose jurisdiction normally includes problems arising out of actions by the demanding state. But federal courts are pre-eminently courts of the entire nation, not associated merely with the locale in which they sit. Why some federal courts have found this distinguishing fact so critical as to deprive them of jurisdiction¹⁹² is hard to see¹⁹³ — although

189. Cf. notes 13-15 *supra* and accompanying text. The narrow-scope inquiry on extradition habeas corpus developed at a time when the inquiry on habeas corpus generally was limited to the adequacy of the papers in the return.

190. See, for a fuller statement of this argument, Sutherland, *Due Process and Cruel Punishment*, 64 HARV. L. REV. 271, 279 (1950).

191. See note 81 *supra* and accompanying text.

192. See, e.g., *Davis v. O'Connell*, 185 F.2d 513, 517 (8th Cir. 1950); *Johnson v. Matthews*, 182 F.2d 677, 682 (D.C. Cir.), *cert. denied*, 340 U.S. 828 (1950).

193. The Third Circuit, in *Johnson v. Dye*, found no such difficulty. Nor has the Second: *United States ex rel. Jackson v. Ruthazer*, 181 F.2d 588 (2d Cir.), *cert. denied*, 339 U.S. 980 (1950) (comity, not power, is the issue); *United States ex rel. Tucker v. Donovan*, 321 F.2d 114, 116 (2d Cir. 1963) (same). Nor the Ninth: *Ross v. Middlebrooks*, 188 F.2d 308 (9th Cir. 1951) (same). A fascinating series of cases in the Second Circuit has raised the problem of the "power" in the federal courts of one circuit to consider the constitutionality of state criminal proceedings in another circuit. Under New York procedure, a prisoner serving a multiple-felon sentence cannot challenge in New York's courts the prior felony conviction on which it is based if the conviction was in another state; he usually cannot challenge it in the foreign state either, since he is not there. The Second Circuit has held that in such a situation the prisoner can challenge the constitutionality of the prior conviction in the federal courts of New York in order to vindicate his right to have his New York sentence reduced. *United States ex rel. Turpin v. Snyder*, 183 F.2d 742 (2d Cir. 1950). In *United States ex rel. Smith v. Jackson*, 234 F.2d 742 (2d Cir. 1956), the situation was further complicated because the petitioner was a fugitive from the state where he had been convicted of the prior felony. New York argued that he had waived his right to challenge the foreign state's conviction by fleeing its jurisdiction. "To this," the court said, "may be added certain considerations of policy — the undesirability of testing a Virginia conviction in a federal court in New York and a court's reluctance to listen to a prisoner who is a fugitive from justice. We do not find these argu-

it goes directly to the question of *forum non conveniens*.¹⁹⁴

Federal habeas corpus power can be contrasted with that of the states on the ground that since extradition is pursuant to federal law, a petitioner can be considered, in relation to the right of a demanding state to take advantage of the process, *pro tanto* a federal prisoner.¹⁹⁵ Rather than lumping the two problems within the concept of the "authority" of the asylum state to arrest a fugitive, it seems preferable to distinguish between the *power* of the asylum

ments persuasive." *Id.* at 478. The arguments boiled down to *forum non conveniens* and deterrence, *versus* the prospect of an innocent man serving an unmerited sentence as a second offender, and the latter must prevail. *Ibid.* *Sweeney v. Woodall* was deemed inapplicable because there the petitioner could get relief when returned, whereas here petitioner challenged the custody of the asylum state. *Id.* at 748-49. This last point was taken up in *United States ex rel. LaNear v. LaVallee*, 306 F.2d 417 (2d Cir. 1962), in which the court held that 28 U.S.C. § 2254 (1958) requires exhaustion of the remedies only of the state whose custody is being challenged (*i.e.* New York), and hence a multiple-felon petitioner need not show an attempt to exhaust the foreign state's remedies. Possible indignity to the foreign state does not justify putting petitioner to an extra proceeding. Nor is the foreign state's judgment challenged — only New York's right to rely on it. (Query whether the court would approve if New York state courts undertook to look behind sister state convictions.) This theory that only the custody of *New York* is being challenged cannot distinguish away the extradition cases, where the custody of the *asylum state* is challenged (on ground that it is not justified by the demand). The difference is that in the multiple-felon cases, affording a petitioner relief has no effect on the foreign state's right to punish him. *Cf.* *United States ex rel. Tucker v. Warden*, 217 F. Supp. 373, 375 (E.D.N.Y. 1963), *aff'd sub nom. United States ex rel. Tucker v. Donovan*, 321 F.2d 114 (2d Cir. 1963). Even this difference may not have obtained in *Smith*, *supra*. *LaNear* has opened up a small flood of petitions to the New York District Courts. See, *e.g.*, *United States ex rel. Compton v. Wilkins*, 315 F.2d 865 (2d Cir. 1963) (remand to state on condition that petitioner be resentenced); *United States ex rel. Noll v. Fay*, 219 F. Supp. 262 (S.D.N.Y. 1963) (same); *United States ex rel. Barnes v. Fay*, 219 F. Supp. 152 (S.D.N.Y. 1963) (held against petitioner on merits). In *United States ex rel. McCray v. LaVallee*, 220 F. Supp. 846 (N.D.N.Y. 1963), the court refused to apply the *LaNear* rule where the prior conviction was in a federal court, on the ground that 28 U.S.C. § 2255 (1958) gives petitioners adequate opportunity to challenge the prior conviction in the sentencing court. On the *LaNear* rationale that only the New York custody is challenged, this result is clearly wrong; yet it is clearly right as a matter of common sense and sound judicial administration. The inconsistency with *LaNear* is a result of the fact that the Second Circuit insisted upon retaining in that case the fiction that no act of the foreign state was being challenged, in order to avoid the burden of *Sweeney v. Woodall*.

For situations similar to that in the multiple-felon cases, see *In re Ross*, 48 F. Supp. 815 (D. Ore. 1942), in which petitioner was permitted to challenge on federal habeas corpus in Oregon his commitment by an Arizona court to a Veterans' Administration Hospital in Arizona when the V.A. had subsequently transferred him to an Oregon V.A. hospital; In the Matter of the Application of Pate, *petition filed*, No. 42683, District Court, N.D. Cal., Aug. 5, 1964, in which habeas corpus is being sought in a California federal court on behalf of a Nevada convict confined in a California prison under the terms of the Western Interstate Corrections Compact, CAL. PENAL CODE §§ 11190-96, and in which *LaNear* is being relied upon as to "jurisdiction" and "exhaustion." See Memorandum of Points and Authorities, In the Matter of the Application of Pate, *supra*.

194. See Sutherland, *supra* note 190, at 278-79.

195. See notes 47 & 117-20 *supra* and accompanying text.

state to *detain* him, and the *right* of the demanding state to *demand* him. The first question should depend only upon whether the prerequisite to such detention — a lawful demand — has occurred, hence upon the technical requirements of the extradition clause and implementing statute; it may therefore appropriately be considered by the state courts of the asylum state, as a part of their general duty to protect citizens from unlawful detention.

The second question, however, involves both characterization of the demanding state's conduct and resolution of a conflict between constitutional principles, "one promoting efficiency and comity between states, the other protecting fundamental rights of the individual."¹⁹⁶ Considerations of interstate comity suggest that this duty is more appropriately filled by the federal courts. These considerations, embodied in the extradition clause and the spirit of full faith and credit, should preclude a state court from sitting in judgment upon the criminal processes of sister states. The federal system is the source of the comity obligation of the states, however, and federal courts are not within the matrix of interstate comity. This is not to say that the federal courts may ignore considerations of interstate comity when rendering decisions which affect relations between states. But as national courts they are in a position to accommodate the demands of comity between the states to other national considerations — in this case, to the protection of individual constitutional rights. Furthermore, in extradition cases it is a federally established procedure — for which the federal courts should have a special responsibility — which is the source of the potential danger to individual rights. Thus, in deciding whether an extraditee is properly held by authority of the United States, the federal courts alone should have the power to resolve a clash between con-

196. For the full quotation from Judge Bazelon's dissent in *Johnson v. Matthews*, see text at note 130 *supra*. See *In re Wallace*, 38 Wash. 2d 67, 227 P.2d 737 (1951), in which the court carefully distinguished the power of state courts on extradition from that of federal courts, holding that, unlike the federal courts, state courts are without jurisdiction to consider whether the demanding state has forfeited its right to use the extradition process. The court thought that federal jurisdiction as to such claims is exclusive, and that full faith and credit bars one state's courts from considering the constitutionality of a sister state's criminal justice. A New York court has observed, in the same vein:

The Federal compact does not tender either the duty or the power to every State to supervise the intramural judicial processes of the others. Where those processes may reach a point of conflict with the United States Constitution, in the nature of things, the Federal courts are the arbiters and make the necessary inquiry and render the appropriate judgment; but even they, by traditional law, by comity, and, indeed, by due deference to the nature of the Federal structure, do not act until available remedies within the State itself have been exhausted.

People ex rel. Reid v. Ruthazer, 4 App. Div. 2d 164, 163 N.Y.S.2d 716 (1957) (reversing release on ground that voidness of conviction in demanding state is not open on extradition habeas corpus). See also Brief for Respondent [New Jersey], p. 10, *Dukes v. Hanna*, 347 U.S. 914 (1954), arguing that because extradition is a federal matter, state courts cannot intervene once the duty to extradite has been established by an adequate demand; Brief for the Commonwealth of Pennsylvania in Opposition to Petition for Writ of Certiorari, pp. 6-7, *Brown v. Baldi*, 348 U.S. 939 (1955); notes 177-78 *supra*.

stitutional provisions: that which requires extradition, and those which extradition, mechanically carried out, would frustrate.¹⁹⁷

Since, in the abstract, it is difficult to weigh the demands of federalism against the importance of giving effective protection to individual rights, a consideration of the specific situations in which a broad-scope inquiry would be warranted may serve to facilitate an accommodation of these conflicting ends. Substantially all commentators have agreed with Justice Douglas and with Judges Bazelon and O'Connell that the broad-scope inquiry should be limited to prospective irreparable injury. Past deprivations as such may be eliminated as proper subjects of inquiry on extradition habeas corpus: whatever relief is appropriate can equally well be secured in the courts of the demanding state.¹⁹⁸ Even when the allegations are of the most horrible cruel and unusual punishment — and even if it be thought that the Constitution requires the release of a person who has been so ill-treated — relief can be adequately afforded by the demanding state's courts, which are subject to the same ultimate supervision by the Supreme Court and therefore in theory administer the same constitutional law as do the courts in the asylum state. For the same reason, the voidness of any proceeding prior to the demand for extradition is no ground for relief beyond the narrow scope traditionally afforded. *Forum non conveniens* alone affords sufficient justification for an absolute rule precluding consideration of such past deprivations. The doctrine that federal courts generally will not intervene in state proceedings to protect constitutional rights until the state courts have had an opportunity to decide the issues presented is as applicable here as it is in the injunction and exhaustion situations. Most important, the equality of pre- and post-extradition remedies where only past deprivations are involved removes any justification for interfering in the operation of extradition. Constitutional provisions are not in unavoidable conflict.

It seems clear that the broad-scope inquiry should go only to *prospective* irreparable injuries. What, then, constitutes a "prospective irreparable injury?" Prospective inability to secure relief for past deprivations of constitutional rights surely qualifies, since denial of access to the courts, state or federal, is itself a denial of a constitutional right, and renders the custody which involves such denial unconstitutional.¹⁹⁹ The prospect of unconstitutional treatment for which no remedy will be available at all is another clear case of irreparable injury; danger of lynching, as in *Mattox*, certainly provides such a prospect, since once the danger materializes court relief is intrinsically impossible.

197. A final consideration supporting the proposed distinction between the roles of state and federal courts is one of flexibility of remedy. If relief less than full release is possible and desirable, federal courts are in a better position to afford it. The type of relief less than release suggested in this Comment would probably be precluded to a state court. See notes 226-33 *infra* and accompanying text.

198. Thus the concurrence of Judge O'Connell in *Johnson v. Dye* was the better view.

199. *Cf. Cochran v. Kansas*, 316 U.S. 255 (1942).

The difficult question is whether a serious deprivation which will occur before an extraditee can secure court relief — and for which such relief may be inherently inadequate — comes within the concept of a prospective irreparable injury. It is reparable in the sense that petitioner will be able to secure such remedy as the law affords; it is irreparable in the sense that no legal remedy can restore what has been lost. The issue here is extremely important to the scope of federal extradition habeas corpus. Since federal habeas corpus can be brought by a third party on behalf of a person improperly detained,²⁰⁰ it is doubtful whether an extraditee who could not make out a case that his life would be endangered could successfully show that he would not be able to get into court if returned. Prison policy could not normally prevent him from securing a hearing, unless, for example, no third person were available to bring habeas corpus on his behalf. Only if an interim injury in its nature irreparable is sufficient basis for relief in the asylum state will such a petitioner be entitled to relief.

As indicated, most interim injuries will be irreparable in the sense that whatever legal remedy there may be will not make good the damage done, or at least not fully. Thus a petitioner who claims that the indictment or conviction underlying the demand is void could argue that although he will be able to challenge it if returned, he will be subjected to the irreparable injury of detention pending a finding that he is entitled to release. Even if monetary compensation for his interim loss of liberty were available, few will argue that it could ever be really commensurate to the deprivation endured. Yet this sort of irreparable injury is an intrinsic, if unfortunate, part of our system of criminal justice; there seems no special reason, at least barring a conviction so patently void that the demand for extradition is a frivolous harassment, why an extraditee should be exempt from what all others must suffer.²⁰¹ On the other hand, if the interim injury involves running "a gamut of blood and terror," it is, in the words of Mr. Justice Douglas, "too great a price to pay" for the vindication of a constitutional right.²⁰² Whether the injury is the sort of deprivation which the law is not ordinarily willing to tolerate pending a judicial hearing on the merits of a claim should be the test of whether, as an interim injury, it should be considered irreparable.²⁰³ Injuries which are in-

200. See 28 U.S.C. § 2242 (1958); *Wilson v. Dixon*, 256 F.2d 536 (9th Cir.), *cert. denied*, 358 U.S. 856 (1958).

201. See note 66 *supra* for cases holding that the unconstitutionality of the criminal law on which the indictment is based affords no ground for relief on extradition habeas corpus. Though frequently alleged, the voidness of a conviction has never been made the basis for relief on extradition habeas corpus.

202. *Sweeney v. Woodall*, 344 U.S. 86, 92 (1952). For the full quotation, see text at note 168 *supra*. See also *Fay v. Noia*, 372 U.S. 391, 415-16 (1963), for the principle that the federal habeas corpus power is the result of a decision in favor of individual rights when in conflict with institutional — that is, Federalism — needs.

203. The limits of tolerance for interim injuries in our constitutional system can be derived from such areas of doctrine as the "substantial injury" that will justify a federal injunction of a state criminal proceeding. See cases cited at note 81 *supra*. The right to

trinsic, necessary elements of the criminal process can be distinguished from injuries which are gratuitous. For example, a modest period of detention before a hearing should be considered not an irreparable injury; a very long period, if petitioner could show facts that would necessarily and unconstitutionally cause it, should be deemed within the meaning of "irreparable injury." Similarly, some kinds of treatment — *e.g.*, inadequate food or medical care — which might be deemed cruel and unusual if imposed for substantial periods of time, are perhaps tolerable for the brief interim between return and relief in the demanding state's courts. Nor should interim racial segregation in the demanding state's prison be deemed so serious as to warrant relief in the asylum state.²⁰⁴

"Prospective irreparable injury," then, includes both total unavailability of relief for past or prospective deprivations, and interim injuries which are intolerably severe. It seems clear in this context that a weighing of the extradition clause and its bases in efficiency, comity and the integrity of state judicial processes against the individual constitutional rights at stake should result in the protection of the latter at the expense of the former. In an unavoidable clash between abstract, general principles of good government, and concrete, immediate human rights, the latter should prevail. This is the ultimate justification for the important role habeas corpus plays in American constitutional law.²⁰⁵ A state which will not honor its constitutional obligations to a prisoner should not be allowed to take advantage of the constitutional procedure of extradition in order to secure power over that prisoner. In summary, the scope of federal habeas corpus in extradition proceedings should extend to the consideration of allegations that extradition will result in a substantial and irreparable deprivation of constitutional rights.²⁰⁶

The question remains whether *Sweeney v. Woodall* forecloses as grounds for relief in the federal courts of the asylum state any intolerable interim injury that will be suffered by the extraditee in the demanding state; it has been noted above that this is a plausible interpretation of the Court's holding. But it seems proper, particularly in view of the quite inadequate briefing, lack of oral argument, and unsatisfactory opinion in the case, to choose instead

a speedy trial and to release on bail are examples of limitations on interim injury built into our constitutional fabric.

204. *Cf. In re Lee*, 62 N.J. Super. 29, 161 A.2d 759 (1960).

205. Judge Bazelon's words in *Johnson v. Matthews* are worth recalling in this regard. See quotation in text at note 130 *supra*.

206. One collateral advantage of allowing such a broad scope inquiry will be to bring to light the despicable penal practices that apparently continue to flourish in some parts of the United States, particularly in the South.

There can be no doubt but that the federal courts, on habeas corpus, can act to prevent prospective deprivations — indeed, this is the case every time a petitioner is released from custody because his conviction was void. *Cf. Rogge & Gordon, Habeas Corpus, Civil Rights, and the Federal System*, 20 U. CHI. L. REV. 509 (1953). *Cf. also Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947) (all opinions assume that, if relief from prospective cruel and unusual punishment were appropriate on the merits, it could be given).

an interpretation which would not require the unfortunate result with which Mr. Justice Douglas was concerned. *Sweeney* can therefore be construed to require only careful pleading, so that the allegation of prospective irreparable injury is plain. The case stands at least for the proposition that the absence of state remedies in the demanding state is an insufficient ground for relief — since if the state courts fail, the federal courts, and ultimately review by the Supreme Court, are available. But *Sweeney* need not be taken to preclude relief for an irreparable injury clearly alleged and adequately proved.²⁰⁷

207. The burden of proof problem is particularly difficult. On the one hand, a petitioner who seeks release is unlikely to be a very reliable witness in his own behalf — though special circumstances, as existed in *Brown v. Baldi*, may mitigate this disability. He is unlikely to be able to present any evidence on his own behalf other than scars — which are of dubious corroborative value — and other escaped prisoners who are as untrustworthy as himself; if he is lucky, he may be able to find a prisoner who has served his term, and has nothing concrete to gain from making prison conditions sound worse than they are. But such a witness may be of little value since his testimony can be objected to on the ground that things have changed since his release. Added to this difficulty is the fact that petitioner must convince the court that his prediction of the future is accurate, a hard burden even in the ordinary case. Cf. note 84 *supra*. Against these almost insuperable odds are ranged the presumption in favor of the regularity of state behavior, the testimony of witnesses for the demanding state who bear the stamp of respectability and hence credibility, and the ease with which assurances of reformed conditions and proper treatment in the future can be given. In short, the situation for a petitioner is even worse than that faced by a defendant who seeks to convince a court that a confession was extracted from him by force. In the latter circumstance the Supreme Court has developed the doctrine of “inherently coercive” situations; but it seems inconceivable that any similar presumption against demanding states would ever be entertained. *But cf.* *Harper v. Wall*, 85 F. Supp. 783, 787 (D.N.J. 1949) (petitioner’s allegations carry conviction “when fitted into the pattern of the realities as they are known”). Only rarely will an implicit admission by the demanding state, such as occurred in *Mattox*, not be a necessary element of a petitioner’s case.

On the other hand, Georgia has complained bitterly of the inconvenience and expense to it of having to appear all over the country to defend itself against allegations which cover many years in varying places, on pain of being presumed against if it fails to do so. It has also objected to the refusal of some judges to allow it to take depositions in Georgia, and to the inadequate notice which has been given it in some cases. Alabama has simply refused to bother to appear at all.

These difficulties cannot be cured. Notice, evidence by deposition (assuming an opportunity for the opposing party to cross-examine the deponent, or at least to submit cross-interrogatories), adequate time to collect evidence and prepare its case, and similar consideration should of course be afforded a demanding state. But inconvenience and expense to it should not defeat the right of a petitioner to a hearing — these go only to the *forum non conveniens* problem, and although a forum may be inconvenient for a party, if it is the only available forum the inconvenience must be put up with. A demanding state’s case cannot fail to suffer if it refuses to appear, but it should not be presumed against; the presiding judge must do the best he can, with the help of the Attorney General of the asylum state, who usually represents the nominal defendant.

Through all these difficulties, the burden of proof required is that appropriate to any other civil case: petitioner must convince the judge that it is more likely than not that an irreparable injury will follow his return. *Walker v. Johnston*, 312 U.S. 275, 286 (1941). To make the burden heavier than this would be to make the petitioner’s objective unob-

Even if it were impossible to treat *Sweeney* as fully compatible with the scope of extradition habeas corpus proposed in this Comment, the case may justifiably be deemed overruled²⁰⁸ — not because a subsequent Supreme Court decision has reached a contrary result, but because the era of habeas corpus law to which *Sweeney* belongs has been thoroughly repudiated. In *Fay v. Noia* (1963)²⁰⁹ Mr. Justice Brennan, speaking for the Court, described the basic continuity in the conception of habeas corpus as the remedy for convictions based on “proceedings so fundamentally defective as to make imprisonment pursuant to them constitutionally intolerable.”²¹⁰ But, he candidly conceded,

We do not suggest that this Court has always followed an unwavering line in its conclusions as to the availability of the Great Writ. Our development of the law of federal habeas corpus has been attended, seemingly, with some backing and filling.²¹¹

The period of the late Forties and early Fifties was a time of just such backing and filling; *Sweeney* and *Johnson v. Dye* were in such legalistic company as *Darr v. Burford* (1950),²¹² and *Sunal v. Large* (1947).²¹³ But the extremely restrictive view of the exhaustion requirement taken by these cases began to falter with *Brown v. Allen* (1953)²¹⁴ and was finally and decisively repudiated in *Fay v. Noia*, where the Court went out of its way to overrule *Darr v. Burford*.²¹⁵ The Court made it absolutely clear in *Fay v. Noia* that it intended to establish an entirely new foundation for much of habeas corpus

tainable, and to frustrate the purpose of having the hearing at all. How strongly convinced a judge will insist upon being made will depend, of course, on the nature of the relief he can give; if restricted to full release, he will probably demand far greater persuasion than if less drastic remedies are available.

208. In this regard, consider *Barnette v. West Virginia State Bd. of Educ.*, 47 F. Supp. 251, 252-53 (S.D. W.Va. 1942), *aff'd*, 319 U.S. 624 (1943); *Martin v. Savage Truck Line, Inc.*, 121 F. Supp. 417 (D.D.C. 1954).

209. 372 U.S. 391 (1963).

210. *Id.* at 414.

211. *Id.* at 411-12.

212. 339 U.S. 200 (1950). *Held*: a petition for certiorari to the Supreme Court is a necessary element of the exhaustion of state remedies prerequisite to the availability of federal habeas corpus. Overruling (in effect) *Wade v. Mayo*, 334 U.S. 672 (1948). Overruled in *Fay v. Noia*, 372 U.S. 391 (1963).

213. 332 U.S. 174 (1947). *Held*: because habeas corpus is not to substitute for appeal, failure to take a timely appeal (in this case from a federal conviction) bars use of habeas corpus after the time for appeal has run. *But cf.* *Fay v. Noia*, *supra* note 212.

214. 344 U.S. 443 (1953). *Held*: only one avenue of state relief need be exhausted; denial of certiorari to the highest state court on that avenue is of no significance to a lower federal court on habeas corpus.

215. *Held*: failure to seek a timely appeal from a state conviction is no bar to federal habeas corpus unless the failure was “deliberate;” *Darr v. Burford* overruled — exhaustion need not include a petition for certiorari. In another area, the territorial jurisdiction of a federal court on habeas corpus, a similar change from a restrictive holding in the late Forties has taken place. Compare *Ahrens v. Clark*, 335 U.S. 188 (1948), *with Jones v. Cunningham*, 371 U.S. 236 (1963).

law — particularly in its relationship to problems of federalism.²¹⁶ The balance between the institutional needs of federalism and protection of individual constitutional rights was weighted far more heavily in favor of the latter in *Fay v. Noia* than it had been in the cases contemporary with *Sweeney*.²¹⁷ It is impossible to believe, after reading *Fay v. Noia*, that the Court would follow *Sweeney* to the extent that that decision must be construed to limit the federal courts to a narrow-scope inquiry on extradition habeas corpus. In sum, *Sweeney* probably can be construed as consistent with a broad-scope inquiry; but to the extent it cannot, it was not entitled to much respect even when delivered²¹⁸ and may in any case legitimately be deemed overruled by subsequent history. It therefore presents no bar to the position urged in this Comment.

Having decided that prospective irreparable injury to constitutional rights in the demanding state should be a basis for relief on federal habeas corpus in the asylum state, the question remains, what is the status of the exhaustion requirement of *Johnson v. Dye*? Of the four possible interpretations of the Supreme Court's opinion, we concluded that only two were likely: that a petitioner cannot, on extradition habeas corpus, change from state to federal court in midstream; or that a petitioner must seek relief in the asylum state courts, and exhaust his remedies there before bringing federal habeas corpus.²¹⁹ It is now possible to make a more sophisticated application of the exhaustion principle to extradition habeas corpus. If a petitioner seeks relief on the traditional narrow-scope ground of deficiencies in the extradition procedure, his allegation goes to the power of the asylum state's governor to have him arrested. For such relief, it is appropriate that he exhaust his state remedies first.²²⁰

216. See, for an explicit indication, 372 U.S. at 439 n.44:

To the extent that any decisions of this Court may be read to suggest a standard of discretion in federal habeas corpus different from what we lay down today, such decisions shall be deemed overruled to the extent of any inconsistency.

217. Compare the legalistic flavor of *Sweeney*:

Considerations fundamental to our federal system require that the prisoner test the claimed unconstitutionality of his treatment by Alabama in the courts of that State.

344 U.S. at 90, with the quite different flavor of *Fay v. Noia*:

It should be unnecessary to repeat what so often has been said and what so plainly is the case: that the availability of the Great Writ of habeas corpus in the federal courts for persons in the custody of the States offends no legitimate state interest in the enforcement of criminal justice or procedure. . . . [F]ew indeed is the number of state prisoners who eventually win their freedom by means of federal habeas corpus. Those few who are ultimately successful are persons whom society has grievously wronged and for whom belated liberation is little enough compensation.

372 U.S. at 440-41.

218. "Decisions of this Court do not have equal intrinsic authority." *Adamson v. California*, 332 U.S. 46, 59 (1947) (Frankfurter, J., concurring).

219. See notes 111-14 *supra* and accompanying text.

220. "Exhaustion" is being used in a non-technical sense here. Strictly, since an extraditee is in custody pursuant to federal authority, not pursuant to a state court judgment, no § 2254 "exhaustion" is needed. But comity requires a principle of accommodation when

On the other hand, if he seeks relief from prospective irreparable injury, the state courts should be without power to afford it; exhaustion of state remedies would be appropriate only if he also relies upon narrow-scope grounds. Relief from prospective irreparable injury should be available only as a last resort; more conventional bases of relief, when they exist, should be exhausted first, and should be exhausted in the first instance in the state courts. *Johnson v. Dye* has this much vitality and should have no more.²²¹

A second problem flowing from our conclusion that the federal courts should entertain a broad-scope inquiry is that of the finality to be accorded to the release as a result of such an inquiry. The normal rule is that, while a denial of relief on habeas corpus has no *res judicata* effect,²²² release on habeas corpus is *res judicata* as to the issues involved in the decision.²²³ After release of an extraditee on traditional narrow-scope extradition habeas corpus, a demanding state can overcome mere technical defects in the papers simply by initiating a second demand. But since a release pursuant to a broad-scope inquiry would be based upon a finding of lack of right in the demanding state to take advantage of extradition procedure, the demanding state could not merely begin the process again. Nor could the demanding state wait until the fugitive entered the jurisdiction of a different federal court, hoping there to find a judge less willing to believe the fugitive's allegations. Barring a successful appeal, its right to demand the fugitive would have been settled.²²⁴ But what should be the result if the demanding state alleges, and can show, that the conditions which led the court to release the fugitive no longer obtain? The release was based upon specific findings of fact; while *res judicata* as to those facts, it cannot bar a new adjudication based upon new facts of the right of the demanding state to take advantage of the extradition process. Such a new adjudication does not collaterally attack the release because, although the parties are the same, the issue is different. If the asylum state's governor, faced with a new demand,²²⁵ honors the request, and there are no technical

state and federal courts have concurrent jurisdiction. See text following note 120 *supra*. It must be recognized that a substantial body of case-law is contrary to the position advocated here, though some recent cases support it. See note 49 *supra*.

221. See notes 115-21 *supra* and accompanying text for the significance, in this regard, of the Court's citation of *Ex parte Hawk* rather than § 2254.

222. See note 11 *supra*.

223. See *In re Kimler*, 37 Cal. 2d 568, 572-73, 579-81, 233 P.2d 902, 905, 909-10, *cert. denied*, 342 U.S. 898 (1951), and *In re Bailleaux*, 47 Cal. 2d 258, 261, 302 P.2d 801, 802-03 (1956), wherein the California, federal and common law rules (all of which give *res judicata* effect to a release) are discussed. See also Commonwealth *ex rel. Wadley v. Baldi*, 88 Pa. D.&C. 165, 166-67 (C.P. 1953) ("Where one has been discharged on habeas corpus, and has been rearrested, the crucial question is whether the same issue as was decided in the habeas corpus proceeding is the basis for the arrest. . .").

224. See *In re Bailleaux*, *supra* note 223, for consideration of this issue.

225. The demanding state's power to initiate a new adjudication by seeking to re-open the habeas corpus action would be limited by the fact that FED. R. Crv. P. 60(b) imposes a "reasonable time" limitation upon the reopening of a case. On the other hand,

defects on which the state or federal courts can predicate release, the demanding state will have an opportunity to convince a federal judge that the conditions upon which the prior release was based have changed. But, because it must convince the court that the prior release is not *res judicata* on the issue, the demanding state bears the burden of proof in such a new adjudication; it must affirmatively show that the conditions upon which the prior release was based have changed, to the extent that there is no longer a sufficient danger of prospective irreparable injury.

Since it shifts the burden of proof to the demanding state in a habeas corpus hearing following a second demand, the principle of *res judicata* alone will make it difficult for a demanding state to succeed with such a second demand. There are, moreover, good reasons why courts should, and undoubtedly would, emphasize the difficulty of succeeding on a second demand. General equitable principles of laches — protection of the legitimate expectations and reliance of the released extraditee — dictate a very dim view of second demands. And although the principle of double jeopardy is not technically applicable, since a demand for extradition is not a criminal prosecution, the spirit which it embodies is surely relevant. Particularly when the second demand comes after a substantial lapse of time and after the creation by the erstwhile extraditee of a new existence for himself, it should probably be barred altogether.

We have shown that a broad-scope inquiry on extradition habeas corpus should be afforded, even if release were the only remedy available. But the broad-scope inquiry would be more palatable if relief less than release were possible. We have seen that the federal courts are not restricted to full release on habeas corpus, but are explicitly given the power to "dispose of the matter as law and justice require."²²⁶ A number of modes of relief short of full release have been suggested.²²⁷ That which appears most promising, although since there is good reason to desire that the demanding state's power to seek a readjudication in a particular case on the grounds of changed circumstances be severely limited temporally (see text following note 225), it might be sensible to allow a demanding state to proceed only by reopening the original case. This would impose the time limit of Rule 60b, and would have the collateral advantages of preventing demanding states from harassing petitioner by such devices as repetitive demands and forum-shopping. Presumably the fact that the demanding state, though it is actually the real party in interest, is not the technical defendant could be easily overcome.

226. See text accompanying notes 17-23 *supra*.

227. Consider, for example, the following:

(1) remand into the custody of a United States Marshal, with directions to take petitioner to the demanding state but to keep him in custody until he has been able to get into court. The primary drawback is that there seems to be no source of power in a court to do so. *Queries*: would the demanding state's courts consider such custody grounds for habeas corpus or other state relief? could petitioner proceed directly in the federal courts on the theory that circumstances existed rendering state relief ineffective? what would be his ground for relief from the custody (of the marshal) in which he would actually be? The same effect as remand into the custody of a marshal might be secured if the asylum court were to induce the United States Attorney in the demanding state to initiate a prosecution of the petitioner under the Fugitive Felon Act, 18 U.S.C. § 1073 (1958) (though the crimes for which this can be done are limited). Petitioner would then be removed to

by no means simple, is the possibility that a federal court in the asylum state could transfer the cause to a federal court in the demanding state. It is difficult to see what advantages would accrue from a true transfer²²⁸ (*i.e.*, transfer of the case testing the custody of the *asylum* state) — beyond some saving of energy from a *forum non conveniens* standpoint. If the hearing by the federal court in the demanding state goes to the same question as that before the federal court in the asylum state — whether the demanding state is without right to take advantage of the extradition process — only the *conveniens* difference is involved. In fact, the demanding state federal court might find itself quite limited as to remedy, assuming the petitioner had been transferred along with the cause.²²⁹ If release were granted, the demanding state could arrest the petitioner before he had had an opportunity to leave the state.

the demanding state to stand trial for the federal offense, and could undertake to persuade the local federal court of the ineffectiveness of that state's remedies to protect him against irreparable injury. Then the question would become, what relief could a federal court in the demanding state give to a petitioner seeking to avoid being handed over (before or after federal conviction and sentence) to state authorities.

(2) remand to the demanding state on condition that it post bond for the proper treatment of petitioner. Apart from other difficulties, the demanding state would undoubtedly consider that its honor precluded it from posting such a bond.

228. A true transfer would be subject to a number of technical difficulties. Is the duty of a federal court on habeas corpus to dispose of the case "as law and justice require" sufficient authority for such relief? 28 U.S.C. § 2241(b) (1958) gives the Supreme Court, the Justices, and circuit judges power to transfer an application for writ of habeas corpus "to the district court having jurisdiction to entertain it," but this statute is clearly designed to allow transfers down the judicial hierarchy, not transfers laterally, and in any case does not authorize transfers by district courts. Apart from problems with the phrase "*the district court having jurisdiction*" (emphasis added; see below), it would be a literalistic misreading of § 2241(b) to interpret it as authorizing a circuit court judge, on appeal from the dismissal of a petition for broad scope extradition habeas corpus, to transfer the case to a demanding state federal court. The general transfer statute, 28 U.S.C. § 1404(a) (1958), empowers a district court to transfer an action, for purposes of convenience and justice, "to any other district . . . where it might have been brought." But a federal court in the demanding state does not have "jurisdiction" of a habeas corpus action in the asylum state for purposes of § 2241(b) [see *Ahrens v. Clark*, 335 U.S. 188 (1948); *but cf.* *Jones v. Cunningham*, 371 U.S. 236 (1963); *United States v. Hayman*, 342 U.S. 205 (1952)], nor is it a court in which the action "might have been brought" for purposes of § 1404(a) (*cf.* 2 MOORE'S FEDERAL PRACTICE ¶ 4.02[5] at 957-59 (1964) for the restrictive view the federal courts have taken of this limitation on transfers). Assuming these problems could be resolved, some equally serious ones remain. Who would be the parties to the transferred cause? Clearly petitioner would be one — and therefore would have to be transferred bodily into the demanding state, both to confer territorial jurisdiction on that state's federal court (*but cf.*, perhaps, *Jones v. Cunningham, supra*) and to enable him to make his case [see *Walker v. Johnston*, 312 U.S. 275 (1941) discussed in note 15 *supra*]. But could the asylum state remain the defendant [sued in the person of its warden — see *United States ex rel. Elliot v. Hendricks*, 213 F.2d 922, 926-27 (3d Cir.), *cert. denied*, 348 U.S. 851 (1954) for the intricacies of the defendant-party problem on federal habeas corpus]? On what grounds? If not, how could the cause be transferred? Sweeping this objection under the rug *arguendo*, how could the demanding state, which would have no custody of the petitioner, be made the defendant?

229. See note 228 *supra*.

The purpose of the transfer would be, rather, to enable the transferee court to consider a *different* question. The transferee court could consider directly the allegedly unconstitutional conduct of the demanding state. Unlike the transferring court, the transferee court need not consider the issue raised by the extraditee through the veil of the extradition process — that is, in terms of the *right* to demand. But the notion of transferring a cause different from that brought in the transferring court is most peculiar. The result could be rationalized by arguing that what the federal court in the asylum state would really be doing is allowing extradition to proceed subject to the condition²³⁰ that the extraditee be delivered directly into the custody of a federal court in the demanding state,²³¹ on the basis of a preliminary finding of the non-availability or ineffectiveness of the demanding state's own remedies. There are some serious difficulties with this mode of relief,²³² and it does not avoid the necessity of a preliminary finding in the asylum state that exhaustion in the demanding state is not called for. But if the wrinkles could be ironed out — by courts, or by the courts with the aid of new legislation to make their power clear — this conditional relief in the asylum state coupled with immediate federal relief in the demanding state might well be a satisfactory resolution of the problem of the proper scope of extradition habeas corpus. A less rigorous standard of proof could be tolerated in the asylum state federal court, since its finding would only be that petitioner is entitled to a federal hearing in the demanding state prior to being returned to that state's custody; thus more effective protection of extraditees' constitutional rights could be afforded. On the other hand, substantial protection of state-federal comity would be effected and issues would be allocated to the most convenient forums.²³³ Whatever the

230. Remand to custody subject to a condition is now a common form of relief on habeas corpus. See note 22 *supra* and accompanying text.

231. Effectuating this direct transfer of custody may be one of the trickiest problems with the proposed conditional relief, since it would seem to involve the federal court in the asylum state exercising some authority over court officers of the demanding state federal court — *i.e.*, they would have both to come and get the petitioner, and to accept custody of him. The transferee court would also have to be cooperative.

232. The most severe is that of the jurisdiction of the transferee federal court to consider claims concerning the constitutionality of the demanding state's behavior when the prisoner is not in fact in state custody. If the federal courts are too hidebound by the mystique of habeas corpus to treat the problem directly as one of creating a remedy to fit the problem, they could invent a convenient fiction: the prisoner is *really* in the demanding state's custody, and is held only temporarily for the demanding state (just as federal prisoners are sometimes held in state jails) by the federal court. This fiction is so close to the truth that it might be palatable — the prisoner would be in federal custody, after all, only *because* of the claim of the demanding state. But these difficulties associated with habeas corpus might be avoided were the suit deemed one for an injunction to restrain the demanding state from proceeding further against the extraditee when the court releases him — if the petitioner failed to make out his case, he would be released into the unconditional (or, perhaps, conditional) custody of the demanding state.

233. The difference between one federal court (asylum state) and another (demanding state) is largely an emotional one on the part of demanding states. See Sutherland, *Due Process and Cruel Punishment*, 64 HARV. L. REV. 271, 278-79 (1950), for a per-

ultimate merits of this proposed remedy, not the least of the grounds for disappointment with the Supreme Court's handling of the *Johnson v. Dye* and *Sweeney* cases is the stifling effect they have had upon the creative initiative of the lower federal courts in devising remedies to meet the problem. Now that the legalistic spirit of that era of habeas corpus law has been repudiated, one can expect the federal courts to be as imaginative in developing flexible remedies on habeas corpus as *Fay v. Noia* indicates they will be with respect to the availability of the writ.

suasive argument that, *forum non conveniens* apart, there is no *real* difference for a demanding state between having its institutions judged by one federal court or by another. But because the difference is emotional does not mean it is not entitled to some weight in the federalism scales.