

4 August 1968

Dear Dan,

I am shoulder deep in habeas corpus. I have already churned out a nondescript, insipid article on the subject for Am. Jur.'s Encyclopedia of Trials. Despite the mediocre result it did get me back into the subject and brought me to grips with the new developments, the 1966 amendments and, more importantly, the 1968 cases. I am now working on a revised edition of my Handbook which will not aspire to the status of a treatise but will perhaps occupy a middle position between a handbook and a treatise, whatever such a creature might be called. In addition to revising the book I am working on a somewhat ambitious expansion, namely an introduction which will try to (1) say what the writ of habeas corpus is, (2) give a sketch of its history, (3) define its place in the federal courts today, and (4) define its role in American jurisprudence generally. I have read, a couple of times, your habeas corpus and magna carta piece and really think it brilliant. In fact, I hope ultimately to write a review of it. It is too important a work to let pass unnoticed. Meanwhile I have some questions which I hope you can answer for me before I set sail, or more accurately wing, for Europe on 2d September.

I notice you rely heavily on Walker and Cohen. I read Walker several times four or five years ago. I don't have him at hand now but am trying to purchase a copy. I recall the book as competent but nothing extraordinary. I do have Cohen available though, and I have been poring over his articles and am now trying to get his LLM thesis (from which the articles came) or a copy of it. My first question is have you seen his thesis? Secondly, ^{Cohen} quotes three sources that he did not have the opportunity to see. I am wondering if you were able to use them. They are:

Fry, The Writ of Habeas Corpus (1858); Van Der Veen, De Engelse Habeas Corpus Act (Leiden, 1878); Sully-Flood, History of the Writ of Habeas Corpus (Ms. Royal Historical Society, London). I am curious to know especially if you have seen the last which perhaps I could stop and examine en route to Paris. Finally, Pendleton Howard in his article on habeas corpus in the Encyclopedia of Social Sciences VII 233-36 (1932) lists in his bibliography a two volume work by W. F. Bailey, Treatise on the Law of Habeas Corpus and the Special Remedies published in Chicago in 1913 that I have never heard of nor seen cited anywhere. Do you know anything of this I wonder.

I thought the article in 52 Va. L. Rev. 486 on the burden, or lack of it, of

federal habeas corpus petitions by state prisoners was a part time job. Do you agree? Or are there aspects of the problem I have overlooked. One aspect it ~~seems~~ seems to me the article overlooked is the curve of the prison population.

I would like someone to calculate the cost of habeas corpus petitions in the federal court as, say a percentage of total judicial expense. Do you have any suggestions as to what the relevant questions might be and how the figures could be obtained? The question of cost seems to me always relevant, though I am not sure it can be ascertained.

In my section (a new section) on original writs (I rely heavily on Oaks) I suggest that an original writ might be justified in an instance where it is necessary to have both respondent and petitioner within the ^{territorial} jurisdiction of the ~~same~~ court ~~where~~ this can't be done in a district court. Do you agree this might be a justification? Can you think of any others, other than when a state or ambassador, etc. is involved at the Sup. Ct. level?

On the question of custody, can you suggest a clear example of when the writ might be available in a federal court to release someone subject to private restraint? I'm having difficulty with this. If a child custody order is issued in violation of the Court, say for lack of adequate notice, is there any conceptual objection to utilizing federal habeas corpus other than the general notion that domestic relations falls within the domain of the state? Wouldn't the fed. ct. have power to issue the writ under §2241 (c) (3)? I'm afraid I've thrown a lot of question at you that you may not have the time to answer. If not, I recognize and accept ~~the~~ fully the pressure of time, being only too aware of it myself.

Incidentally, Mostyn writes me that he's interested in taking off from his practice for a couple of years. Frankly I don't know whether ~~that~~ he's interested in Ala. or whether you are interested. He mentioned to me that he would like to go to New Mexico. These Englishmen are a strange breed. At any rate, I throw it out as general background information you might like to keep in mind.

The political situation looks rather bleak. If either Humphrey or Nixon becomes president, the prospect for domestic peace and tranquillity, not to mention our foreign crusades, is not especially bright, in my opinion.

I hope you and Jan are having a pleasant summer. I hope to hear from you before I leave. After the end of this month my plans are still a bit uncertain, but I shall keep in touch and let you know whenever I alight.

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As ever,

