No. 08-1234

IN THE

Supreme Court of the United States

KIYEMBA, ET AL.,

Petitioners,

—v.—

BARACK H. OBAMA ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF THE RIGHT HONOURABLE LORD GOLDSMITH QC AND 252 OTHER MEMBERS OF BOTH HOUSES OF PARLIAMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND, THE EUROPEAN PARLIAMENT, THE SCOTTISH PARLIAMENT, AND THE WELSH ASSEMBLY AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE AMICI CURIAE[1]

Each of the *amici curiae* is a serving member of one of the two Houses of Parliament of the United Kingdom of Great Britain and Northern Ireland, or a serving British member of the European Parliament, or a serving member of the Scottish Parliament or Welsh Assembly.

The lead *amicus*, The Right Honourable Lord Goldsmith QC, is a partner in the firm which is counsel of record for these *amici*. He was Attorney General of the United Kingdom of Great Britain and Northern Ireland during the period 2001-2007. All *amici* participate in this brief as parliamentarians, and not as former cabinet members, senior judges, serving bishops, or any other capacity they may occupy or have occupied.

Amici are aware of the burden that unwarranted *amicus curiae* briefs impose upon the Court, and are interested only in ensuring that the Court is fully apprised of the historical development of the writ of *habeas corpus* under English and

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[1] Per Supreme Court Rule 37.6, no portion of this brief was authored by counsel for any party, and no person or entity made any monetary contribution to the preparation or submission of this brief. Letters of consent to the filing of this brief have been filed with the Clerk of the Court pursuant to Supreme Court Rule 37.3.

Welsh Law, and of the remedies available to all successful applicants.

In this case, *amici* seek to ensure that the efficacy of the Great Writ is neither destroyed nor diminished; that a finding of improper detention brings with it a remedy; and that the principles of individual liberty and the rule of law are upheld. Accordingly, *amici curiae* submit this brief in support of the Petitioners Jamal Kiyemba *et al.*

SUMMARY OF ARGUMENT

The history of *habeas corpus* in England supports a conclusion that, upon a finding of unlawful detention, the remedy for the writ was immediate and non-discretionary release.

By the end of the 17th century, a series of parliamentary and judicial actions had ensured that the writ always had an effective remedy and was enshrined in the English constitution as the "palladium of . . . liberty."

The writ was directed at the jailer, rather than the jailed, and required the delivery of both an explanation for the detention and the detainee to the court. Such writs were sent from London to a wide array of jurisdictions including Canada, Ireland, Jamaica, and Barbados. In each such case, the detained person was to be transferred to London.

The decision of the Court of Appeals in effect is that the Executive, depending on whether or not it chooses to exercise its executive powers (here its executive immigration powers), is able to block the power of the *habeas* court to order release, which is *the* quintessential power given to a *habeas* court. That is the opposite of the historical purpose of the writ. Indeed, to allow the Executive this power would be indistinguishable in effect from a

suspension of *habeas corpus* in the context of these Petitioners.

As was stated by Mr. Justice Lemaistre in 1781, no country is "so arbitrary and despotic that a conscientious judge is bound to admit as lawful a ministerial power to imprison without bail or mainprise."[2]

[2] JUSTICE STEPHEN LEMAISTRE, REPORT FROM THE COMMITTEE TO WHOM THE PETITION OF JOHN TOUCHET AND JOHN IRVING, AGENTS FOR THE BRITISH SUBJECTS RESIDING IN THE PROVINCES OF BENGAL, BAHAR AND ORISSA, gen. app. 9 (1781).

ARGUMENT

I. History Of *Habeas Corpus* Under English Law

A. The Importance of the Great Writ

There can be no doubting the singular importance of the writ of *habeas corpus* in English legal and constitutional history and practice. As early as 1628, it was described as "the highest remedy in law for any man that is imprisoned." *Proceedings in Parliament Relating to the Liberty of the Subject*, (1628) 3 Howell's State Trials 59, 95. In 1670, Chief Justice Vaughn was able to state that "the Writ of *habeas corpus* is now the most usual remedy by which a man is restored again to his liberty, if he have been against law deprived of it." *Bushell's Case,* (1670) 124 Eng. Rep. 1006, 1007 (C.P.). William Blackstone in his *Commentaries in the Laws of England*, described *habeas corpus* as "the great and efficacious writ in all manner of illegal confinement." 3 WILLIAM BLACKSTONE, COMMENTARIES *129. Shortly afterwards, Sir Robert Chambers stated that it was "the great instrument of English liberty." 2 A COURSE OF LECTURES ON THE ENGLISH LAW 1767-73, at 7 (1986).

Early American writers took a similar view. For instance when, in 1774, the First Continental Congress wrote to Britain, it described the Habeas

Corpus Act, 1679, 31 Car. 2, c. 2 (Eng.), as "that great bulwark and palladium of English liberty."[3] Just over thirty years later, America's fourth Chief Justice John Marshall, described *habeas corpus* simply and succinctly as "the Great Writ." *Ex parte Bollman*, 8 US (4 Cranch) 75, 95 (1807).

More recently, and as one example of many, the Law Commission of England and Wales has stated that "the writ's efficacy over its long history stems from its capacity to operate in a very short time and to secure the production of the appellant as of right," and has recognized that "the ancient constitutional rationale that habeas corpus exists to free an individual from unlawful detention." LAW COMM'N OF ENGLAND AND WALES, ADMINISTRATIVE LAW: JUDICIAL REVIEW AND STATUTORY APPEALS 92, 97 (1994). It is because of the Writ's importance, and of the rights it now protects, that *amici* have submitted this brief.

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[3] WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 115 (1980).

B. Summary of the Writ's Practice and Function

The prerogative form of the writ – *habeas corpus ad subjiciendum* – contained a *cum causa* clause, commanding that the recipient: "Produce the body … with the explanation" of the detention. It has been stated:

> The writ was, literally, a scrap of parchment, about one or two inches by eight or ten inches in size, directing the jailer to *produce the body of the prisoner* along with an explanation of the cause of the prisoner's detention. The writ's recipient, typically a jail keeper or sheriff, would write this explanation, which was called the return.

Paul D. Halliday & G. Edward White, *The Suspension Clause: English Text, Imperial Contexts and American Implications,* 4 VA. L. REV. 575, 598-99 (2008) (emphasis added) [hereinafter Halliday & White].

Mr. Justice Wilmot expressed the general understanding of the writ at that time when, in 1758, he described the functioning of the writ as "a demand by the King's Supreme Court of Justice *to*

produce a person under confinement, and to signify the reason of his confinement." *Opinion on the Writ of Habeas Corpus*, (1758) 97 Eng. Rep. 29, 43 (emphasis added).

During the course of the 17th century, the court of the King's Bench imposed its oversight over both competing and lower courts,[4] and marginal jurisdictions.[5] Although most often viewed in modern times as a vehicle for oversight of the Executive, in these early centuries the writ was also conceived as a means by which the judiciary could ensure that the King's justice was properly administered.[6] It was as much for the *benefit* of the King that the power of the writ be untrammeled and that the geographic and jurisdictional remit of the writ be as broad as possible. As stated in *Bourn's Case*:

> [T]his writ is a prerogative writ, which concerns the King's justice to be

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[4] DUKER, *supra* note 3, at 27-40.

[5] *See* Halliday & White, *supra*, at 633-67; Brief of Legal Historians as Amici Curiae at 12-16, *Boumediene v. Bush*, 128 S. Ct. 2229 (2008) (Nos. 06-1195, 06-1196); *infra*, Section II.G.

[6] *See* Halliday & White, *supra*, at 598-607.

> administered to his subjects; for the King ought to have an account why any of his subjects are imprisoned . . . and to dispute it is not to dispute the jurisdiction, but the power of the King and his Court, which is not to be disputed.

(1619) 79 Eng. Rep. 465, 466 (K.B.).

C. Key Developments in *Habeas Corpus* in the 17th and 18th Centuries

Cases involving *habeas corpus* are known in English Law from at least 1214, *see* DUKER, *supra* note 3, at 22, 100 n.74,[7] although others have suggested 1199, Andrew P. Miller, *New Looks at an Ancient Writ: Habeas Corpus Reexamined*, 9 U. RICH. L. REV. 49, 50 (1974), *citing* DANIEL MEADOR, HABEAS CORPUS AND MAGNA CARTA 8 (1966).

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[7] Roman Law, which operated in Britain, had the remedy of *De homine libero exhibendo*. This required the production of a free man to a court if fraudulently held. This law survives in the *Digest of Justinian*, which was compiled in the 6th century, but was from earlier codes compiled in the 3rd and 4th centuries. THE DIGEST OF JUSTINIAN 615 (Alan Watson trans., 1985).

Nonetheless, it was from the 17th century that the writ came to prominence.[8]

The story of *habeas corpus* for much of the 17th century can be seen as an extended series of efforts by judges and parliaments to strengthen the power of the writ and to close loop-holes in its practice. Again and again, those in power sought to circumvent the authority of the writ, and each time they were thwarted. In short, it was a century-long struggle to ensure that the right to *habeas corpus* was not empty, but brought with it a powerful remedy. By the end of the century, this had been enshrined in the English Constitution.

Habeas corpus became central to the English political and constitutional consciousness with the finding in *Darnel's Case*, in 1627, that a return to a writ stating only that the prisoners were detained "by special command of his majesty," was sufficient to remand the prisoners.[9] The case concerned five

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[8] The works of Duker and Sharpe provide the classic discussions of the history of *habeas corpus*. DUKER, *supra* note 3; ROBERT J. SHARPE, THE LAW OF HABEAS CORPUS (2d ed. 1989).

[9] *Proceedings on the Habeas Corpus brought by Sir Edward Darnel, Sir John Corbet, Sir Walter Earl, Sir John Heveningham & Sir Edmund Hampden* (*Darnel's Case*),

men who had refused to pay a forced loan to Charles I, a form of taxation that had not been sanctioned by Parliament. Despite the perceived protections offered by *Magna Carta*, this case highlighted the then limits of *habeas corpus*, including the fact that the writs routinely only asked for the reasons for a person's "detention" and not the reason for the "arrest."

The following year, Parliament attempted to rectify this through the passing of the Petition of Right, 1628, 3 Car. 1, c. 1 (Eng.). This was a complaint addressed to the King. It recited the provision in *Magna Carta* by which no freeman was to be imprisoned "but by the lawful judgment of his peers, or by the law of the land," and a law of Edward III which had stated that no man was to be imprisoned "without being brought to answer by due process of law." The Petition of Right then complained that:

> Nevertheless, against the tenor of the said statutes, and the other good laws of your realm to that end provided, divers of your subjects have of late been

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(1627) 3 Howell's State Trials 1 (K.B.). *But see Searches' Case*, (1588) 74 Eng. Rep. 65 (C.P.).

> imprisoned without any cause showed; and when for their deliverance they were brought before your justices by your Majesty's writs of habeas corpus, there to undergo and receive as the court should order, and their keepers commanded to certify the causes of their detainer, no cause was certified, but that they were detained by your Majesty's special command, signified by the lords of your Privy Council.

Id., cl. 5.

The Petition of Right further prayed that "no freeman, in any such manner as is before mentioned, be imprisoned or detained." *Id.*, cl. 10. The whole text was by way of an entreaty to the King. Thus one obvious deficiency in the Petition of Right is that it was not a statute *per se*. It imposed no *actual* restrictions on the powers of detention of the King, or the Privy Council.

At the same time that Parliament attempted to bolster the writ through the Petition of Right, the judges and their clerks appear to have done the same. From the summer of 1628 onwards, and for the first time, every writ of *habeas corpus* required

information regarding the "arrest" of the prisoner, as well as the traditional "detention."[10]

The following year (1629), the limitations of the Petition of Right were brought home to Parliament. In a case concerning William Stroud, the Attorney-General stated: "A Petition in Parliament is not a law . . . so that now the case remains in the same quality and degree, as it was before the Petition." *Proceedings against William Stroud*, (1629) 3 Howell's State Trials 235, 281-82 (K.B.).

Parliament was suspended between 1629 and 1640, leaving no opportunity to turn the Petition of Right into law. When Parliament met again in 1640, the opportunity was seized with the passing of the Habeas Corpus Act, 1641, 16 Car. 1, c. 10 (Eng.). The act sought to enshrine and bolster the common law writ by stating that upon issuance of a writ the custodian of the detained was to "bring or cause to be brought the body of the . . . party so committed" and to provide a return stating the "true cause of such . . . imprisonment." *Id.* § 8. The act also abolished the

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[10] PAUL D. HALLIDAY, HABEAS CORPUS: FROM ENGLAND TO EMPIRE, 50-51 (forthcoming 2010) [hereinafter HALLIDAY].

Star Chamber (a reviled source of arbitrary detention). *Id.* at § 1.

Civil War erupted in 1642, followed by the death of Charles I in 1649, the rule of Cromwell as Lord Protector from 1653 to 1658, and the restoration of Charles II in 1660. Under both Cromwell,[11] and Charles II's Lord Chancellor the Earl of Clarendon,[12] there were widespread attempts to circumvent *habeas corpus* by the transportation of prisoners to places such as the Isles of Scilly and Jersey. Further, in 1676, a court ruled that writs could not be issued during the court vacations. *Proceedings against Mr Francis Jenkes*, (1676) 6 Howell's State Trials 1190 (K.B.). Parliament was concerned that these practices were often leaving the writ without a remedy, and Parliament responded with repeated attempts from 1668 to 1679 to address these practices through enactment of a new Habeas Corpus Act. DUKER, *supra* note 3, at 52-58. A new Habeas Corpus Act was finally passed in 1679. 31

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[11] *Administration of Justice during the Usurpation of the Government*, (1649-1660) 5 Howell's State Trials 935.

[12] *Proceedings in Parliament against Edward Earl of Clarendon, Lord High Chancellor of England, for High Treason, and other High Crimes and Misdemeanors*, (1663-1667) 6 Howell's State Trials 291 (H.L.).

Car. 2, c. 2 (Eng.).[13] In many ways, the Act is best seen as a codification of much of the existing common law, rather than an innovation in the law of *habeas corpus*. Halliday & White, *supra*, at 611. The Act outlawed the transportation of prisoners "beyond the seas," made clear that jurisdictions such as Jersey and Guernsey were within the remit of the writ, and protected the issuance of writs during vacation.

Section 3 of the Act had left to the discretion of the judge the setting of bail. Habeas Corpus Act, 31 Car. 2, c. 2, § 3 (Eng.). This was a power open to abuse as a means of ensuring that a bailed prisoner was kept in detention, so once again Parliament acted to rectify a perceived limitation to the writ and to ensure the writ retained its remedy. The Bill of Rights complained that: "An excessive bail hath been required of persons committed in criminal cases to

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[13] The Act was widely influential in the American colonies. "With the sole exception of Connecticut, which passed its own unique habeas corpus statute in 1821, all of the habeas corpus acts passed in the thirteen original colonies or states were patterned after the English Act," and the Act often guided courts in cases to which it did not apply directly. Dallin H. Oaks, *Habeas Corpus in the States, 1776-1865*, 32 U. CHI. L. REV. 243, 253 (1965). *See also Boumediene*, 128 S. Ct. at 2246.

elude the benefit of the laws made for the liberty of the subjects." 1689, 1 W. & M. c. 2 (Eng.). This was addressed by the declaration in the Bill of Rights: "That excessive bail ought not to be required, nor excessive fines imposed."[14]

The year after the enactment of the Bill of Rights saw the first of the so-called "Suspension Acts." 1689, 1 W. & M., c. 7 (Eng.). These did not in fact "suspend" *habeas corpus*, but rather extended the offences for which people could be detained. By then, however, not even such acts could fully limit the effectiveness of the writ. The busiest single period for *habeas* judges in the 17th and 18th centuries was the year after the passing of the first Suspension Act; in that year, the detentions of more than 250 prisoners were reviewed, with more than eighty percent bailed or released.[15]

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[14] *See* 3 WILLIAM BLACKSTONE, COMMENTARIES *135 (discussing the link between the changes in the Bill of Rights, and the need to protect the writ from abuse).

[15] HALLIDAY, *supra* note 10, at 135. A further measure of the importance of *habeas corpus* in this period is that approximately 11,000 such cases from 1502 to 1798 survive in manuscript. *See* Halliday & White, *supra*, at 591 n.36.

The period from 1627 to 1689 saw repeated attempts by the Executive to get around the writ, and repeated successful efforts by judges and parliaments to ensure that the writ continued to have force.[16] By the end of the 17th century, *habeas corpus* was enshrined in the English Constitution as a writ with remedy of release for those who had been unlawfully imprisoned. Generations of parliamentarians and judges had striven for this and had succeeded.

D. The Position of *Habeas Corpus* Under English Law in 1789

This Court in *Boumediene v. Bush* stated that "the analysis may begin with precedents as of 1789, for the Court has said that 'at the absolute minimum' the [Suspension] Clause protects the writ as it existed when the Constitution was drafted and ratified." *Boumediene*, 128 S. Ct. at 2248, *citing INS v. St. Cyr,* 533 U.S. 289, 301 (2001). The logic of this is beyond question. After all, America's founders

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[16] Symptomatic is the increasing proportion of writs that required a speedy return "immediately after receipt." At the beginning of the 17th century the proportion of such writs was eight percent, by the end of the century it was ninety percent. *See* HALLIDAY, *supra* note 10, at 53.

"were inspired and guided to a large extent by principles and ideals derived from the study of English law and legal traditions." Chief Justice John G. Roberts, *Foreword* to ERIC STOCKDALE & RANDY J. HOLLAND, MIDDLE TEMPLE LAWYERS AND THE AMERICAN REVOLUTION, xv (2007). Moreover, seven drafters of the U.S. Constitution had received legal training at the Middle Temple in London,[17] and when subscriptions for an American edition of Blackstone's *Commentaries in the Laws of England* were invited in 1770, over 1600 orders were placed,[18] including one by Thomas Marshall, the father of the future Chief Justice Marshall.[19]

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[17] *See* E. ALFRED JONES, AMERICAN MEMBERS OF THE INNS OF COURT (1924); ERIC STOCKDALE & RANDY J. HOLLAND, MIDDLE TEMPLE LAWYERS AND THE AMERICAN REVOLUTION (2007).

[18] *See* ERIC STOCKDALE, 'TIS TREASON, MY GOOD MAN! FOUR REVOLUTIONARY PRESIDENTS AND A PICCADILLY BOOKSHOP 163 (2005).

[19] *See* JEAN SMITH, JOHN MARSHALL: DEFINER OF A NATION 77 (1995).

1. Writs of *Habeas Corpus* Were Directed at the Jailer

In 1789, the writ was directed at the jailer, and not at the detained. This means it was the nationality and status of the *jailer* that was determinative and not the sovereign jurisdiction within which the jailer operated, or the nationality of the detained.

For instance, in 1812, an application for *habeas corpus* was made on behalf of ten African crewmen of a Portuguese ship then in Truro harbor in Cornwall. The court decided that since the men were in the custody of a Portuguese "jailer," the writ could not run.[20] In this instance, it mattered not in whose sovereign territory the detained were (for that was clearly England), nor the nationality of the detained, but solely in whose detention the detained were kept. This case can usefully be compared with *John Forbes v. Sir Alexander Inglis Cochrane and Sir George Cockburn*, which found that escaped slaves from America "when on board an English

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[20] Ruth Paley, *After Somerset: Mansfield, Slavery and the Law in England, 1772-1830*, *in* LAW, CRIME AND ENGLISH SOCIETY, 1660-1830 at 166, 175 (N. Landau ed., 2002).

ship, had all the rights belonging to Englishmen . . . there is no difference between an English ship and the soil of England." (1824) 107 Eng. Rep. 450, 457 (K.B.).

2. The Writ Required Delivery of the Prisoner to the Judge and an Explanation for His Detention

As stated above in Part I.B, a writ of *habeas corpus*, issued by one of several courts in London,[21] required the jailer both to deliver the prisoner to the court and provide a return that justified the existing detention. It was not for a prisoner to provide a basis for his release: "[I]t cannot lie on the party imprisoned to negative the cause of his detention." *Leonard Watson's Case*, (1839) 112 Eng. Rep. 1389, 1414 (Q.B.). It was then for the judge to determine whether the prisoner should be released, bailed or remanded. *See infra* Part II (discussing the remedies arising from a successful application).

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[21] The courts of Chancery, Common Pleas and Exchequer could each issue writs, but it was the King's Bench (or Queen's Bench) judges who were most active in utilizing the powers of the writ.

3. The Protection of the Writ Extended to Aliens

As stated in Part I.D.1 above, the writ was directed to the jailer rather than the jailed. It also made no distinction between aliens and others. Halliday & White, *supra*, at 604-07, 651-71. Thus, in numerous instances, without any consideration of the idea that an alien in British territory might somehow have a lesser presumptive entitlement to freedom than a subject, the writ's protection extended to aliens including:

- Frenchmen;[22]
- a Dutchman;[23]
- a Swede;[24]

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[22] *Dupuis' Case*, (1695) The National Archives [hereinafter TNA], KB16/1/5 (teste April 12, 1695); PC2/76, f. 116v (K.B. and P.C.); Halliday & White, *supra*, at 657 n.253, 667 n.287 (discussing three instances of a writ granted to Frenchmen in India).

[23] TNA, KB145/17/14, *cited in* Halliday & White, *supra*, at 605 n.71.

[24] *R v. Schiever*, (1759) 97 Eng. Rep. 551 (K.B.).

- Spaniards;[25]
- a Maltese;[26]
- African slaves owned by Americans;[27]
- a southern African;[28]
- a "foreigner";[29]
- Indians;[30] and
- many others.[31]

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[25] *Anonymus – The Case of Three Spanish Sailors*, (1779) 96 Eng. Rep. 775 (C.P.).

[26] TNA, KB21/14 ff. 70v. and 72v, *cited in* Halliday & White, *supra*, at 605 n.71.

[27] *Ex parte Anderson*, (1861) 121 Eng. Rep. 525 (Q.B.); *Somerset v. Stewart*, (1772) 98 Eng. Rep. 499 (K.B.).

[28] *The Case of the Hottentot Venus*, (1810) 104 Eng. Rep. 344 (K.B.).

[29] *The Case of Du Castro a Foreigner*, (1697) 92 Eng. Rep. 816 (K.B.).

[30] Halliday & White, *supra*, at 651-71.

4. The Writ Ran to All Jurisdictions Under English Control

The writ's geographical and jurisdictional reach extended as far as the rule of the King of England. Indeed, according to one document from the late 17th century (in part decrying the Executive's attempts to send prisoners overseas beyond the imagined scope of the writ), the extent of the writ had to be as broad as possible, for any prisoners who were deemed to be outside the reach of the writ were, in effect, banished from the kingdom, and only an Act of Parliament could banish a subject. Absent such an Act, therefore, there was a presumption the writ would run to the edge of the King's dominion. The boundaries of the writ and the King's dominions (obviously including his overseas possessions) had to be the same.[32]

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[31] *Id.* at 605 n.72 ("[H]undreds of foreign seamen, caught up in the press gangs in English, Caribbean or even foreign ports, successfully used habeas corpus to gain release from naval service in the second half of the eighteenth century.").

[32] *Administration of Justice during the Usurpation*, 5 Howell's State Trials at 941.

As appears from history, the very purpose and genesis of the writ is to operate as a bulwark against the use by the Executive of its powers. That is seen very clearly in the episode of *Darnel's Case*, (1627) 3 Howell's State Trials 1 (K.B.), and the subsequent struggle of the judges and Parliament to establish sway over the Executive. Even in the earliest days, when the writ was designed to support the King, its purpose was to ensure that executive power was not abused by subordinate authorities.

II. Remedies

Under English Law, the writ of *habeas corpus* transfers the custody of the detainee to the court. This was the case in the 17th and 18th centuries when the Marshal of the Marshalsea would take formal custody of a prisoner brought to the King's Bench. HALLIDAY, *supra* note 10, at 59. This remains the case in modern English law: "[t]he effect of service of such a writ is to make the 'gaoler' *responsible to the court in place of the authority* which ordered the detention, leaving it to the court to determine on the return of the writ whether the detention should or should not continue." *R v. Sec'y of State for the Home Dep't, ex parte Muboyayi*, (1992) 1 Q.B. 244, 258 (emphasis added). Thus, the decision as to what should happen to the detainee is removed from the

Executive – lying instead purely in the hands of the judge.

After issuing a writ of *habeas corpus*, and upon receiving custody of the detained and the return stating the reason for detention, the *habeas* judge classically had three options in the 17th and 18th centuries. If he found that the detained was being properly held he could order one of two things: the detained to be bailed (if it was a bailable offence) or remanded back into custody. If the *habeas* judge found that the detained was improperly held he had but one option: to order release. There is no question that the judge was authorized to order release, but stronger than that in such a situation the judge had no discretion *not* to order release.[33]

A. The *Transfer* of a Prisoner Was an Essential Part of the Operation of the Writ of *Habeas Corpus*

The Respondents in this case have argued that what is being sought by the Petitioners is "release *plus* transfer," which is beyond the power of a *habeas* judge to grant. Brief for the Respondents in Opposition (NO. 08-1234), at 19; *see also id.* at 8,

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[33] SHARPE, HABEAS CORPUS, *supra* note 8, at 58-59.

11, 13, 23. With the greatest of respect, this argument derives from two misunderstandings of the early history of *habeas corpus*. As already stated above in Part I.B, upon the issuance of a writ, two things were to happen: the jailer was to complete a return explaining the circumstances and justification for the detention, and the prisoner was to be brought before the *habeas* judge. Indeed this is what *habeas corpus* literally means – "Produce the body."

The terms of the Habeas Corpus Act, 1679, 31 Car. 2, c. 2 (Eng.), make this aspect of the writ plain:

> That whensoever any person or persons shall bring any *habeas corpus* directed unto any Sheriff or Sheriffs, Gaoler, Minister or other person whatsoever … that the said officer or officers … shall within three days … *upon payment or tender of the charges of bringing the said prisoner, to be ascertained by the judge or court that awarded the same, and endorsed upon the said writ, not exceeding twelve pence per mile, and upon security given by his own bond to pay the charges of carrying back the prisoner*, … *and bring or cause to be brought the body of the party so*

> *committed or restrained, unto or before the lord chancellor, or lord keeper of the great seal of England for the time being, or the judges or barons of the said court from which the said writ shall issue*.

Id. § 1 (emphasis added). The section went on to allow more time if the detainee was more than twenty miles away, and more time again if over 100 miles away.

The Habeas Corpus Act, made clear provision that those detained should be brought before the court. *Id.* In all instances in which a judge in London issued a writ outside London, including to other jurisdictions, it was done on the understanding that the prisoner would be brought to London for the hearing. *See, e.g.*, *infra*, Part II.G. Further, some cases discuss requests by jailers to have the expenses for such transfers recouped from unsuccessful applicants. *See Ex parte Anderson*, (1861) 121 Eng. Rep. 525 (Q.B.); *Dodd's Case,* (1857) 44 Eng. Rep. 1087 (Ch.D.); *R v. Mayor of Kingston-upon-Hull*, (1724) 88 Eng. Rep. 1102 (K.B.); *R v. Armiger,* (1663) 83 Eng. Rep. 940 (K.B.). Thus the *transfer* of a prisoner took place well before any decision about release was made, and was considered an utterly central aspect of the writ.

B. The Court Did Not Have Discretion as to How to Act upon a Finding of Unlawful Detention

It was stated in *Hawkeridge's case* "that upon an insufficient return the party ought to be bailed or discharged, as all our books and infinite precedents are." (1616) 77 Eng. Rep. 1404 (K.B.). When later quoted in 1758, this *dictum* was rephrased (though without changing the meaning) to read "that upon an insufficient return the party *must* be bailed or discharged." *Opinion on the Writ of Habeas Corpus*, 97 Eng. Rep. at 45 (emphasis added). Indeed this later version of the *dictum* reflects a better understanding of the effect of the writ. For instance in *R v. Smith*, (1734) 93 Eng. Rep. 983 (K.B.), the question arose whether the court could make a direction as to with whom the detained should live in the future: "And all the court declared, that upon this writ they could only deliver him out of the custody of the aunt, and inform him he was at liberty to go where he pleased." Similar facts pertained in *R v. Clarkson et al.,* (1722) 93 Eng. Rep. 625 (K.B.), where the court held, "we have nothing to do to order her to go with Dibley, but can only see that she is under no legal restraint: all we can do is declare that she is at her liberty to go where she pleases." Further, *Brass Crosby's Case* stated, "if the legal charge is not returned, the person *must* be

discharged." (1771) 95 Eng. Rep. 1005, 1008 (C.P.) (emphasis added). Lord Mansfield, in *Somerset v. Stewart*, stated, "The only question before us is, whether the cause on the return is sufficient? If it is, the negro *must* be remanded; if it is not, he *must* be discharged." (1772) 98 Eng. Rep. 499, 510 (K.B.) (emphasis added).

A finding of unlawful detention did not afford a judge any further discretion.[34] Indeed, the non-discretionary aspect of *habeas corpus* has been seen as one of its strengths. As recently as 1994 (at a time when the Law Commission of England and Wales considered merging the procedures for *habeas corpus* and judicial review), one of the main grounds for rejecting such a proposal was the concern that, over time, the "discretionary nature of judicial review could infect habeas corpus." LAW COMM'N OF ENGLAND AND WALES, ADMINISTRATIVE LAW 92. Under English law, in 1789 as much as today, a finding by a *habeas* judge that someone is improperly detained leaves the judge with no discretion. Release must be ordered.

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[34] SHARPE, HABEAS CORPUS, *supra* note 8,, at 58-59.

C. Release Was Intended To Be Immediate

The two principal parliamentary acts of the 17th century both emphasized the speed of the writ. For instance, Section 6 of the Habeas Corpus Act, 1641, 16 Car. 1, c. 10 (Eng.), speaks of release being performed "without delay upon any pretence whatsoever," while Section 2 of the Habeas Corpus Act, 1679, 31 Car. 2, c. 2 (Eng.) uses the term "speedy relief."

Indeed, when, in 1758, an enquiry was made of the King's Bench judges as to the practice of *habeas corpus* writs, several of the questions focused on whether such writs could be issued during vacation time (*i.e.*, outside the normal periods of the courts) Mr. Justice Wilmot's response was that

> the strongest reason that can be urged in support of the practice of issuing these writs by the Judges of the Court of King's Bench, in vacation, before the statute [of 1679], [was] because there could not otherwise have been a perfect and complete remedy at all times for the subject against imprisonment.

Opinion on the Writ of Habeas Corpus, 97 Eng. Rep. at 41.

The need to protect a subject's liberty required speed of action at all times – otherwise *habeas corpus* was not a "perfect and complete remedy." Indeed, a few pages later, Mr. Justice Wilmot referred to "instantaneous relief." *Id.* at 44. Other judges have spoken of applicants being "discharged at once," or gaining "immediate release." *Ex parte Brown*, (1864) 122 Eng. Rep. 835, 842 (Q.B.); *Cox v. Hakes*, (1890) 15 A.C. 506, 514 (H.L.). In other instances, the release was so immediate that the young female applicants had to be walked home by a judge's tipstaff. *R v. Clarkson*, 93 Eng. Rep. at 625, and *R v. Anne Brooke and Thomas Fladgate*, (1766) 98 Eng. Rep. 38 (K.B.). Again and again, the final lines of judgments contain phrases like: "[s]he was discharged;"[35] "the man was discharged;"[36] "he was

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[35] *R v. Clerk*, (1697) 88 Eng. Rep. 1202, 1203 (K.B.); *R v. Bowerbank*, (1697) 90 Eng. Rep. 302 (K.B.); *R v. Bryan*, (1725) 93 Eng. Rep. 86 (K.B.); *The Case of Du Castro a Foreigner*; *Yaxley's Case*, (1693) 90 Eng. Rep. 772, 773 (K.B.); *R v. Fownes*, (1682) 89 Eng. Rep. 877 (K.B.); *Case of James Jones*, (1682) 84 Eng. Rep. 1229 (K.B.); *London v. Grafton*, (1669) 84 Eng. Rep. 349 (K.B.); *Pritchard's Case*, (1665) 83 Eng. Rep. 64 (K.B.); *Parker's Case*, (1640) 79 Eng. Rep. 1100 (K.B.); *R v. Reve*, (1631) 80 Eng. Rep. 1172, 1173 (K.B.).

discharged accordingly;"[37] or "the defendant was discharged."[38] Note the past tense. It would run counter to the whole practice and history of the writ in this period for a person whose release had been ordered to then remain in custody.[39]

D. Practical Difficulties Were Not Permitted To Delay the Release

It has been argued by the Respondents that the practical difficulties in this case prevent the Petitioners' release. Brief for the Respondents (No. 08-1234), at 2, 11, 13.

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[36] *R v. Hall*, (1765) 97 Eng. Rep. 1022 (K.B.).

[37] *R v. Wilkes*, (1763) 95 Eng. Rep. 737, 742 (K.B.).

[38] *R v. Banghurst*, (1732) 93 Eng. Rep. 44 (K.B.); *R v. Catherall*, (1731) 93 Eng. Rep. 927 (K.B.); *R v. West*, (1705) 92 Eng. Rep. 265, 266 (K.B.); *R v. Clark*, (1697) 90 Eng. Rep. 560, 561 (K.B.); *Co. Vintners v. Clerke*, (1696) 87 Eng. Rep. 580 584 (K.B.); *Lord Banbury's Case*, (1694) 90 Eng. Rep. 776, 777 (K.B.).

[39] Indeed, in modern English practice, it is accepted that an application for *habeas corpus* "has virtually absolute priority over all other court business." *R v. Home Sec'y, ex parte Cheblak,* (1991) 1 W.L.R. 890, 894 (C.A.).

It is with all deference submitted that this argument overlooks that the Framers of the U.S. Constitution would doubtless have recalled a then recently-decided case that made plain that such an argument should not be allowed to succeed. The case of *Somerset v. Stewart*, (1772) 98 Eng. Rep. 499 (K.B.) concerned a claim for *habeas corpus* by a black slave temporarily within the English jurisdiction, but purchased in Virginia and soon to be taken to Jamaica. Given the publicity about the decision in the American colonies,[40] the final sentence of Lord Mansfield's judgment must have been well known to all involved in drafting the Constitution:

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[40] The judgment for the man's release reverberated through the colonies in America and was reported in twenty-two different American newspapers. PATRICIA BRADLEY, SLAVERY PROPAGANDA AND THE AMERICAN REVOLUTION, 66-80 (1999); see, e.g., Halliday & White, *supra*, at 676 n.313 (citing 4 ESSEX GAZETTE (Salem Mass.), June 30 to July 7, 1772 at 200; MASS. GAZETTE & BOSTON WKLY NEWSL, September 10, 1772, 1). Benjamin Franklin, then resident in London, wrote a letter to the *London Chronicle* regarding this case. THE PAPERS OF BENJAMIN FRANKLIN, VOL. 19, JANUARY 1 THROUGH DECEMBER 31, 1772, 187-188 (LEONARD W. LABAREE ET AL. eds., 1975).

> *Whatever inconveniences, therefore, may follow from a decision*, I cannot say this case is allowed or approved by the law of England; and therefore the black *must* be discharged.

Id. at 510 (emphasis added).

Lord Mansfield knew that the remedy could brook no delay. If the detention is unlawful, then no inconvenience can be allowed to prevent release.

In the view of *amici*, the English authorities provide no justification for the view that practical difficulties can delay release. A combination of production and release of the prisoner has been the hallmark of successful applications for *habeas corpus* since its inception. It is submitted that the Respondents and the Court of Appeals are incorrect to assert otherwise.

E. The Writ of *Habeas Corpus* Was Compensatory in Nature

In its decision below, the Court of Appeals of the District of Columbia Circuit in its decision below stated that "whatever the scope of habeas corpus, the writ has never been compensatory in nature."

Kiyemba v. Obama, 522 F.3d 1022, 1029 (D.C. Cir. 2009).

The *amici* beg to differ. The Habeas Corpus Act, 1641, 16 Car. 1, c. 10, § 5 (Eng.), called for triple damages to be paid to those wrongly imprisoned, while the Habeas Corpus Act, 1679, 31 Car. 2, c. 2, §5 (Eng.), called for £500 in damages to be paid by any jailer who released but then re-imprisoned someone for the same offence.

It is not surprising, however, that in a letter of 1758 to Justice Baron Parker, the action for damages was described as "a rope thrown to a drowning man, which cannot reach him, or will not bear his weight." *See*, Jonathan L. Hafetz, *The Untold Story of Noncriminal habeas corpus and the 1996 Immigration Acts*, 107 YALE L.J. 2509, 2530 n.156 (1998). This letter adequately makes the point that fines and damages are inadequate compensation compared to the release sought. Nor was it permissible for damages to replace the remedy of release.

F. The Sending of Writs of *Habeas Corpus* to Jurisdictions Outside "England": 1300-1961

The Court of Appeals for the District of Columbia Circuit below stated that, "never in the

history of habeas corpus has any court thought it had the power to order an alien held overseas brought into the sovereign territory of a nation and released into the general population." *Kiyemba*, 522 F.3d at 1029. This statement reveals a misunderstanding of the writ of *habeas corpus*. Consistent with historical practice (*See*, Section I.D.3 above), this Court in *Boumediene v. Bush*, 128 S. Ct. at 2248, concluded that the writ of *habeas corpus* was available to non-citizens being held by the United States at Guantánamo. As explained in Part I.B, *habeas* courts in the 17th and 18th centuries always required the detained to be brought before them; and the *habeas* courts of London frequently sent writs into other jurisdictions. The *habeas* courts of England in this period had the powers to make an order in the exact terms listed by the District Court here.

In a long series of cases beginning around 1600 and lasting for the next 250 years, the justices of the King's Bench ensured that the writ extended into all number of jurisdictions where certain "franchises" allowed divergent civil and property laws. As Hale had put it in the mid 1600s, no franchise could "bar the King from his suit." SIR MATHEW HALE, THE PREROGATIVES OF THE KING 204 (David E.C. Yale ed., 1976). In each and every one of the examples cited in the next few pages, the English *habeas* judge was

ordering someone brought into his jurisdiction, where he would then have the power to order release.[41]

1. 1300-1640

In the period up to 1640, it is possible to identify a significant number of jurisdictions to which the courts of London sent writs. For instance, writs of *habeas* corpus were sent to Calais during the 14th century while it was a dominion of the English crown.[42] From 1600 onwards, justices of the King's Bench in London consistently sent writs to Berwick-upon-Tweed, a town that operated under Scottish law. *Brearly's Case*, (1600) TNA, KB21/2/87 (K.B.), *cited in* HALLIDAY, *supra* note 10, at 259-261, and *cited in Bourn's Case*, (1619) 79 Eng. Rep. 465 (K.B.). Similarly, the Cinque Ports in southern England were another divergent jurisdiction that enjoyed a franchise of their own laws. Nonetheless, in 1619, it

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[41] Also note the statement that writs of *habeas corpus* "have gone beyond sea." *Anonymus*, (1671) 124 Eng. Rep. 928 (C.P.).

[42] *Ex parte Anderson*, 121 Eng Rep. at 526 (citing examples from 1363, 1364, 1374, and 1397).

was found that the writ extended to these ports.[43] In 1629, Justice Sir William Jones stated that "in ancient times" the writ had been sent from London to Gascony when this had been part of the King's dominions.[44]

2. 1641-1678

The period up to 1679 was witness to the continuing efforts of judges to keep the jurisdictional boundaries of the writ broad. Durham was a county palatine from which private litigation could not come to London. In terms of *habeas corpus*, however, the King's Bench asserted its jurisdiction and sent writs. *Rickaby's Case*, (1641) 82 Eng. Rep. 459 (K.B.). The County Palatine of Chester was in an analogous position to Durham. In another case from 1641, the Constable of Chester Castle claimed that the writ could not protect his prisoner John Lloyd The court in London disagreed and brought attachment proceedings against the Constable. *Lloyd's Case*, (1641-42) TNA, KB145/15/17; KB32/10;

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[43] Variously reported as *Bourn's Case*, 79 Eng. Rep. 465 and *Habeas Corpus al Cinque-Ports pur un Borne Imprison La*, (1619) 81 Eng. Rep. 975 (K.B.).

[44] Cambridge University Library, MS Gg.2.19, f. 63, *cited in* HALLIDAY, *supra* note 10, at 267.

KB21/12/171v., 176, 179v., and KB21/13/5, 5v., 15, 18, 18v. and 21 (K.B.), cited from HALLIDAY, *supra* note 10, at 267 and 436 n. 31.

In 1654, Oliver Cromwell's Council of State (the Privy Council by another name) sent several prisoners, including John Lilburne, to Jersey in the hope that they would be beyond the writ's reach. They were not. Upon Lilburne's application, Mr. Justice Richard Aske sent the writ to Jersey. *Lilburne's Case*, (1654) British Library, Hargrave MS 48, 34 *verso* (K.B.), *cited in* HALLIDAY, *supra* note 10, at 227-228. The next instances of English courts sending writs of *habeas corpus* to Jersey are *R v. Overton*, (1668) 82 Eng. Rep. 1173 (K.B.), and *R v. Salmon*, (1669) 84 Eng. Rep. 282 (K.B.). In both these cases the prisoners were ordered delivered to English courts.

In 1669, *Craw v. Ramsey* affirmed the earlier judgments that the writ had run to Calais and Gascony. (1669) 124 Eng. Rep. 1072 (C.P.). Then in 1672, Thomas Meade applied for *habeas corpus* despite his being detained in Jamaica. This did not stop a justice in London from sending the writ. *Meade's Case*, (1672) TNA, KB21/17/103 (K.B.), *cited in* HALLIDAY, *supra* note 10, at 268-269.

3. 1679-1789

As already stated above, in Part I.C, the Habeas Corpus Act, 1679, 31 Car. 2, c. 2, § 10, was drafted to ensure that nothing would stop the writ from running "into any County Palatine, The Cinque Ports or other Privileged Places within the Kingdom of England, Dominion of Wales, or Town of Berwick-upon-Tweed and the Islands of Jersey or Guernsey." A few days after the Act came into force, the first known writ was successfully sent to Guernsey. *Creed's Case*, (1679) TNA, KB145/13/31 and KB21/19/201 (K.B.), *cited in* HALLIDAY, *supra* note 10, at 249.

The case of *Anonymus*, concerned the sending of a *habeas corpus* writ to Ireland. As stated in the report, "the Court seemed to be of opinion, that a habeas corpus might be sent hither *to remove him* as writs mandatory had been awarded in Calais, and now to Jersey, Guernsey, etc." (1681) 86 Eng. Rep. 230 (K.B.) (emphasis added).

Similarly, in 1692, justices in London were willing to send a writ to Barbados on behalf of a William Moore. *Moore's Case* (1692) TNA, KB21/24/151 (K.B.), *cited in* HALLIDAY, *supra* note 10, at 271.

In *R v. Cowle,* (1759) 97 Eng. Rep. 587 (K.B.), the court affirmed that places such as Calais and Berwick-upon-Tweed had been covered by the writ.

4. 1790-1862

Cases decided after the adoption of the U.S. Constitution in 1789 are consistent with the earlier cases. Thus, in *Ex parte Wyatt*, (1837) 5 Dowl. 389, a husband successfully had writs sent to France in an attempt to recover his estranged wife.

It was also within the power of London's King's Bench to send the writ to the Isle of Man, as was so held in 1849. *Re Crawford*, (1849) 116 Eng. Rep. 1397 (Q.B.).

In *Re Frederick Belson*, (1850) 13 Eng. Rep. 823 (Ch.D.), two children held by a parent on Jersey, were not only ordered to be brought before the Court of Chancery in London, but were subsequently made wards of that court – *i.e.*, were released within England.

Dodd's Case, (1857) 44 Eng. Rep. 1087 (Ch.D.), concerned an English solicitor and his clerk imprisoned on the island of Jersey. Upon an application for *habeas corpus* to the English courts, the two men were ordered to be brought before the Lord Chancellor in London. The solicitor's clerk was

released in London, and the solicitor himself remanded to jail on Jersey.

In *Ex parte Lees,* (1860) 120 Eng. Rep. 718 (Q.B.), although finding that a writ should not be sent in the particular instance, as the applicant had already been convicted by the local Supreme Court, it was found that the London court had the ability to send a writ to St. Helena should it be necessary.

Ex parte Anderson, 121 Eng. Rep. at 525, concerned an escaped slave from Missouri who was being held in a Toronto jail. The British and Foreign Anti-Slavery Society applied for a writ of *habeas corpus* to be sent for him to Canada. The English court deliberated whether it had jurisdiction to send such a writ (concerns based purely on the fact that it would go to Canada, rather than on his nationality, for simply by being in Canada he was deemed a "British subject"). After stating that the court was "sensible of the inconvenience which may result from such a step," *id.* at 527, the court decided that it *would* issue the writ and order the man brought before them in London.[45] In this instance, an

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[45] *See* PATRICK BRODE, THE ODYSSEY OF JOHN ANDERSON (1989) for discussion of this case. Ultimately, Anderson was released in Canada before he could be sent to England. Shortly after *Ex parte Anderson* many of the

English court was asserting that it had the power under the common law to order a foreigner to be brought to London for a determination as to whether he should be set free there.

5. 1863-1961

Despite the enactment of the Habeas Corpus Act of 1862, 25 and 26 Vict., c. 20 (Eng.), English courts continued to send writs to other jurisdictions. The King's Bench in London sent a writ to the Isle of Man in 1864, just as it had done so earlier. *Ex parte Brown*, (1864) 122 Eng. Rep. 835 (Q.B.).

In 1923, Art O'Brien, a British national, was arrested in London, and then, because he was an Irish republican sympathizer, deported to the newly independent Irish Free State where he was held in a Dublin jail. *R v. Sec'y of State for Home Affairs, ex parte O'Brien,* (1923) 2 K.B. 361. O'Brien

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same judges heard *In Re Mansergh*, (1861) 121 Eng. Rep. 764 (Q.B.). This concerned a court-martial case from India and the judges clarified that *Ex parte Anderson* was not authority that writs would be sent to all colonies. In response to *Ex parte Anderson*, the Habeas Corpus Act, 1862, 25 and 26 Vict., c. 20 (Eng.), was passed to prohibit sending a writ from London to a jurisdiction that had its own Supreme Court with the power to issue writs.

successfully applied in London for a writ of *habeas corpus*, at which time the Home Secretary was required to "make the return to writ and have the body of Art O'Brien before the Court of Appeal [in London] on May 16, 1923." *Id.* at 399. The report of the case laconically concludes, "He produced the body of the said Art O'Brien in Court. O'Brien was thereupon discharged." *Id.* at 400.

The case of *Abdul Aziz Shalman v. Governor of St Helena* is equally instructive. Unreported, June 13, 1961 (St. Helena Supreme Court), TNA, CO 1026/240 S4829. The case concerned Bahraini nationals who were unlawfully detained and then exiled to the island of St Helena in 1956. After a first failed attempt at a *habeas corpus* application, which went as far as the Privy Council,[46] further information regarding the timing of their arrest came to light which showed that they had been arrested two hours *earlier* than the Order in Council sanctioning their arrest and a second application was made. This second application was successful,

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[46] *Abdul Rahman al Baker v. Robert Edmund Alford*, (1960) A.C. 786 (P.C.).

and the applicants were released on St. Helena, and allowed entry to the United Kingdom.[47]

This case bears considerable similarity to the detentions at Guantánamo. In *Shalman*, despite the British Government having been complicit in their initial arrest and subsequent exile, as well as having resisted all previous attempts to have them released, there was no question upon a determination that the detention was unlawful, that the prisoners should be immediately released, and then subsequently allowed entry to the United Kingdom.

These more recent rulings remained faithful to the sweep of the writ as it has existed for centuries. A jailer must bring his prisoner into court and explain to the judge's satisfaction why the law permits the incarceration. Otherwise, the prisoner must be freed to walk out the courtroom doors.

CONCLUSION

From the 17th century onwards the writ of *habeas corpus* was conceived and used as a control

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47 Bernard Levin, *The Ex-prisoners of Saint Helena*, The Spectator (London), June 16, 1961, 865-866; *see also* David Clark & Gerard McCoy, The Most Fundamental Legal Right. Habeas Corpus in the Commonwealth 54-55 (2000).

against the unlawful use of executive power. This was achieved by granting to courts the ability to order the immediate and non-discretionary release of an illegally detained person. It would be a surprising result that would run counter to this history if the exercise of executive powers – in this instance immigration powers – was allowed to thwart the operation of the writ. The Respondents have conceded that the Petitioners are illegally detained, and that they cannot be returned to their country of origin. In this context, to affirm the decision of the court below is in effect to suspend the operation of *habeas corpus* for these Petitioners.

For the foregoing reasons, *amici* urge the Court to reverse the decision below and mandate the production of the Petitioners before the District Court for the issuance of an order of release.

Respectfully submitted,

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December 11, 2009

APPENDIX – LIST OF AMICI CURIAE

Members of the House of Lords:

Baroness Afshar, Lord Ahmed of Rotherham, Lord Alderdice, Lord Armstrong of Ilminster GCB, Lord Berkeley OBE, Lord Birt, Lord Bowness CBE, The Right Honourable Lord Boyd of Duncansby QC, Viscount Bridgeman, Lord Brooke of Alverthorpe, The Right Honourable Lord Brooke of Sutton Mandeville, The Right Honourable Baroness Butler-Sloss GBE, Lord Campbell of Alloway QC, Lord Carlile of Berriew QC, Lord Clement-Jones CBE, The Right Honourable Lord Cope of Berkeley, Lord Corbett of Castle Vale, The Right Honourable Baroness Corston, Lord Cotter, The Right Honourable Lord Crickhowell, Lord Crisp KCB, Lord Dholakia OBE, The Right Honourable Baroness D'Souza, Lord Dubs, Lord Dykes, Viscount Eccles CBE, Lord Evans of Temple Guiting CBE, The Right Reverend Lord Bishop of Exeter, Baroness Falkender CBE, Baroness Falkner of Margravine, Professor Baroness Finlay of Llandaff, Baroness Fookes DBE, Lord Freud, Lord Freyberg, Baroness Garden of Frognal, Baroness Gibson of Market Rasen OBE, Lord Glentoran CBE, The Right Honourable Lord Goldsmith QC, Lord Goodhart QC, Lord Gordon of Strathblane CBE, Baroness Goudie, Baroness Gould of Potternewton, Lord Greaves, Lord Grenfell, General the Lord Guthrie of Craigiebank CBE OBE, Baroness Hamwee, The Right Reverend Bishop Lord Harries of Pentregarth, Lord Haskel, Lord Haworth, Baroness Henig CBE, Lord Henley,

Lord Hodgson of Astley Abbotts CBE, The Right Honourable Lord Howe of Aberavon QC, Baroness Howe of Idlicote CBE, Lord Hylton, Lord Jay of Ewelme GCMG, The Right Honourable Baroness Jay of Paddington, The Right Honourable Lord Jenkin of Roding, Lord Joffe CBE, Lord Jones of Cheltenham, Lord Lea of Crondall OBE, Lord Leach of Fairford, Lord Lester of Herne Hill QC, Earl of Liverpool, Lord Low of Dalston CBE, Lord Lucas of Crudwell and Dingwall, The Right Honourable Lord Mackay of Clashfern, Lord Mackenzie of Framwellgate OBE, Lord Maginnis of Drumglass, Lord Marlesford, The Right Honourable Lord Mayhew of Twysden QC, Baroness McIntosh of Hudnall, Baroness Miller of Chilthorne Domer, Lord Mitchell, Lord Montagu of Beaulieu, Baroness Morgan of Huyton, Lord Newby OBE, Baroness Northover, Baroness O'Cathain OBE, Baroness O'Loan of Kirkinriola DBE, Lord O'Neill of Clackmannan, Baroness Paisley of St George's, Lord Pannick QC, Baroness Perry of Southwark, Lord Peston, Baroness Prosser, Lord Puttnam CBE, General the Lord Ramsbotham GCB CBE, Lord Rea, Lord Rennard MBE, The Right Honourable Lord Renton of Mount Harry, The Right Honourable Lord Rooker, The Right Honourable Lord Roper, Lady Saltoun of Abernethy, Earl of Sandwich, Earl of Selborne KBE, Baroness Sharp of Guildford, Lord Sheikh, Viscount Simon, Professor Lord Smith of Clifton, The Right Honourable Lord

Steel of Aikwood KT KBE, Baroness Stern CBE, Lord Taylor of Warwick, Lord Thomas of Gresford QC OBE, Baroness Thomas of Winchester, Lord Tombs, Baroness Tonge, Lord Tope CBE, Lord Tordoff, Lord Tyler CBE, Baroness Uddin, The Right Honourable Lord Waddington QC, The Right Honourable Lord Wakeham, Lord Walker of Aldringham GCB CMG CBE, Lord Wallace of Saltaire, The Right Honourable Lord Wallace of Tankerness, Baroness Walmsley, The Right Honourable Lord Warner, Baroness Warnock DBE, Baroness Warwick of Undercliffe, Baroness Whitaker, Baroness Wilkins, The Right Honourable Baroness Williams of Crosby, Lord Woolmer of Leeds

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