No. 05-5477

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ABU BAKKER QASSIM and ADEL ABDU' AL-HAKIM,

Petitioners-Appellants,

v.

GEORGE W. BUSH, ET, AL.,

Respondents-Appellees.

On Appeal From a Final Judgment of the
United States District Court for the District of Columbia

BRIEF OF *AMICUS CURIAE* AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF PETITIONERS-APPELLANTS

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INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents a fundamental question on the role of habeas corpus to remedy judicially-determined unlawful Executive detention. The central issue presented by the district court ruling is whether the federal courts are powerless to grant relief in a habeas corpus proceeding where detainees, who have been judicially determined to be in custody in violation of law and who indisputably do *not* qualify as "enemy combatants," remain incarcerated and without any judicial remedy whatsoever for their unlawful detention.

Amicus submits the instant brief to address three points. *First*, the district court erred in concluding that the immigration cases and the political branches' authority over admission of aliens preclude granting any relief for unlawful detention in this case. In *Clark v. Martinez,* 543 U.S. 371 (2005), the Supreme Court ordered the release from detention of aliens who had never been admitted or made an "entry" under the immigration laws. The Court did so over the government's intense objection that such relief would raise the same separation of powers and security concerns that caused the district court to deny relief in this case.

Second, the district court's failure to fashion an appropriate remedy misapprehended the authority and flexibility that 28 U.S.C. § 2243 confers. That provision embodies a congressional directive that habeas courts exercise their broad authority to fashion appropriate relief where immediate release is not feasible.

Third, the history and purpose of the Great Writ of Habeas Corpus, enshrined in the Constitution, cannot tolerate unlawful custody continuing unabated and indefinitely solely because the Judiciary deems itself incapable of fashioning meaningful relief. The writ that the Framers inherited from England embodies protections against detention practices by the Executive that would otherwise undermine the writ's efficacy. If the government's ability to

contrive forms of detention is capable of negating the courts' power to grant relief for unlawful incarceration, then the Suspension Clause would be eviscerated, and the Executive rather than the Judiciary will be the ultimate arbiter of detention.

INTEREST OF AMICUS

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization of more than 500,000 members dedicated to protecting the fundamental rights guaranteed by the Constitution and the laws of the United States. The ACLU has special expertise and experience regarding the rights of aliens and the forms of relief available in cases where release from detention is judicially compelled. The Immigrants' Rights Project ("IRP") of the ACLU conducts a nationwide program of litigation and advocacy to enforce and protect the constitutional and civil rights of non-citizens. The IRP litigated *INS v. St. Cyr*, 533 U.S. 289 (2001), and *Demore v. Kim*, 538 U.S. 510 (2003), in the Supreme Court and has litigated numerous cases applying the principles set forth in *Zadvydas v. Davis*, 533 U.S. 678 (2001), and *Clark v. Martinez*, 543 U.S. 371 (2005), governing release from immigration detention of aliens who cannot be removed to their home countries.

STATEMENT OF THE CASE

Petitioners Abu Bakker Qassim and Adel Abdu' Al-Hakim have commenced their fifth year of imprisonment by the United States. They were seized in late 2001, held at Kandahar, Afghanistan in January 2002, and transported to Guantanamo Naval Base by the United States government in June 2002, where they have been incarcerated ever since and remain today. App. 0212, 0346. They filed habeas corpus actions through counsel on March 10, 2005. App. 0011. In July 2005, petitioners' attorneys learned that both Qassim and Al-Hakim had been determined

not to be "enemy combatants" by the "Combatant Status Review Tribunals" in March 2005. App. 0212, 0218.

In December 2005, the district court held that any legal basis for petitioners' detention had ended and that their continued incarceration was unlawful. *Qassim v. Bush*, __ F. Supp. 2d __, No. CIV.A. 05-0497(JR), 2005 WL 3508654 (D. D.C. Dec. 22, 2005), at *3. Yet, the district court declined to order their release or issue a remedial order of any kind. Instead, the court concluded that, despite its categorical finding that the detention of these prisoners "is unlawful," *id.*, habeas relief would be denied because "a federal court has no relief to offer." *Id.* at *5.[1]

In the district court, the government opposed any order of release and every possible alternative to the petitioners' current incarceration. The district court considered and denied reassigning petitioners to non-custodial quarters at Guantanamo or ordering the government to consider exercising its statutory authority to transport petitioners within the district court's jurisdiction from Guantanamo to the District of Columbia. *See id.* at *3-4. The district court ruled that it lacked the power to provide a remedy that it unambiguously "believe[d] justice requires," *id.* at *3, including an order "requiring petitioners' release, without specifying how, or to where," *id.* at *4.

STATUTES AND REGULATIONS

All applicable statutes and provisions of constitutional and international law relevant to this appeal are set forth in the Brief of Petitioners-Appellants at 2-4 and are incorporated here by reference.

[1] Since the district court's decision in this case, Congress has amended the habeas corpus statute in the Detainee Treatment Act of 2005, Pub. L. No. 109-148, §§ 1001-1006, 119 Stat. 2680, 2739-44 (2005). The Brief of Petitioners-Appellants addresses the impact of that enactment and why the Act does not apply to this case. The instant brief is limited to the question of whether the district court erred in failing to grant relief.

ARGUMENT

The central question at issue here is whether the district court erred in failing to grant *any* relief after finding that the petitioners' detention is unlawful. In the government's view and under the district court's ruling, the Judiciary would be powerless to grant any relief whatsoever even though the United States transported the petitioners involuntarily to Guantanamo, the petitioners have been determined by the government itself not to be subject to "enemy combatant" designation, and the court has ruled that their custody is without legal authority. If the district court's holding is allowed to stand, the Executive will have effectively thwarted the Judiciary's authority to remedy unlawful incarceration by detaining petitioners at Guantanamo Naval Base and then invoking the nature and location of Guantanamo as the reason they cannot be released. Such contrivances cannot be reconciled with the purpose or the protections of the Great Writ.

The district court's conclusion is based on a misreading of the Supreme Court's immigration cases, is contrary to the court's remedial power under 28 U.S.C. § 2243, and violates the core purpose and historical guarantee of habeas corpus.

1. *The Immigration Cases Do Not Bar the Judiciary From Ordering Release and Authorizing Parole.*

The district court concluded that it could not grant any relief because of its mistaken conclusion that the political branches' authority over immigration admission and exclusion precluded a habeas court from ordering petitioners' transportation to the District of Columbia under the parole authority of the Executive. The court reasoned that "the only way [for the government] to comply with a release order would be to grant petitioners' entry into the United States" and that doing so would run afoul of the "special province of the political branches,

particularly the Executive, with regard to the admission or removal of aliens." *Qassim*, 2005 WL 3508654, at *4. The district court further believed that "[a]n order requiring their release into the United States – even into some kind of parole 'bubble,' some legal-fictional status in which they would be here but not have been 'admitted' – would have national security and diplomatic implications beyond the competence or the authority of this Court." *Id*. at *5 (footnote omitted).

None of the reasons given by the court withstand scrutiny under the Supreme Court's immigration cases. As an initial matter, the court's opinion reveals but fails to acknowledge the contradiction within its own analysis. The court correctly concluded that it plainly had the power to order the petitioners brought to the United States to appear at a hearing before the court "if genuine issues of material fact existed with regard to the legality of petitioners' detention." *Id.* at *3. If that were the case, "the habeas statute and the authority of *Rasul v. Bush* would … support an order to produce the bodies of petitioners here." *Id*. Then, the court could presumably "set appropriate conditions for petitioners' release into the community, on parole, until the government could arrange for their transfer to another country." *Id.* (citing authority).

But the court rejects relying on that inherent authority because petitioners' claim is purely legal rather than factual and their presence in court is not required to adjudicate their petition. *Id*. Even assuming the court is correct in characterizing petitioners' claim, the court's inherent power to order them brought to the District of Columbia cannot turn on that difference. Either a habeas court possesses (as it must) the authority both to conduct necessary hearings and – more critically – to grant meaningful relief if the petitioner prevails, or it does not. The power of the habeas court cannot depend on whether the petitioners' claim raises factual or legal issues. Moreover, allow that would create the ironic (if not perverse) incentive for petitioners to assert a

factual claim in order to invoke the court's greater authority and thereby be able to obtain meaningful relief.

More fundamentally, the district court erred in concluding that it lacked authority to order the Executive to "parole" petitioners to the United States as a remedy for the unlawful detention. That relief would not cause petitioners to be "admitted" to the United States in any sense that contravenes the political branches' immigration authority. The court's conclusion that such an order would compel the petitioners' "*entry* into the United States," *Qassim*, 2005 WL 3508654, at *4 (emphasis added), reflects a fundamental misunderstanding of the parole authority and the Supreme Court's precedents. Far from being supported by the immigration case law of the Court, the district court's analysis is inconsistent with the reasoning of *Zadvydas v. Davis*, 533 U.S. 678 (2001), and *Clark v. Martinez*, 543 U.S. 371 (2005).

The immigration statute provides a specific mechanism, "parole," by which noncitizens can be brought to the United States, or released from detention, without conferring any of the statutory rights that would accompany "admission" or a legal "entry." *See* 8 U.S.C. § 1182(d)(5)(A). The Supreme Court long ago recognized that allowing parole out of detention does not confer legal status on the alien:

> For over a half century this Court has held that the detention of an alien in custody pending determination of his admissibility does not legally constitute an entry though the alien is physically within the United States. … Our question is whether the granting of temporary parole somehow effects a change in the alien's legal status. . . . Congress specifically provided that parole "shall not be regarded as an admission of the alien[.]"

Leng May Ma v. Barber, 357 U.S. 185, 188 (1958) (citations omitted). *See also Kaplan v. Tod*, 267 U.S. 228, 230-31 (1925) (excludable alien paroled into country held not to have made an "entry" under the immigration statute). A paroled alien has long been deemed to remain in the

same status as one "on the threshold of initial entry." *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953).

Ordering the Executive to exercise its statutory parole authority as a remedy for its own unlawful conduct that is causing petitioners' detention would not run afoul of the separation of powers doctrine or usurp the role of the political branches.[2] In both *Zadvydas* and *Martinez*, the Supreme Court rejected the government's submission that it would violate the separation of powers or exceed the judiciary's authority for a court to compel the release into the community (under appropriate supervision) of aliens who had no right to enter or remain in the United States. In both cases, the Court emphasized that such release from detention did not transgress the courts' proper role. The Court acknowledged that the practical result of such an order would be release into the community. But it emphasized that such release did not confer a legal right to "liv[e] at large" but merely a right to be "supervis[ed] under release conditions that may not be violated"). *Zadvydas*, 533 U.S. at 696.

Martinez is particularly relevant because the Supreme Court confronted the situation of aliens who had never been granted entry to the United States. The aliens in that case indisputably had no right to be admitted to the United States because they had been convicted of serious criminal offenses. 543 U.S. at 374-75. They nonetheless asserted a right to be released from incarceration on the ground that their continued detention was unlawful. 543 U.S. at 374-75, 376. Those aliens were detained because, like the petitioners here, they could not be removed to their home country and no other country would take them. The Court held that their

[2] In contrast, as the government evidently concedes, petitioners' return to China is affirmatively prohibited because they are at risk of torture. App. 0275-76.

continued incarceration was without statutory authorization and that they must be released into the community. See i*d.* at 386-87.

The government vigorously argued in *Martinez*, as it does in this case, that judicially compelled release of the individuals from detention would violate the separation of powers. In particular, the government asserted that granting habeas relief to aliens who had never been admitted would confer a judicially-ordered entry into our country over the objection of the political branches. The government specifically attempted to distinguish the Court's earlier decision in *Zadvydas* on the ground that it concerned only aliens who previously had been lawfully admitted and then lost their right to remain. *See Zadvydas*, 533 U.S. at 693. *See also* Brief for the Petitioners [United States], *Martinez* (No. 03-878), 2004 WL 1080689, at 20.

The situation presented by *Martinez*, the government argued, was entirely different because the aliens had *never been admitted*. Brief for the Petitioners [United States], *Martinez* (No. 03-878), 2004 WL 1080689, at 20. For a court to order the release of such aliens would pose grave separation-of-powers and national security concerns:

> That constitutional distinction [between aliens admitted by our government and those stopped at the border] rests not just on historical conceptions of the power of the national government to control immigration and the very limited rights of individuals arriving at the border, but also on practical separation-of-powers considerations in this sensitive area where foreign policy and national security intersect.
> * * *
> [W]hen the political Branches have stopped an alien at the border and have made the quintessentially political determination that he should not be admitted or released into the United States, a judicial order compelling his release into the Country would *cause* an entry that the political Branches have refused and, in the process, would directly countermand the specific and individualized entry decision made by those whom the Constitution has charged with protecting the borders and conducting foreign relations. It simply "is not within the province of the judiciary to order that foreigners who have never … even been admitted into the country" should "be permitted to enter, in opposition to the constitutional and

lawful measures of the legislative and executive branches."

Id. at 19-20 (citing cases) (emphasis added).[3]

The Supreme Court necessarily rejected this reasoning when it held in *Martinez* that inadmissible aliens stopped at our border and denied entry must be released (subject to permissible conditions of supervision) if their detention becomes unlawful. *See* 543 U.S. at 378, 386-87.[4] The Court's decision ordering release from detention – and thus parole into the country over the government's vehement objection – compels rejection of the district court's erroneous conclusion that the immigration cases prohibit meaningful judicial relief in this case. As in

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[3] *See also* Brief for the Petitioners [United States], *Martinez* (No. 03-878), 2004 WL 1080689, at 16-17 (citations omitted):

> The singular authority of the political Branches over immigration derives from the "inherent and inalienable right of every sovereign and independent nation" to determine which aliens it will admit or expel. Indeed, the power "to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe," is not only "inherent in sovereignty," but also "essential to self-preservation." That power is vital "for maintaining normal international relations and defending the country against foreign encroachments and dangers." The power to exclude is a legislative and an "inherent executive" power. Accordingly, "[c]ourts have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control."
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> * * *
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> The political Branches' comprehensive control over immigration matters reaches its apex when dealing with aliens who are stopped at the border and are seeking admission to the United States[.]

The government's brief in *Martinez* relied on the same cases that the district court cited below. *Compare Qassim*, 2005 WL 3508654, at *4 (citing *Fong Yue Ting v. United States, Knauff v. Shaughnessy* and *Fiallo v. Bell*) *with* Brief for the Petitioners [United States], *Martinez* (No. 03-878), 2004 WL 1080689, at 15-17 (citing same).

[4] *Martinez* arose in the context of Mariel Cubans who had physically been paroled, but the holding governs *all* "inadmissible" aliens, including specifically aliens detained at the border who have never been physically present in the territory of the United States at all.

Martinez, parole is a judicially-enforceable remedy for the unlawful executive detention of aliens with no right to enter the United States.

The district court's other reason for rejecting immigration parole was the stated concern that doing so would have "national security and diplomatic implications" beyond its authority. The *Martinez* Court necessarily rejected that contention as well when it ordered release over the government's identical objections that compelling of inadmissible aliens "stopped at the border" would compromise our national security. *See* Brief for the Petitioners [United States], *Martinez* (No. 03-878), 2004 WL 1080689, at 37-40.[5] Indeed, in a notable respect, the consequence of *Martinez* has broader implications than providing relief to these petitioners. Under *Martinez*, the Court's ruling applies to inadmissible aliens without any right to entry or admission who unilaterally decide to come to our shores without authorization or any participation by our government. Here by contrast, the petitioners never sought to enter or be admitted to the United States and are now seeking parole under judicial and executive supervision. A judicial order of

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[5] The government vigorously argued that judicially-compelled release of inadmissible aliens would have dire constitutional, safety, security and diplomatic consequences:

> Moreover, adopting what would be, for all practical purposes, a time limit on the physical exclusion of aliens would have significant foreign policy and security implications for the United States – areas into which the judiciary should be loath to tread (if at all) without the clearest direction from Congress and the Executive Branch. Any diminution in the political Branches' comprehensive control over the borders, the admission of aliens, and the management of international migration crises would render the Nation more vulnerable to manipulation and infiltration by hostile powers and would tie the government's hands in responding to humanitarian emergencies.
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> * * *
>
> It is difficult to understate the damage that could occur to the United States' international relations and national security if the government does not speak with one voice in the handling of migration crises at the border, or if foreign powers are told that the President and Congress cannot control the physical infiltration into the United States of criminals and other aliens stopped at the border.

Brief for the Petitioners [United States], *Martinez* (No. 03-878), 2004 WL 1080689, at 39, 41.

release pursuant to a determination of unlawful detention (and under conditions of release applicable to the *Martinez* aliens) would apply to a limited universe of cases, and to far fewer aliens than are governed by *Martinez.*[6]

Finally, the district court evidently believed that bringing petitioners to the District of Columbia as a remedy for their unlawful detention would *ipso facto* compel their release into the community. *Qassim*, 2005 WL 3508654, at *5. But the habeas remedy would address petitioners' *current* unlawful detention by the Executive and would not in itself preclude application of other relevant immigration or criminal statutes governing admission, detention and release. In this case, the conclusive Combatant Status Review Tribunal determination that petitioners are *not* enemy combatants would appear to reject the concerns of dangerousness or terrorism that animated the district court's decision. But even if the circumstances of petitioners were different, a court providing relief in this habeas action would not thereby be abrogating other statutory authority the government might possess.[7]

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[6] In *Martinez*, the government estimated that more than 1000 aliens would apparently gain release if the Court rejected the government's position and that a total of approximately 4020 aliens were then in the pipeline to benefit from a favorable ruling. See Brief of Petitioner [United States], *Martinez* (No. 03-878), 2004 WL 1080689, at 8 & n.5. Court decisions implementing *Martinez* indicate that judicial release orders are proceeding unremarkably. *See, e.g., Morales-Fernandez v. INS*, 418 F.3d 1116, 1124 (10th Cir. 2005) (holding that *Martinez* "dictates that Mr. Morales-Fernandez be released and paroled into the United States"); *Tran v. Gonzales* __F. Supp. 2d __, No. CIV.A.04-2202, 2006 WL 217947 at *2 (W.D. La. Jan. 22, 2006) (ordering petitioner's release from detention "under an order of supervision on conditions that the government believes are appropriate under the circumstances").

[7] Insofar as other statutes may authorize exclusion or even detention of inadmissible aliens and parolees, the government could presumably invoke them if they were applicable to these petitioners in the future. As the *Martinez* Court noted, other provisions of law may authorize detention of an inadmissible alien and parolee "who presents a national security threat or has been involved in terrorist activities." 543 U.S. at 727 n.8 (quoting USA PATRIOT Act of 2001, § 412(a), 115 Stat. 350 (enacted Oct. 26, 2001) (codified at 8 U.S.C. § 1226a(a)(6))). Furthermore, any alien entitled to release under the immigration detention statute can be

2. *The Habeas Corpus Statute Authorizes the Judiciary to Provide Meaningful Relief for Unlawful Detention.*

The district court's failure to grant relief also contravenes the duty imposed by 28 U.S.C. § 2243, namely that the court "shall summarily hear and determine the facts, and dispose of the matter as law and justice require." The court expressly concluded that "justice requires" granting relief, but believed itself without legal authority to do so. *Qassim v. Bush*, __ F. Supp. 2d __, No. CIV.A. 05-0497(JR), 2005 WL 3508654 (D. D.C. Dec. 22, 2005), at *3. Although the district court correctly looked to 28 U.S.C. § 2243 in determining the scope of relief appropriate here, the court misapprehended the statute's significance by construing it as a limit on its ability to fashion a remedy in the circumstances of this case. In fact, § 2243 provides a court with flexibility to fashion appropriate relief under circumstances where it concludes that outright release may not be feasible or warranted. In this case, the court failed to take the measures necessary to achieve that purpose.

Section 2243 and its antecedents were enacted to give habeas courts greater flexibility to fashion appropriate remedies where immediate release was not appropriate or practicable – not to authorize denial of relief altogether. In construing a predecessor statute containing nearly identical language, the Supreme Court explained that the provision "invested [the courts] with the largest power to control and direct the form of judgment to be entered in cases brought up before it on habeas corpus." *In re Bonner*, 151 U.S. 242, 261 (1894). *See also Hilton v.*

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subjected to conditions of supervised release and to criminal penalties – including further detention – for failure to comply. *See id.* at 387-88. (O'Connor, J., concurring). *See also Zadvydas*, 533 U.S. at 695 (in ordering release "[w]e nowhere deny the right of Congress to remove aliens, to subject them to supervision with conditions when released from detention, or to incarcerate them where appropriate for violations of those conditions"). In any case, it appears that the government has not articulated any such concerns here and that the petitioners requested a hearing before the district court to provide any necessary assurances in this regard.

Braunskill, 481 U.S. 770, 775 (1987) (stating that under § 2243, "a court has broad discretion in conditioning a judgment granting habeas relief"); *Carafas v. LaVallee*, 391 U.S. 234, 239 (1968) (explaining that § 2243's "mandate is broad with respect to the relief that may be granted"); *Miller v. Overholser*, 206 F.2d 415, 420 (D.C. Cir. 1953) ("Courts have said many times that the availability of the great writ must not be circumscribed by any technical considerations, and the statute directs that the court shall dispose of the petition 'as law and justice require.'") (quoting 28 U.S.C. § 2243).

Accordingly, the Supreme Court has held that a habeas court may delay the release of a successful petitioner in order to provide the government with "an opportunity to correct the constitutional violation found by the court." *Hilton*, 481 U.S. at 775. In other words, if the error is of a kind that may be corrected without release, a court may allow the government an opportunity to correct the violation. *See, e.g., Mahler v. Eby*, 264 U.S. 32, 46 (1924) (directing that petitioners not be released until the government had a reasonable time in which to correct the defect).

But that is plainly not the case here. The district found that release was warranted but declined to fashion any remedy. This is a case where the violation is not susceptible to correction, and release is therefore the norm. *See In re Bonner*, 151 U.S. at 262 (where "no correction can be made of the judgment, . . . the prisoner must then be entirely discharged").

Section 2243 reflects a congressional directive that courts sitting in habeas make every effort to provide some appropriate remedy to those whose liberty is unlawfully restrained. The statute cannot be read to authorize a complete denial of relief to one who has been found to be detained unlawfully. Notably, the courts have deemed habeas competent to address claims that would result only in a small "quantum change in the level of custody." *Graham v. Broglin*, 922

F.2d 379, 381 (7th Cir. 1991) (Posner, J.) (discussing array of habeas relief as encompassing "outright freedom, or freedom subject to the limited reporting and financial constraints of bond or parole or probation, or the run of the prison in contrast to the approximation to solitary confinement that is disciplinary segregation").

Under § 2243, once the district court found that the petitioners were being detained in violation of law, the court was obligated to fashion some appropriate remedy or, at a minimum, to direct the government to consider and propose alternatives to correct the violation within a reasonable time. Thus, even if the district court were justified in hesitating to impose a specific remedial course immediately, the court must be reversed for failing to take even the modest step of ordering conditional release and requiring the government to offer conceivable alternatives for implementing the court's directive.

3. *Denial of Relief for Unlawful Detention Eviscerates the Core Protection Guaranteed by the Writ of Habeas Corpus.*

Most fundamentally, the district court's decision must be reversed because it eviscerates the most essential protection of the Great Writ of Habeas Corpus, a judicial remedy for unlawful executive detention. Habeas corpus, enshrined in our Constitution from England, is the core protection against illegal detention by the Executive. The very purpose of the writ would be negated if the Executive engaging in unlawful detention were capable of imposing forms of incarceration that render the Judiciary powerless to grant relief from custody. That would have the effect of debilitating the Suspension Clause and would make the Executive, rather than the Judiciary, supreme in matters of detention. The writ would be turned on its head, and the Executive would become the ultimate arbiter of when habeas corpus can accomplish its purpose of compelling release from unlawful detention.

The Great Writ, protected by the Suspension Clause, was "[c]onsidered by the Founders as the highest safeguard of liberty" and was "written into the Constitution" for that reason. *Smith v. Bennett*, 365 U.S. 708, 712 (1961). Indeed, the Framers included the Suspension Clause in the original document even though the Constitution included few provisions protecting individual rights before passage of the Bill of Rights.

The Supreme Court has repeatedly and recently emphasized that the writ's protections are at their greatest when the custody concerns *executive* detention. "[A]t its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest." *INS v. St. Cyr*, 533 U.S. 289, 301 (2001). *See also Swain v. Pressley*, 430 U.S. 372, 386 (1977) (Burger, C.J., concurring); *Brown v. Allen*, 344 U.S. 443, 533 (1953) (Jackson, J., concurring in result); *Lonchar v. Thomas*, 517 U.S. 314, 322 (1996). *See generally Rasul v. Bush*, 542 U.S. 466, 474 (2004).

Judicial enforcement of the Great Writ is, by design and practice, the greatest protector of personal liberty in the Anglo-American legal system. *See* Zechariah Chafee, Jr., *The Most Important Human Right in the Constitution*, 32 B.U. L. Rev. 144 (1952). The writ serves as "the great bulwark of personal liberty; since it is the appropriate remedy to ascertain whether any person is rightfully in confinement or not." Joseph Story, *Commentaries on the Constitution of the United States* § 1333 (1833). As such, it is essential that the Judiciary provide a *remedy* when executive detention is found to be unlawful.

It is well established that common law traditions and usages of habeas in England and this country figure prominently in ascertaining the scope of the writ's protections. *See, e.g.*, *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 93-94 (1807) ("[F]or the meaning of the term habeas corpus, resort may unquestionably be had to the common law"); *Preiser v. Rodriguez*, 411 U.S.

475, 485 (1973) ("By the time the American Colonies achieved independence, the use of habeas corpus to secure release from unlawful physical confinement . . . was thus an integral part of our common-law heritage."); *Peyton v. Rowe*, 391 U.S. 54, 59 (1968) ("(t)o ascertain its meaning and the appropriate use of the writ in the federal courts, recourse must be had to the common law . . . and to the decisions of this Court interpreting and applying the common-law principles") (quoting *McNally v. Hill*, 293 U.S. 131, 136 (1934)). *See also Ex parte Parks*, 93 U.S. 18, 21 (1876). S*ee generally* William F. Duker, *Constitutional History of Habeas Corpus* (1980).

The English writ that the Framers inherited embodied protections against procedural devices deployed by the Executive to impede the efficacy of the writ. In his renowned article, *The Most Important Human Right in the Constitution*, Professor Chafee recounts the evolution of the writ in England and its incorporation into our Constitution. Among the central safeguards enacted by the British Parliament in 1687, and already embodied into the writ at the time of the Constitution, were the protections against the Crown undermining the practical capacity of the Judiciary to enforce the writ. In particular, Chafee explains that *Jenckes' Case*, 6 How. St. Tr. 1189 (1676), led to a series of reforms intended by Parliament to overcome failures by the Judiciary to effectuate the right to a habeas hearing and to order actual release. *See* 32 B.U. L. Rev. at 148-50.

Chafee further details that among the tactics of the custodians at that time was "sending prisoners to the Channel Islands and to army garrisons" as a means of thwarting release. *See id.*, at 150. That and other practical problems caused Parliament to act. Chafee explains the Parliament's response: "These evils did not call for a new formulation of liberty of the person – that had been well done years before . . . . The real trouble was with the procedure available to vindicate that liberty. Yet it was not necessary to create entirely new machinery – the common-

law writ of habeas corpus was good when it worked. What was needed was to tighten up and sharpen the machinery all down the line, and the Habeas Corpus Act did just that." *Id*. at 150. Thus, Chafee continues, Parliament enacted a restriction for "*every possible hitch* in the proceedings Parliament could foresee." *Id.* at 152 (emphasis added). Included among these was a "list of places outside England to which English prisoners must not be sent." *Id*.

These reforms and many others were codified in our habeas corpus statute, now at 28 U.S.C. § 2241, and secured by the Suspension Clause. They underscore that an effective judicial remedy for unlawful detention is the cornerstone of habeas corpus. The district court's failure in this case to grant any relief for petitioners' detention after finding it unlawful is at odds with that history and purpose. *See Jones v. Cunningham*, 371 U.S. 236, 243 (1963) (noting that the writ "is not now and never has been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose – the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty"). *See also Fay v. Noia*, 372 U.S. 391, 401-02 (1963) (function of habeas writ has been "to provide a prompt and efficacious remedy for whatever society deems to be intolerable restraints"); *Ex parte Milligan*, 71 U.S. 2, 116 (1866) (Davis, J.) ("[i]t was the manifest design of Congress to secure a certain remedy by which any one, deprived of liberty, could obtain it, if there was a judicial failure to find cause of offence against him"); *Chatman-Bey v. Thornburgh*, 864 F.2d 804, 806 (D.C. Cir. 1988) (en banc) (Starr, J.) ("habeas' role is to serve as an effective and imperative remedy" for detentions in violation of law) (citation and punctuation omitted).

This case presents a new version of the tactics that historically have been – and legally must be – rejected if the writ is to continue to serve as the central guarantor of human liberty and the rule of law. The government seized and transported the petitioners to Guantanamo, the

government detained them pending an adjudication by the Combatant Status Review Tribunal, and the government now refuses to find any alternative to their present incarceration or to release them – because they are at Guantanamo. In other words, the Executive has created the very circumstances that it now insists preclude petitioners' release or any remedy whatsoever. At a bare minimum, the district court was obliged to do more than it did and to order some relief. If its failure to do so is permitted, the Executive will possess the ultimate trump in any similar habeas proceeding where the custodian can construct conditions of incarceration so restrictive or byzantine that they can later be invoked as constituting practical or legal impediments to a judicial remedy.

Ultimately, as with earlier procedural hurdles that the courts and common law have rejected, habeas corpus may not be compromised in this manner. Today, as before, "habeas corpus cuts through all forms and goes to the very tissue of the structure. It comes in from the outside, not in subordination to the proceedings, and although every form may have been preserved, opens the inquiry whether they have been more than an empty shell." *Frank v. Mangum*, 237 U.S. 309, 346 (1915) (Holmes, J., dissenting).

The value of the writ lies in commanding the government to provide a legal accounting in court and a remedy if the confinement is unlawful:

> [T]he glory of the English law consists in clearly defining the times, the causes, and the extent when, wherefore, and to what degree, the imprisonment of the subject may be lawful. This induces an absolute necessity of expressing upon every commitment the reason for which it is made; that the court upon an habeas corpus may examine into its validity; and according to the circumstances of the case may discharge, admit to bail, or remand the prisoner.

3 William Blackstone, *Commentaries on the Laws of England* *133 (emphasis added). The district court erred by failing to comply with that mandate.

CONCLUSION

For the reasons and upon the authorities cited above, the judgment of the district court should be reversed in part and the case remanded with instructions that the court grant relief to remedy the petitioners' unlawful detention.

Respectfully submitted,

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