

No. 05-892

IN THE
Supreme Court of the United States

ABU BAKKER QASSIM, ET AL.,

Petitioners,

—v.—

GEORGE W. BUSH, ET AL.,

Respondents.

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

**AMICUS CURIAE BRIEF OF THE
AMERICAN CIVIL LIBERTIES UNION
IN SUPPORT OF THE PETITION FOR CERTIORARI**

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INTRODUCTION¹

The petitioners in this case are detained by the United States at its military base at Guantanamo Bay, Cuba. The government itself has concluded that the petitioners do *not* qualify as “enemy combatants” and a federal district court has correctly held that petitioners’ continued detention under these circumstances is unlawful. The critically important question now presented to this Court is whether the federal courts are powerless to order a remedy for this unlawful detention, as the district court held, thus leaving the Executive with unreviewable discretion to determine if and when petitioners’ unlawful custody will end.

Amicus recognizes that *certiorari* before judgment is rarely granted. We nonetheless believe it is appropriate in this case because the district court’s conclusion is so fundamentally at odds with the history and purpose of habeas corpus, and because the ruling below dramatically highlights a pressing need to provide the lower courts with clear guidance on the proper scope of judicial authority in a habeas corpus proceeding.

As set forth below, the district court’s failure to grant relief rests on three fundamental errors. *First*, the court erred in concluding that this Court’s immigration cases and the political branches’ authority over the admission of aliens preclude the Judiciary from fashioning a meaningful remedy for petitioners’ unlawful custody. To the contrary, *Clark v. Martinez*, 543 U.S. 371 (2005), rejected the same separation of powers and security concerns that seemingly stymied the district court in this case, and this Court’s rulings provide

¹ Pursuant to Supreme Court Rule 37.2, letters of consent to the filing of this brief have been lodged with the Clerk of the Court. No counsel for either party to this matter authored this brief in whole or in part. Furthermore, no persons or entities, other than the amicus itself, made a monetary contribution to the preparation or submission of this brief.

ample authority to “parole” petitioners into the community subject to appropriate safeguards.

Second, the district court misapprehended the authority and flexibility provided by 28 U.S.C. § 2243. That statutory provision embodies a congressional directive that habeas courts exercise broad remedial authority to formulate appropriate relief when immediate release is not feasible.

Third, this is not the first instance in which an executive has tried to shape its detention practices in order to frustrate the ability of habeas courts to issue appropriate relief. As a matter of history and practice, therefore, habeas courts have long possessed the authority to fashion remedial orders that preserve the efficacy of the Great Writ and to ensure that unlawful custody does not continue unabated and indefinitely. Were the rule otherwise, habeas courts would be reduced to issuing advisory opinions and the Suspension Clause would be largely eviscerated.

INTEREST OF AMICUS CURIAE

The American Civil Liberties Union (“ACLU”) is a nationwide, nonprofit, nonpartisan organization of more than 500,000 members dedicated to protecting the principles of liberty and equality guaranteed by the Constitution and the laws of the United States. In furtherance of these goals, the ACLU has participated in numerous cases before this Court involving the scope of habeas corpus and the rights of non-citizens, including *INS v. St. Cyr*, 533 U.S. 289 (2001), and *Demore v. Kim*, 538 U.S. 510 (2003).

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 or early 2002, held in Afghanistan, and transported to Guantanamo

Naval Base by the United States government in June 2002, where they have been incarcerated ever since and remain today. Pet. App. 1a. They filed habeas corpus actions through counsel on March 10, 2005. Pet. App. 2a. 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. Pet. App. 2a-3a.

In December 2005, the district court held that any legal basis for petitioners' detention had ended and that their continued incarceration was unlawful. Pet. App. 6a. 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," Pet. App. 6a, habeas relief would be denied because "a federal court has no relief to offer." Pet. App. 11a.²

In the district court, the government opposed any order of release and rejected any alternative to the petitioners' ongoing (and indefinite) 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. Pet. App. 7a-

² 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). Amicus does not address that statute or its impact on this case at this stage because it was not in effect at the time of the district court's ruling and played no role in the district court's reasoning. As the petitioners note in their petition for writ of *certiorari* before judgment, there are ample grounds for the Detainee Treatment Act not applying to this case, which the parties may fully brief if the Court deems it necessary.

8a. The district court ruled that it lacked the power to provide a remedy that it unambiguously “believe[d] justice requires,” Pet. App. 6a, including an order “requiring the petitioners’ release, without specifying how, or to where,” Pet. App. 8a.

On December 23, 2005, petitioners filed their notice of appeal to the United States Court of Appeals for the District of Columbia Circuit. That appeal is currently pending and scheduled for oral argument on May 8, 2006.

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. That question is of pervasive and enduring importance and should be answered by this Court immediately to give proper guidance to the courts of appeals and district courts grappling with habeas corpus actions challenging the detention of foreign nationals at Guantanamo Naval Base.

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 this Court’s immigration cases, is contrary to

the Judiciary's remedial power under 28 U.S.C. § 2243, and violates the core purpose and historical guarantee of habeas corpus.

1. *This Court's Immigration Cases Do Not Bar the Judiciary From Ordering Release and Authorizing Parole of Unlawfully Detained Non-Citizens.*

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 preclude 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 the 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." Pet. App. 9a-10a. 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 would not have been 'admitted' – would have national security and diplomatic implications beyond the competence or the authority of this Court." Pet. App. 10a (footnote omitted).

As an initial matter, the district court's opinion makes plain but does not acknowledge the contradiction within its own analysis. The court correctly concluded that it necessarily had the power to order the petitioners brought to the United States to appear at a hearing before the court "[i]f genuine issues of material fact existed with regard to the legality of petitioners' detention." Pet. App. 7a. 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.” Pet. App. 7a. Then, the district 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.” Pet. App. 7a (citing authority).

But the district court rejected 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. Pet. App. 7a. Even assuming the court is correct in characterizing petitioners’ claim as legal, the district court’s power to order detainees 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 be less *after* a finding of unlawful detention, and cannot depend on whether the petitioners’ claim raises factual or legal issues. If the court’s remedial capacity were to turn on that distinction, it would create the ironic (if not perverse) incentive for petitioners to assert a factual claim in order to trigger the court’s greater authority and thereby 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,” Pet. App. 9a (emphasis added), reflects a fundamental misunderstanding of the parole authority and this 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 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 to remedy 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.³ In both *Zadvydas* and *Martinez*, the Court rejected the government's submission that a court compelling the release into the community (under appropriate supervision) of aliens who had no right to enter or remain in the United States would exceed the judiciary's authority or violate the separation of powers. 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 in that case the Court confronted the situation of aliens who had never been granted entry to the United States. The Court's holding demonstrates that parole is a judicially-enforceable remedy for the unlawful executive detention of aliens with no right to enter the United States. The aliens in that case were detained, were deemed to be outside the country and indisputably had no right to be admitted to the United States. 543 U.S. at 374-75. 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. 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. The Court held that their continued incarceration was without statutory authorization and that they must be released into the community. *See id.* at 386-87.

The government vigorously argued in *Martinez*, as it has in this case, that judicially compelled release of those

³ As the government evidently concedes, petitioners' return to China is affirmatively prohibited because they are at risk of torture. Pet. for Cert. at 7.

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 addressed 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] at 20, *Clark v. Martinez*, 543 U.S. 371 (2005) (No. 03-878), 2004 WL 1080689.

In contrast, the aliens in *Martinez*, the government argued, could not be released because they (like the petitioners here) had *never been admitted*. Brief for the Petitioners [United States] at 20, *Martinez* (No. 03-878), 2004 WL 1080689. The government insisted that a judicial order of release 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).⁴

⁴ See also Brief for the Petitioners [United States] at 16-17, *Martinez* (No. 03-878), 2004 WL 1080689 (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

This Court necessarily rejected the government’s 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, 386-87.⁵ 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 Court’s immigration jurisprudence prohibits granting meaningful judicial relief in this case.

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. In *Martinez* this Court also necessarily rejected that contention when it ordered petitioners’ release over the identical objection that releasing inadmissible aliens “stopped at the border” would compromise our national security. *See* Brief for the Petitioners [United States] at 37-

largely immune from judicial control.”

* * *

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* Pet. App. 10a (citing *Fong Yue Ting v. United States*, *Knauff v. Shaughnessy* and *Fiallo v. Bell*) with Brief for the Petitioners [United States] at 15-17, *Martinez* (No. 03-878), 2004 WL 1080689 (citing same).

⁵ *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.

40, *Martinez* (No. 03-878), 2004 WL 1080689.⁶ Indeed, in one notable respect, the release ordered under *Martinez* has broader implications than providing relief to these petitioners. The *Martinez* ruling applies to all inadmissible aliens, including all who unilaterally come to our shores without authorization and whose arrival is entirely outside the control of our government. In this case, by contrast, the petitioners include only those who were brought to our territory by the government, who have never sought to enter

⁶ 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.

* * *

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] at 39, 41, *Martinez* (No. 03-878), 2004 WL 1080689.

or to be admitted to the United States, and who are now seeking parole only under judicial and executive supervision. In short, a judicial order of release (with appropriate conditions) pursuant to a finding of unlawful detention would apply only to a limited number of cases and to far fewer aliens than those already governed by *Martinez* and the unknown number who will be covered in the future.⁷

Finally, review is warranted to correct the district court's seeming belief that bringing petitioners to the District of Columbia as a remedy for their unlawful detention would *ipso facto* compel their release into the community. Pet. App. 10a. In fact, 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 establish that the concerns of dangerousness or terrorism that animated the district court's decision are absent. But even if that were not the case, a court providing relief in this habeas action would

⁷ In *Martinez*, the government estimated that more than 1,000 aliens would apparently gain release if the Court rejected the government's position and that a total of approximately 4,020 aliens were then in the pipeline to benefit from a favorable ruling. See Brief of Petitioner [United States] at 8 & n.5, *Martinez* (No. 03-878), 2004 WL 1080689. 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* 411 F. Supp. 2d 658, 660 (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").

not thereby be abrogating other statutory authority the government might possess.⁸

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. Pet. App. 6a. 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

⁸ 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 Court noted in *Martinez*, 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 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.

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, this 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. 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”).

Accordingly, the 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”), *cited with approval in Wilkinson v. Dotson*, 544 U.S. 74, 125 S. Ct. 1242, 1250 (2005) (Scalia, J., concurring).

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, *certiorari* should be granted because the court erred in 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, review is warranted because the district court’s decision 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.

This 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). *See generally Rasul v. Bush*, 542 U.S. 466, 474 (2004).

The English writ that the Framers inherited embodied protections against procedural devices deployed by the Executive to impede the efficacy of the writ. *See* Zechariah Chafee, Jr., *The Most Important Human Right in the Constitution*, 32 B.U. L. Rev. 144 (1952). In his renowned article, 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 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”).

This case presents a new version of the tactics that historically have been – and legally must be – rejected for the writ 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.

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 set forth above, amicus respectfully submits that the petition for writ of *certiorari* before judgment should be granted.

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