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Brief Amici Curiae of Legal Historians Listed Herein in Support of Repondent, I.N.S. v. St. Cyr, No. 00-767 (U.S. Mar. 27, 2001), .

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Docket No. 00-767

United States Supreme Court Amicus Brief.
IMMIGRATION AND NATURALIZATION SERVICE,
Petitioner,
v.
Enrico ST. CYR, Respondent.
No. 00-767.
March 27, 2001.

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

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STATEMENT OF INTEREST[1]

The first question herein is whether the federal courts may

[1] *Amici* state that no party or its counsel has authored this brief in whole or in part, nor has any person or entity other than *amici* and their counsel made any monetary contribution to its preparation. Letters of consent by the parties to the filing of this Brief have been lodged with the Clerk of this Court. Sup. Ct. R. 37.6.

review Respondent's statutory retroactivity claim on *habeas corpus*. *Amici curiae* are professors of legal history at law schools and universities in the United States and England with expertise in English legal history prior to 1789 and/or early American legal history. The professional interest of *amici curiae* legal historians is in ensuring that the Court is fully and accurately informed respecting the historical precedent, understandings and evidence regarding the scope and availability of the writ of *habeas corpus* that, under this Court's precedents, are properly considered in evaluating the issues raised under the Suspension Clause. U.S. Const., Art I, § 9, cl. 2. The people whose lives and writings *amici curiae* study, including the generation which drafted this country's Constitution, considered *habeas corpus* a great bulwark of personal freedom, and unquestionably the Framers, educated in English law, drew on their common law comprehension when they prohibited suspension of the writ. *Amici curiae* have no personal, financial, or other professional interest, and take no position, respecting the other issues raised in the case at bar.

SUMMARY OF ARGUMENT

Respondent Enrico St. Cyr asserts that he is in custody and subject to deportation by the Immigration and Naturalization Service ("INS") based on the agency's misinterpretation of its organic statute, the Immigration and Nationality Act, 8 U.S.C. §§ 1101 *et. seq*. Mr. St. Cyr contends that Congress, in amending the immigration statutes in 1996 to eliminate certain forms of discretionary relief from deportation, did not intend the amendments retroactively to render him ineligible for relief based on conduct or convictions that predated the 1996 laws. The administrative courts rejected Mr. St. Cyr's statutory interpretation and refused to consider his application for relief. In his petition for a writ of *habeas corpus*, Mr. St. Cyr asked that a U.S. district court judge adjudicate his statutory retroactivity claim and determine the lawfulness of his custody by the Executive branch.

The INS responds that no judge may consider Mr. St.

Cyr's statutory claim, on *habeas* petition or otherwise. In her opening brief, the Acting Solicitor General argues that the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") requires, and the Constitution permits, the conclusion that no court can review the agency interpretation of the relevant provision, even if, as Mr. St. Cyr claims, that interpretation is incorrect and therefore results in Respondent's unlawful detention and deportation.

The Acting Solicitor General maintains that this conclusion is consistent with the Suspension Clause because "non-constitutional" claims such Mr. St. Cyr's statutory retroactivity claim are "well removed" from the "core of the Great Writ." (Brief for Petitioner at 27, 28.) The government in its brief reviews late nineteenth century and early twentieth century challenges to deportation orders and discerns "four kinds of challenges" that are concededly subject to judicial review: (1) where the person detained was a citizen, not an alien; (2) for an alien deprived of a "fundamentally fair administrative proceeding"; (3) where the factual finding of deportability was "completely without supporting evidence"; and (4) where the case did not fall within any statutory category for deportation. *Id.* at 30.

The historical evidence set forth below shows, however, that whenever a deprivation of liberty was predicated upon determination of a question of law, that determination was reviewable on *habeas*. *Amici curiae* are unaware of evidence that either the English common law or early American *habeas* practice recognized the sort of parsing of legal claims urged by the government here. Rather, the historical evidence indicates that the statutory interpretation claim raised by Respondent falls within the scope of *habeas corpus* at common law.

1. The writ of *habeas corpus* was available to persons subject to civil detention in a wide range of contexts in England prior to 1789. The INS may be analogized to eighteenth century executive agencies such as the British Navy, administrative bodies such as the Sewer Commissioners, or courts

of "inferior" (limited) jurisdiction. As both case law and commentaries confirm, unlawful detention by any such bodies could be corrected upon issuance of *habeas corpus*. The Great Writ was available to non-enemy aliens and citizens alike. *Habeas* was commonly granted where a detention was grounded on an error of law, including an error of statutory interpretation. *Habeas* was never fettered by any requirement that the error go to the jurisdiction of the decision-maker who decided to detain petitioner. Moreover, any distinction between constitutional and non-constitutional errors was unknown to English law and *habeas corpus* in the English courts. Legislative efforts to reform *habeas* procedure in England in the late seventeenth to early nineteenth centuries also uniformly assumed the broad availability of the writ to correct errors of law that resulted in civil detention by the government.

2. Similarly, early American courts commonly utilized *habeas* to resolve disputes of law, including disputes of statutory construction, raised by petitioners detained civilly. American common law also extended such remedies to non-citizens. Early American jurists who interpreted statutes on *habeas* challenges to civil confinement included John Marshall, Joseph Story, and Lemuel Shaw. Further, while the distinction between constitutional and non-constitutional errors of law does have meaning in the American historical context, it does not appear to have ever been used to confine to constitutional errors the scope of *habeas corpus* in cases of civil, Executive branch detention.

ARGUMENT

I.
AT COMMON LAW IN ENGLAND, *HABEAS CORPUS* WAS AVAILABLE GENERALLY TO REVIEW THE LEGALITY OF CIVIL CONFINEMENT, WITHOUT LIMITATION AS TO CITIZENSHIP OR THE NATURE OF THE ILLEGALITY ASSERTED

Case Law and Commentaries Demonstrate the General Availability of the Writ to Challenge the Legality of Civil Confinement

1. *By the Eighteenth Century,* Habeas Corpus *Was Established as a General Remedy for Unlawful Detention, Whether Civil or Criminal*

The writ of *habeas corpus* originated as a judicial development in the common law and Chancery courts of England.[2] It was known to the common law as early as the fifteenth century, and was used to test the validity of executive committals in numerous sixteenth century cases.[3]

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[2] As noted below (*see infra*, I.B), *aspects* of habeas corpus practice, particularly in criminal cases, were affected by seventeenth-century and later legislation. The broader common law writ, however, lived outside statute, and had earlier origins.

[3] *See* R.J. SHARPE, THE LAW OF HABEAS CORPUS 6-8 (2d ed. 1989); ROLLIN C. HURD, A TREATISE ON THE RIGHT OF PERSONAL LIBERTY AND ON THE WRIT OF HABEAS CORPUS AND THE PRACTICE CONNECTED WITH IT (2d ed. 1876) (reprint, Da Capo Press, 1972); 9 W.S. HOLDSWORTH, HISTORY OF ENGLISH LAW 104-25 (2d ed. 1938) (Methuen & Co., Sweet & Maxwell, 1966 reprint); 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 129-38 (1st ed. 1765-1769) (facsimile

The functions of the early writ were varied and included relief from detention that, in modern terms, was civil in nature. Any person contending that he or she was unlawfully detained or confined could petition for *habeas corpus*. The petition could also be filed by the legal custodian of the person confined. The recipient of the writ (the alleged confiner) was then required to file a return stating the legal basis for the detention. The broad scope of *habeas corpus* was widely recognized; as Chief Justice Coke observed in his *INSTITUTES*, the writ extended to all detention "contra legem terrae," *i.e.*, against the laws of the land, whether civil or criminal, 1 EDWARD COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 54 (1642 ed.) (William S. Hein Co. 1986). Blackstone described *habeas corpus* as the "the bulwark of the British Constitution," 4 BLACKSTONE'S COMMENTARIES 438, and stated that the writ was "efficacious . . . in all manner of illegal confinement," 3 BLACKSTONE'S COMMENTARIES at 131.

2. Eighteenth Century Courts Granted the Writ to Review the Legality of Detention in a Wide Range of Civil Contexts

Habeas Corpus *as a Remedy Against Impressment*

Judges used *habeas corpus* on numerous occasions to redress the unlawful impressment of sailors into the British Navy. *See, e.g., R. v. White*, 20 Howell's State Trials 1376, 1377 (K.B. 1746) (King's Bench discharging a seaman upon determining he was statutorily exempt from impressment); *Goldswain's Case*, 96 Eng. Rep. 711 (C.P. 1778) (writ used

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reprint, Univ. of Chicago Press, 1979).

to challenge a sailor's impressment); *Ex parte Drydon*, 101 Eng. Rep. 235, 236 (K.B. 1793) (Kenyon, C.J.) (holding the naval recruitment statute was subject to an exception, and therefore discharging the sailor). *Habeas* review of impressment cases enabled not only review of the state's compliance with statutory enlistment rules but also review of executive decisions. *Ex parte Boggin*, 104 Eng. Rep. 484, 484 n.(a) (K.B. 1811) (reference to *Chalacombe's Case*--*habeas* issued on behalf of impressed master of a coal vessel, despite opposition by counsel for Admiralty on grounds that exemptions for "seafaring men of this description" were given only by "grace and favour," not "of right").

Habeas Corpus *as a Remedy Against Civil Detention by Executive Bodies and Inferior Courts*

The Great Writ was used to review actions by inferior courts of record, as well as commissions and tribunals which affected the liberty of the subject. Thus, actions by the London Court of Sessions,[4] the bankruptcy commissioners,[5] the College of Physicians in its malpractice jurisdiction over doctors,[6] the decisions of justices of the peace[7] and of the

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[4] *See Bushell's Case*, 69 124 Eng. Rep. 1006, 1016 (C.P. 1670) (*habeas corpus* granted to discharge a juror who had been committed for contempt by London Court of Sessions for voting to acquit).

[5] *Hollingshead's Case*, 91 Eng. Rep. 307 (K.B. 1702) (prisoner discharged; bankruptcy commission had failed to adhere to statute); *R. v. Nathan*, 93 Eng. Rep. 97, 914 (K.B. 1724 [reported 1730]), (*habeas* applied to a commitment by bankruptcy commissioners).

[6] *Dr. Groenvelt's Case*, 91 Eng. Rep. 1038 (K.B. 1702) (holding that statute empowering College of Physicians to fine did not abrogate royal pardon power).

Sewers Commission sitting as a court of record[8] were all reviewable upon the return of *habeas corpus.*

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[7] *Gardener's Case*, 78 Eng. Rep. 1048 (K.B. 1600) (review of question of whether justice of the peace properly interpreted firearms statute).

[8] *Hetley v. Boyer*, 79 Eng. Rep. 287 (K.B. 1613) (discharging individual imprisoned for refusing to release a suit to challenge taxation system used by the Commission to finance project; holding such taxation system to be invalid).

This inherent and wide-ranging supervisory jurisdiction can properly be analogized to the very kind of review sought in the present case, *i.e.*, review by an Article III court over the activities of Article I specialized tribunals, the Board of Immigration Appeals and Immigration Judges. "Under the common law definition, both immigration judges and the BIA qualify as inferior courts because their jurisdiction is specialized and limited. In certain respects, immigration tribunals are like the King's conciliar courts, the extensive power of which the common law courts sought to supervise through *habeas corpus*." Jonathan L. Hafetz, *Note: The Untold Story of Noncriminal Habeas Corpus and the 1996 Immigration Acts*, 107 YALE L.J. 2509, 2538 (1998) (footnote omitted).

Habeas Corpus *as a Remedy in Slavery Cases*

The writ of *habeas corpus* supplied the jurisdictional basis for the landmark emancipation case, *Somerset v. Stewart*, 20 Howell's State Trials 1, 79-82 (K.B. 1772). There, a writ was issued to bring up the body of James Somerset, an African slave who had been purchased by defendant Charles Stewart in Virginia. Somerset was confined on board a ship lying in English waters, about to depart for Jamaica. The Chief Justice, Lord Mansfield, ruled that the only question was "whether the cause of detention upon the return was sufficient," and since there was no authority under English law to force a slave out of the country, "the black must be discharged." James Oldham, *New Light on Mansfield and Slavery*, 27 JOUR. OF BRITISH STUDIES 45, 56-58 (1988) (quoting from the Hill manuscript).

Habeas corpus also won a discharge in February

1771 for another slave, Thomas Lewis, who otherwise would have been sent off by his master to Jamaica to be sold. *See R. v. Stapylton*, transcribed at 2 JAMES OLDHAM, THE MANSFIELD MANUSCRIPTS AND THE GROWTH OF ENGLISH LAW IN THE EIGHTEENTH CENTURY 1225-28 (1992); *see also id.* at 1242 (discussion). During the Lewis case, Lord Mansfield also noted that he had granted writs of *habeas corpus* preventing the impressment of slaves in two or three cases on the basis of affidavits of their masters. PRINCE HOARE, MEMOIRS OF GRANVILLE SHARP 59 (1820).

Habeas Corpus *as a Remedy Against Other Forms of Non-criminal Confinement*

Judges provided relief from private civil detention in a diverse range of cases on *habeas* petitions. One common type involved family disputes. In *R. v. Delaval*, 97 Eng. Rep. 913 (K.B. 1763), a *habeas* writ supported by affidavits from parents produced an inquiry into the state of their daughter, who had been apprenticed at age fifteen to a music master, but who had been handed over to defendant to become his mistress. Lord Mansfield approved this use of the writ and mentioned three other cases "of writs of *habeas corpus* directed to private persons, 'To bring up infants.'" *Id.* at 914. In *R. v. Turlington*, 97 Eng. Rep. 741 (K.B. 1761), the writ was issued to the keeper of a private "mad-house" to bring into court a woman who had been placed in the asylum by her husband. (The court first ordered that a medical examination of the woman be conducted, and on receiving an affidavit from the examining doctor that the woman appeared perfectly sane, the writ was ordered. The woman appeared in court, though no return to the writ was made.) *See also R. v. Lee*, 83 Eng. Rep. 482 (K.B. 1676) (reviewing husband's detention of wife, but refusing relief); *Lister's Case*, 88 Eng. Rep. 17, 17 (K.B. 1721) (reviewing detention, releasing wife

whose husband "[took] her violently into his custody").

3. The Scope of Habeas *Review in the Eighteenth Century Encompassed Questions of Law, Including Questions of Statutory Interpretation*

As Chief Justice Coke stated, *habeas* review was generally available to provide relief against detention contrary to the laws of the land. Questions of statutory interpretation, along with questions of common law, were properly and frequently addressed on *habeas.* A common use of *habeas* was in connection with the bankruptcy statutes. In *R. v. Nathan*, 93 Eng. Rep.914 (K.B. 1724 [reported 1730]), for example, the bankruptcy commissioners concluded that defendant, on his examination under oath, "had notoriously prevaricated." They had committed him to the Fleet Prison without bail until they had resolved his estate or until he "be otherwise delivered by due course of law." *Id.* On a *habeas* petition, the court ruled, *per curiam*, that the statute required questions be put to the bankrupt in writing and that he be given time to consider his answer, adding: "It is very dangerous to let people depart from the words of the Act." *Id.* Since the commitment did not conform to the words of the statute, defendant was discharged.

Common law judges in eighteenth-century England disagreed about the extent to which the truth of facts asserted in a return of a writ could be examined by the court in a *habeas* hearing without being put before a jury. This was one of the issues debated by Parliament on the unsuccessful 1758 *habeas corpus* bill and dealt with in the 1816 Act. (*See infra*, pp 12-15). Because the legal merits of Respondent's statutory interpretation claim in the present case can be determined on the basis of undisputed facts -- in eighteenth century terms, on the face of the return -- that difference of views is not pertinent to the case at bar.

The common law courts *were* careful, however, to preserve and examine the legal merits of a *habeas* petition, even if this required procedural maneuvering to enable relevant statutory interpretation to become reviewable. For example, in a King's Bench impressment case in June 1777, the court considered how to take up the merits of the *habeas* petitioner's claim that he was statutorily exempt. Lord Mansfield observed that, "this writ is an antient and constitutional writ; it must go in its original form, without bending to particular purposes," but after discussion:

> At last, Lord Mansfield, with great respect to the gentlemen of the bar, proposed to them this question, "Whether any harm could result from this mode, if adopted, viz. For the Crown Lawyers to return the writ of Habeas Corpus, that Mellichip, being a liveryman serving upon the river Thames, had been impressed into his Majesty's service, having no legal exemption." This, his Lordship said, would give the gentleman on the other side an opportunity of suggesting, that he had an exemption, such as the charter of the City, constant, invariable, immemorial usage, or whatever plea might be alleged. This being entered on the record, might lead to a compleat investigation of the whole matter in view. To which proposal all parties seemed to acquiesce.

MORNING CHRONICLE, June 18, 1777, *quoted in* 1 MANSFIELD MANUSCRIPTS, 78.

4. *At Common Law, the Writ of* Habeas Corpus *Ran Throughout the Sovereign's Territory and Applied to All Persons Present Therein, Including Aliens*

The writ applied to all non-enemy aliens detained

within the realm. Such treatment is consonant with a central precept of English justice, that the sovereign's writs run throughout the realm and apply to all persons physically present therein. Thus, all aliens within the realm were treated as entitled to its benefits, and subject to its burdens. This is clearly demonstrated by the slave cases discussed above (*Somerset v. Stewart*, *R. v. Stapylton*, p. 7, *supra*). *See also Case of The Hottentot Venus*, 104 Eng. Rep. 344, 344 (K.B. 1810) (entertaining a *habeas* petition of a "female native of South Africa" allegedly held in private custody); *R. v. Schiever*, 97 Eng. Rep. 551 (K.B. 1759) (reviewing, but denying, the *habeas* petition of a neutral alien deemed a prisoner of war because he was captured aboard an enemy French privateer).

In *Calvin's Case*, 77 Eng. Rep. 377 (1608) (a seminal case dealing with issues of citizenship and alienage -- though not a *habeas* case) Chief Justice Coke explained why aliens are equally subject to the prerogative writs, and equally entitled to their benefits. "[W]hen an alien . . . cometh into England, because as long as he is within England, he is within the King's protection; therefore so long as he is here, he oweth unto the King a local obedience or ligeance, for that the one (as has been said) draweth the other." *Id.* at 383.[9]

The common law of England therefore affords no support to any suggestion that the scope of the Great Writ is in any way conditioned by the nationality of the detainee. Providing the critical element of physical presence was established, *habeas corpus* could be sought on behalf of (and,

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[9] That *habeas corpus* had not been specifically used to review immigration matters as of 1789 reflects the fact that England did not by statute limit admission of aliens until 1793.

indeed, against) any person, regardless of citizenship.

The Eighteenth and Early Nineteenth Century History of *Habeas Corpus* Legislation in England Reflects a General Understanding That Civil *Habeas* Was Available to Review Executive Detention at Common Law

As shown above, *habeas corpus* was developed by fifteenth and sixteenth century common law courts as a remedy against unlawful detention. Although a common law creation, constitutional crises led to its reaffirmation in the Petition of Right and the *Habeas Corpus* Act of 1640.[10] Subsequent legislation built on these foundations with largely procedural reforms.

1. The Habeas Corpus *Act of 1679*

[10] For the full early history, *see* the sources cited at n.3, *supra*.

By 1679, the principle that the writ was available at common law and under the 1640 Act to challenge the legality of detention in a wide range of contexts, civil and criminal, was well established. But problems and controversies had arisen, particularly in criminal cases, regarding the appropriate procedures to be used and which specific courts had power to grant the writ. Unlike its predecessors, the 1679 Act did not codify general principles of *habeas* practice, but instead addressed specific practical issues pertaining to the availability of the writ in cases of criminal confinement (*e.g.*, the availability of the writ during court "vacation" time).

2. The Habeas Corpus *Bill of 1758*[11]

In 1758, a bill was proposed to extend the procedural reforms of the 1679 Act to non-criminal cases. It passed the House of Commons but eventually failed in the face of opposition in the House of Lords. But two premises emerge clearly from the debate surrounding the bill. *First*, it was not seriously questioned that *habeas corpus* was already, as a matter of common law, generally available in cases of civil detention. *Second*, there was general agreement that, at least with respect to executive detention, the scope of review on *habeas corpus* in civil cases already was and clearly should remain at least as extensive as in criminal cases, including review of questions of law. The central issues in controversy in 1758 were whether, given the broad scope of civil *habeas*

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[11] *See generally*, Barbara W. Kern, *The English High Judiciary & the Politics of the Habeas Corpus Bill of 1758*, *in* HENDRIK HARTOG, WILLIAM E. NELSON, & BARBARA W. KERN, (eds.) LAW AS CULTURE & CULTURE AS LAW 147 (2000). *Amici* are grateful to Ms. Kern for extending to us her research materials.

at common law, reforms were necessary in the civil context, whether the specific reforms proposed would render *habeas* too readily available in cases of *private* detention, and whether procedural steps were needed to ensure the availability of *habeas* during times when the common law courts were not sitting, *i.e.*, during "vacation time" instead of "term time."[12].

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[12] The central common law courts sat only four times a year for about two to three weeks at a time. The dates for the terms varied from year to year according to the calculation of religious holidays, *see generally* C.R. CHENEY (ed.), HANDBOOK OF DATES FOR STUDENTS OF ENGLISH HISTORY (1978), but customarily the year began in November with Michaelmas Term (after the "long vacation"), followed by Hilary (January/February), Easter (April/May) and Trinity (June/July).

The bill captured public attention, as shown by "An Account of the Origin and Use of the Writ of HABEAS CORPUS, and of the Bill now in Parliament concerning it," printed in several London newspapers in late May 1758 (*e.g. Lloyd's Evening Post, The London Chronicle, Payne's Universal Chronicle*), when the bill had passed the Commons and was before the House of Lords. The bill was reportedly prompted by a recent impressment act, specifically by reported abuses of impressment officers in disregarding statutory exemptions. The absurdity of saying that *habeas corpus* was available to those accused of crime but not available to those unsuspected of any crime was remarked in the newspapers, but was said to be a "doubt . . . raised by some Lawyer." Yet there was, in fact, no serious question that the *Habeas Corpus* Act of 1679 did not apply to men confined under impressment acts (who had been accused of no crime), but rather that their remedy lay with the writ of *habeas corpus* at common law.

The purpose of the 1758 bill was, thus, not to secure the availability of *habeas* in civil cases; civil *habeas* had long been firmly established. Rather, the bill had been put forward by Charles Pratt, M.P., later Lord Chancellor Camden, in response to the plight of an unnamed gentleman who had been improperly impressed (since, as a gentleman/property holder, he was exempt by statute from impressment), but for whom, for *procedural* reasons, *habeas corpus* had not been effective. As detailed above, *habeas* petitions were available to challenge the impressment of persons who were statutorily exempt (*supra*, p. 5), but *habeas procedures* in civil cases were at times insufficiently expeditious to prevent a falsely impressed man languishing in prison for some time pending judicial action, or, in some cases, from being enlisted and transported from the

jurisdiction before the writ became returnable.[13]

[13] These procedural difficulties were discussed in the newspapers of the day. *See, e.g.*, LONDON CHRONICLE, March 18-21, 1758; LONDON EVENING POST, April 28 - May 2, 1758.

Pratt's bill swept through the House of Commons with barely a murmur. It was highly popular, and its eventual defeat in the Lords met with indignant public reaction, one commentator calling it a blow to one of the two fundamentals of English liberty (the other fundamental being trial by jury).[14] The opposition in the Lords was led by Lords Mansfield (recently-appointed Chief Justice of the Court of King's Bench) and Hardwicke (recently resigned as Lord Chancellor after nearly twenty years in that office). In their deliberations, the Lords resolved to put ten questions to the twelve common law judges in order to better understand the need for, and the implications of, the bill. Answers given by nine of the twelve judges are printed in *Parliamentary History*; the views of the other three, including Mansfield, can be reconstructed from other sources.[15] It is not necessary here to recount all of the difficulties that Mansfield, Hardwicke and others had with the bill, except to note one concern--that the bill would make it *harder* to obtain the writ in some civil matters, particularly family disputes, than had been true in practice.[16]

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14 *See, e.g.*, THE MONITOR OR BRITISH FREEHOLDER, July 1, 1758 ("Every friend of liberty must shudder"; "usurpation upon the rights and liberty of the people"; "without [the bill] the personal liberty of the subject may be left to the discretion of a passionate, corrupt, or indiscreet judge").

15 Sir Michael Foster and Thomas Parker (Chief Baron of the Court of Exchequer) corresponded with Chief Justice Wilmot of the Common Pleas, as reproduced in M. DODSON, THE LIFE OF SIR MICHAEL FOSTER, KNT. (1811). Mansfield's answers were never printed, but his notes on the questions and about the bill generally are among surviving manuscripts at the family home in Perthshire, Scone Palace.

16 This would have been due to, among other things, the requirement in the bill that *actual confinement* be alleged, which

could not be done in the case of a wife or child who had willingly gone off to live with another person. Hardwicke's unpublished views can be found at Add. MSS 35,878, f. 91 et seq. Mansfield's unpublished notes are at Scone Palace MSS, Bundle 1352.

3. The Habeas Corpus *Act of 1816*

At the end of the debate in the House of Lords in 1758, Hardwicke moved that the judges should prepare a bill "to extend the power of granting writs of *Habeas Corpus*" to cases not within the 1679 Act, and to present the bill at the start of the next session of Parliament.[17] This was agreed, and according to Horace Walpole, the maneuver prevented a division in the Lords.[18] The bill was in fact drafted, but was never introduced.[19]

In 1816, however, an act was passed (56 Geo. III, c. 100) that was virtually identical to the judges' bill. The 1816 Act applied to non-criminal situations other than imprisonment for debt or by process in a civil suit, and provided, among other things, that the writ could issue during vacation on a probable cause showing by affidavit, and that the truth of the facts alleged in the return could be examined by a single judge in vacation or by the court in term time.

II.
IN COLONIAL AND EARLY POST-COLONIAL AMERICAN LAW, *HABEAS CORPUS* WAS GENERALLY AVAILABLE TO REVIEW THE LEGALITY OF CIVIL CONFINEMENT, WITHOUT LIMITATION AS TO CITIZENSHIP OR THE

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17 15 PARL. HIST. ENG. 925-25.

18 *Id.* at 925, n.*.

19 The bill is printed in DODSON, *supra*. In a letter of March 9, 1759, Hardwicke reported to Newcastle that he "understood the judges had made a draft," but that, after a little noise about it some time back, he had heard nothing further. He concluded that "it did not look as if the friends of the bill were eager for it." Add. MSS 32,888, f. 436.

NATURE OF THE ILLEGALITY ASSERTED

In colonial and post-colonial America, the lawfulness of Executive Branch confinement was subject to review on petition for writ of *habeas corpus*. In adjudicating *habeas* petitions, state and federal judges performed the core judicial function of interpreting statutes and resolving other questions of law. Judges recognized that the writ was available to contest the legality of civil confinement, and further that it was available regardless of the petitioner's citizenship status. Consistent with the contemporaneous practice in England described above (*supra*, I.A), American judges adjudicated *habeas* challenges to non-criminal confinement by persons in military custody, held as a debtor, bonded servant, or slave, and detained as a deserter from a foreign ship.

As is explained below, the broad scope extended by American courts to *habeas corpus* was affirmed in countless decisions, including opinions by John Marshall, Joseph Story, and Lemuel Shaw. Had Mr. St. Cyr filed a petition for *habeas corpus* in 1789 contending that his Executive Branch custody was pursuant to the government's misinterpretation of a statute, there is substantial evidence that a judge would have decided the merits of the statutory claim.

A. *Habeas Corpus* As Known In England Was Fully A Part of Early American Law

From the establishment of the American colonies, *habeas corpus* was a part of colonial law. *See* WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 98 (1980) (conquest of "infidel" (non-Christian) lands such as American colonies resulted in extension of the law of England in force at time of conquest, including common law and all affirming statutory law, insofar as "was applicable to colonial life"); JOSEPH STORY, COMMENTARIES ON THE

CONSTITUTION OF THE UNITED STATES § 156 (1851) (observing that in each colonial charter, "either expressly or by necessary implication it is provided that the laws of England so far as applicable shall be in force there"); HURD, *supra* at 92 ("The American colonists always claimed to possess 'all the rights, liberties, and immunities of free and natural-born subjects within the realm of England'") (citation omitted). Thus, "the common-law writ of *habeas corpus* was in operation in all thirteen of the British colonies that rebelled in 1776." DUKER, *supra*, at 115. As detailed in Part I, *supra*, that common-law writ was available to review legal challenges to civil custody.[20]

There are few reported *habeas* decisions from the colonial period. This was true because of the paucity of printed case reports, *see* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 102-03, 322-26 (2d ed. 1985), and because "incarceration was not routinely imposed as a

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[20] While the common law right to *habeas corpus* applied with full effect from the establishment of each colony, the *Habeas Corpus* Act of 1679 did not initially extend there, so its procedural innovations were at first unavailable. DUKER, *supra*, at 99 (post-conquest enactments by Parliament applied in colonies only by express direction). Eventually, however, royal governors in Virginia, South Carolina, North Carolina, and Georgia issued proclamations extending the 1679 Act's procedural reforms in those colonies. *See* Dallin H. Oaks, *Habeas Corpus in the States - 1776-1865*, 32 U. CHI. L. REV. 243, 251 (1965); *see also* A.H. Carpenter, *Habeas Corpus in the American Colonies*, 8 AM. HIST. REV. 18, 24-25 (1902); DUKER, *supra*, at 100, 103-06. Official extension of the 1679 Act was likely but a formality, for as Zechariah Chafee surmised, "in actual practice all judges used its procedure as a matter of course." Zechariah Chafee, Jr., *The Most Important Human Right in the Constitution*, 32 B.U.L. REV. 143, 146 (1952).

means of postconviction punishment for criminal acts until the nineteenth century," Marc M. Arkin, *The Ghost at the Banquet: Slavery, Federalism, and Habeas Corpus for State Prisoners*, 70 TUL. L. REV. 1, 11 (1995). The *habeas* decisions that do exist from the colonial era, however, confirm the writ's role as the principal recourse of persons subject to illegal government detention, including non-criminal custody. HURD, *supra*, at 96-97; DUKER, *supra*, at 101-02.

B. In the Post-Colonial Era, *Habeas Corpus* Was As Broad and Effective a Remedy As in England

Judges widely understood the writ to be available to review the lawfulness of non-criminal confinement in early America, including statutory questions. *See* WILLIAM S. CHURCH, A TREATISE ON THE WRIT OF HABEAS CORPUS 137 (2d ed. 1893); ("[T]he writ . . . may issue in civil as well as in criminal cases . . . ."); *id.* at 249 ("The issue raised on the hearing of a *habeas corpus* may be one of law simply."); HURD, *supra*, at 146.[21]

Chief Justice John Marshall and Associate Justice Joseph Story, riding circuit, each authored important decisions resolving statutory construction questions on *habeas* petitions challenging civil confinement, Marshall in a

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[21] It is also plain that the writ was available to non-citizens. *See, e.g.*, Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 COLUM. L. REV. 961, 989 (1998) ("The right to the writ . . . in the United States was . . . not limited to citizens."); *U.S. v. Villato*, 28 F. Cas. 377, 378-79 (Cir. Ct. D. Pa. 1797) (on *habeas*, discharging non-citizen arrested for treason).

debtor case, *see In re Randolph*, 20 F. Cas. 242 (Cir. Ct. D. Va. 1833) (Marshall, C.J., on circuit), Story in a military enlistment case, *see U.S. v. Bainbridge*, 24 F. Cas. 946, 949-52 (Cir. Ct. D. Mass. 1816) (Story, J., on circuit) (interpreting naval enlistment statute), and again in a case involving deserters from a foreign ship, *see Ex parte D'Olivera*, 7 F. Cas. 853, 854 (Cir. Ct. D. Mass. 1813) (Story, J., on circuit) (construing federal statute governing naval desertion). *See also C'wealth v. Downes*, 41 Mass. (24 Pick.) 227 (Mass. 1836) (Shaw, C.J.) (on *habeas*, construing provision of federal enlistment statute).

1. *The Founders Enshrined* Habeas Corpus *in its Full Width and Effect*

The Articles of Confederation were silent as to *habeas corpus*, Chafee, *supra*, at 145, and "when the constitutional convention met in Philadelphia in 1787 there were [only] four states with *habeas corpus* guarantees in their constitutions." Oaks, *supra*, at 247. *But see* Chafee, *supra*, at 146 (absence of *habeas* provisions in state constitutions because writ "had been so long and solidly established in every colony that assertion was probably considered unnecessary").

Yet the authors of the U.S. and state constitutions were careful to preserve the writ of *habeas corpus* and to ensure that early U.S. practice continued English and colonial traditions. At the Constitutional Convention, Charles Pinckney of South Carolina proposed several versions of a guarantee of the writ of *habeas corpus*, and apart from objection by some that the writ should never be suspended, the Suspension Clause was adopted with little debate. HURD, *supra*, at 107-10; Oaks, *supra*, at 248-49 (noting that three

colonies voted against the provision that writ may be suspended "when in cases of Rebellion or Invasion the public Safety may require it"); DUKER, *supra*, at 127-35.

Statutory enactments followed the adoption of *habeas corpus* clauses in the federal and state constitutions. Congress provided for *habeas corpus* jurisdiction in section 14 of the Judiciary Act of Sept. 24, 1789, 1 Stat. 73, 81-82 (1789), which codified the familiar common law writ. The common law of each original state also provided for *habeas* review. The states moved slowly to adopt formal statutory provisions, Oaks, *supra*, at 251, and initially all patterned their statutes on the 1679 English Act. *Id.* at 252-53. *See also* HURD, *supra*, at 121-28. Like the 1679 Act, the statutes in five states initially neglected non-criminal confinement, leaving civil custody subject to challenge under the traditional common law writ. Oaks, *supra.* at 254-55.

2. *Post-Colonial Case Law Evidences The Wide and General Application of* Habeas Corpus *To Review Questions of Law*

Reflecting eighteenth century English practice, the writ of *habeas corpus* was invoked to challenge the lawfulness of non-criminal confinement in a number of circumstances in the post-colonial period. In their decisions, state and federal judges regularly performed the traditional function of construing statutes and resolving other questions of law.

a. Habeas *as a Remedy for Indentured Servants*

Habeas was used to challenge private confinement as an indentured servant, and in these cases judges regularly adjudicated statutory claims. *See, e.g.*, *Respublica v. Keppele*, 2 U.S. 197, 198-99 (Mem.) (Pa. 1793) (construing Pennsylvania servant statute, concluding infant could not be

bound, and discharging fourteen year-old who had fled service); *State v. Sheve*, 1 N.J.L. (1 Coxe) 230, 230 (N.J. 1794) (granting writ to 27-year old man indentured by mother, upon application of common-law principle that "parental authority to dispose of a child's services ceases when the latter arrives at the age of twenty-one"); *State v. Taylor*, 3 N.J.L. (2 Penning.) 467, 1808 WL 1006, at *1 (N.J. 1808) (Pennington, J., dissenting) (minor must agree to indenture himself under "the true construction" of state servitude statute); *C'wealth ex rel. Stephenson v. Vanlear*, 1 Serg. & Rawle 248, 1815 WL 1221, at *2-3 (Pa. 1814) (opinion of Tilghman, C.J.) (construing 1799 statute, in part in contrast to 1790 statute, and holding master's assignment of indentured minor to third-party, without consent of minor's father, improper under later statute); *In re Goodenough*, 19 Wis. 274 (1865) (holding indenture in violation of state statute requiring that instrument specify instruction in "profession, trade, or employment"). Church gives the specific example that where states regulate such relationships, "[i]ndentures of apprenticeship must conform to the requirements of the statute," CHURCH, *supra*, at 744, and are subject to review on *habeas*. *Id.* at 745**.**

Judges also adjudicated a related legal claim on *habeas*, that a master had unlawfully removed a servant from the state in which the indenture had been executed. *See, e.g.*, *C'wealth v. Edwards*, 6 Binn. 202 (Pa. 1813) (applying common law to hold minor bound in Virginia may not be removed to Pennsylvania, where indenture does not provide for such removal). *See also Davis v. Coburn*, 8 Mass. 299, 1811 WL 1678, at *4 (Mass. 1811) (if master could assign servant from New Hampshire "into *Massachusetts*, I see not why he might not have sent him to *Georgia*, or even to *China*. That a master should have such legal authority would

be monstrous") (emphasis in original); *Gusty v. Diggs*, 11 F. Cas. 128 (Cr. Ct. D.C. 1820) (apprentice bound in Maryland may not be brought into District of Columbia).

b. Habeas *As Applied in Civil Debtor Cases*

Debtors subject to confinement also petitioned for writs of *habeas corpus* in the United States, and these petitions frequently raised questions of law.[22] The opinions

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[22] *See, e.g.*, *Kennedy & Co. v. Fairman*, 2 N.C. (1 Hayw.) 408 (N.C. 1796) (construing creditor notice provision of insolvency statute and remanding prisoner); *Fitzpatrick v. Neal*, 3 N.C. (2 Hayw.) 8 (N.C. 1797) (debtor arrested and imprisoned pursuant to letter of attorney released because letter not under required seal); *Shorthouse & Ross v. Carothers*, 3 Yeates 182 (Pa. 1801) (releasing debtor who had been re-arrested after posting bond in same cause); *Ex Parte McNeil*, 6 Mass. 245 (Mass. 1810) (discharging debtor as privileged from arrest while attending court in the "necessary care of his action"); *C'wealth v. Cornman*, 4 Binn. 483 (Pa. 1812) (construing provisional discharge section of 1812 insolvency statute and remanding prisoner); *C'wealth v. Alexander*, 6 Binn. 176 (Pa. 1813) (on *habeas*, releasing debtor on grounds that warrant was defective); *Attorney Gen. v. Fenton*, 19 Va. (5 Munf.) 292 (Va. 1816) (affirming discharge of men confined by court-martial, for failure to pay fine for not appearing at place of rendezvous for militia); *C'wealth v. Keeper of Jail*, 4 Serg. & Rawle 505 (Pa. 1818) (construing 1802 federal statute prohibiting arrest of soldier for debt and denying writ to detained husband who deserted family and failed to provide maintenance); *Bank of U.S. v. Jenkins*, 18 Johns. 305, 309 (N.Y. Sup. Ct. 1820) (affirming authority under state *habeas* statute to review lawfulness of debtor's imprisonment); *Richards v. Goodson*, 4 Va. (2 Va. Cas.) 381 (Va. 1823) (holding debtor privileged from arrest while attending court on his own case and discharging prisoner); *C'wealth v. Waite*, 19 Mass. (2 Pick.) 445 (Mass. 1824) (where debtor arrested upon valid execution, incorrect copy produced in return to writ, and correct copy provided later, terms of state

in *In re Randolph*, 20 F. Cas. 242 (Cir. Ct. D. Va. 1833), show that judges resolved questions of statutory construction in *habeas* challenges to civil confinement of debtors. There, on a warrant issued by the Treasury under a statute governing the administration of public accounts, *see* 3 Stat. 592, 31 U.S.C. §§ 506-508, Randolph was arrested for debt allegedly outstanding following his naval service. *Randolph*, 20 F. Cas. at 242. On *habeas*, Chief Justice Marshall recited but avoided several constitutional challenges raised by Randolph's counsel, notably that the act impermissibly conferred judicial power on the executive. *Id.* at 253-54 (Marshall, C.J., on circuit). He then conducted a detailed statutory analysis, comparing the text of §§ 2 and 3 of the act, before construing the sections narrowly as not applying to Randolph, an "acting" Purser. *Id*. at 254-57; *see also id.* at 256 (describing "fair construction" of act); *id.* at 251-52 (Barbour, D.J., on circuit) (construing act as not permitting Treasury to reopen account previously settled).[23]

c. Habeas *To Redress Unlawful Military Enlistment*

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statute satisfied). *See also Discharge of Richardson*, Worcester Sup. Jud. Ct., (Mass. Sept. 1800) (discharging debtors who, as soldiers, were exempt from imprisonment for debt under federal statute), cited in William E. Nelson, *The American Revolution and the Emergence of the Modern Doctrine of Federalism and Conflict of Laws*, 62 COLONIAL SOC. OF MASS. 419, 458 n.7 (1984); Oaks, *supra*, at 265.

[23] Judge Barbour also considered "whether *habeas corpus* could be sustained in favor of a party imprisoned under civil process," *id.* at 253, in light of Marshall's cryptic decision in *Ex Parte Watson*, 10 U.S. (6 Cranch) 52 (1810). Barbour reviewed the common law authorities, however, and concluded that "the writ is not confined to criminal cases." *Randolph*, 20 F. Cas at 253.

Nineteenth century American courts decided many *habeas* petitions challenging the legality of military and naval enlistments, routinely exercising a broad scope of review. NELSON, *supra*, at 457 ("State writs of *habeas corpus* . . . were used on numerous occasions to test the validity of military enlistments . . . Such state writs, of course, carried with them the power to interpret the federal statutes by which the validity of the enlistments was determined"). *See generally* HURD, *supra*, at 156.

Many *habeas* challenges to military enlistments arose around the time of the War of 1812. In an effort to expand the nation's military forces, the federal government paid bounties to enlistment brokers for each new recruit secured, leading to a high number of fraudulent enlistments, often of minors. Arkin, *supra*, at 14-15. *See, e.g.*, *C'wealth v. Murray*, 4 Binn. 487, 487, 492-93 (Pa. 1812) (opinion of Tilghman, C.J.) (interpreting 1809 statute as permitting naval enlistment of minor child who "has neither father, master, nor guardian" and "against the consent" of mother, relying in part on comparison between 1802 army and 1809 naval enlistment statutes); *Ex parte Mason*, 5 N.C. (1 Mur.) 336, 337 (N.C. 1809) (construing statutory term "parent" as including mothers as well as fathers); *C'wealth v. Cushing*, 11 Mass. (11 Tyng) 67, 71 (Mass. 1814) ("The *true construction* must be, that persons under the age of twenty-one years are not to be enlisted or held in service, unless with the [required] consent . . . and if they have no parents, guardians, or masters, they are not to be enlisted or held in service at all") (emphasis added); *C'wealth ex rel. Menges v. Camac*, 1 Serg. & Rawle 87, 1814 WL 1344, at *2 (Pa. 1814) (opinion of Tilghman, C.J.) (construing statute as permitting father to consent days after minor's formal enlistment).[24]

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[24] *See also In re Stacy*, 10 Johns 328, 333-34 (N.Y. Sup. Ct. 1813)

(Kent, C.J.) (discharging civilian accused of treason and detained by federal military authorities as beyond authority of tribunal).

The differing interpretations of the parental consent provisions reached by the Pennsylvania and Massachusetts courts were addressed in a major opinion by Justice Story on circuit. *United States v. Bainbridge*, 24 F. Cas. 946 (Cir. Ct. D. Mass. 1816), exemplified statutory construction in a *habeas corpus* case. *Bainbridge* was a challenge to a minor's enlistment in the U.S. Navy without parental consent. After concluding that Congress could constitutionally authorize the enlistment of a minor without parental consent, Justice Story turned to the specific question of whether Congress actually had so legislated. Reviewing the language of the naval and army enlistment acts, and reading the instant statute against general common-law contract principles, Justice Story concluded that the naval acts allowed the enlistment of a minor without his father's consent. *Id.* at 951-52.[25]

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[25] *Habeas* challenges to military enlistments led judges to continue to construe the statutes after the War of 1812. *See, e.g.*, *State v. Brearly*, 5 N.J.L. 555, 1819 WL 1256, at *5 (N.J. Sup. Ct. 1819) (consent by master subsequent to enlistment of apprenticed minor sufficient under statute); *State v. Clark*, 2 Del. Cas. 578, 580-81 (Del. Ch. 1820) (discharging soldier on evidence that he was underage and intoxicated at time of enlistment, "knew nothing of being enlisted until the next morning," and lacked his father's consent, as confinement was "contrary to law"); *In re Carlton*, 7 Cow. 471, 471, (N.Y. Sup. Ct.1827) ("Any person illegally detained, has the right to be discharged, and it is the duty of this court to restore him to his liberty."); *C'wealth v. Downes*, 41 Mass. (24 Pick.) 227, 1836 WL 2527, **3-4 (Mass. 1836) (Shaw, C.J.) (distinguishing *Bainbridge* and holding statute does not authorize minor enlisting as seaman in the U.S. Navy without consent of his legal guardian); *Bamfield v. Abbot*, 2 F. Cas. 577, 578 (D. Mass. 1847) (discharging minor allegedly enlisted under 1846 act, where company had "not [yet] been mustered into the service of the United States, or been received or accepted by any officer thereof"); *C'wealth ex rel. Webster v. Fox*, 7 Pa. 336, 1847 WL 5030, at *2 (Pa. 1847) (prohibition in the 1802 Act against enlistment of minors without consent of

father, guardian, or master "is as plain as the English language can make it"); *Sim's Case*, 61 Mass. (7 Cush.) 285, 309 (1851) (issuance of writs "is constantly done, in cases of soldiers and sailors, held by military and naval officers, under enlistments complained of as illegal and void"); *U.S. ex rel. Turner v. Wright*, 28 F. Cas. 798, 798-99 (Cir. Ct. W.D. Pa. 1862) (construing statute as requiring discharge of minor who enlisted on false oath); *U.S. v. Taylor*, 28 F. Cas. 22, 22-23 (D.N.J. 1863) (statutory language and legislative history indicate that oath of enlistment taken by the recruit is conclusive as to his age); *In re McDonald*, 16 F. Cas. 33, 34-36 (D. Mass. 1866) (engaging in "[a] careful examination of the acts of congress regulating enlistments in the army" to determine whether, *inter alia*, enlistment of minor without father's consent was valid).

Habeas review of legal questions in the enlistment cases was plainly available to non-citizens. *See, e.g.*, *C'wealth v. Harrison*, 11 Mass. 63, 65 (Mass. 1814) (discharging Russian minor enlisted without consent of parent, guardian, or master, as "[a] foreign minor is included in the [statutory] prohibition"); *Wilson v. Izard*, 30 F. Cas. 131, 1815 U.S. App. Lexis 247, at *2 (C.C. D. N.Y. 1815) (adjudicating claim by British enlistees that they were "alien enemies" ineligible to serve but remanding); *U.S. v. Wyngall*, 5 Hill 16, 18, 26, 1843 WL 4481, at *7 (N.Y. Sup. Ct. 1843) (construing statutory authorization to enlist "able bodied citizen[s] of the United States" as directory, not mandatory and concluding that non-citizen was lawfully enlisted).

d. Habeas *Relief For Deserters From Foreign Ships*

Seamen who deserted from foreign ships, regardless of citizenship, were subject to arrest, either at the request of consular officers pursuant to treaty or under general federal legislation enacted in 1829. *See* Neuman, *supra*, at 990-91. These arrests occasionally prompted *habeas* petitions to state and federal judges, whose decisions resolved questions of law. *See, e.g.*, *C'wealth v. Holloway*, 1 Serg. & Rawle 392 (Pa. 1815) (discharging alleged deserter and holding arrest not authorized by statute or common law); *Case of the Deserters from the British Frigate L'Africaine*, 3 Am. L.J. 132 (reporting 1809 Maryland decision discharging alleged deserters); *Case of Hippolyte Dumas*, 2 Am. L.J. 86 (reporting 1807 Pennsylvania decision discharging alleged deserters); *Ex parte Pool*, 4 Va. (2 Va. Cas.) 276 (1821) (arrest of deserters by justice of peace exceeded his authority); *In re Pederson*, 19 F. Cas. 91 (S.D.N.Y. 1851) (construing treaty as inapplicable to Swedish deserter who

returned home and was later arrested after emigrating to U.S.); *see also U.S. v. Lawrence*, 3 U.S. (3 Dall.) 42, 49 (Mem) (1795) (where district court declined request of French consul to arrest alleged deserter, Attorney General sought mandamus from Supreme Court, arguing if arrest was unlawful prisoner could seek release on *habeas corpus*);*U.S. v. Desfontes & Gaillard* (S.D. Ga. 1830) (on *habeas* petition by French Consul to deliver alleged French deserters, holding sailors properly detained on state criminal charges and remanding to state custody), reprinted in Eric M. Freedman, *Milestones in Habeas*

Corpus: Part I, 57 ALA. L. REV. 531, 598-99 (2000).

In 1813, Portugese sailors arrested as alleged deserters petitioned for a writ of *habeas corpus* in federal court, requiring Justice Story, on circuit, to interpret provisions of a federal statute. *Ex parte D'Olivera*, 7 F. Cas. 853, 854 (Cir. Ct. D. Mass. 1813) (Story, J., on circuit) (construing Act of July 20, 1790, 1 Stat. 131, regulating seamen in merchant service). The court, per Story, was "of the opinion, that the act for the regulation of seamen exclusively applies to seamen engaged in the merchants' service of the United States." *Id.* at 854. Because the Portugese sailors were engaged by a foreign vessel, Story held their confinement was authorized by neither statute nor treaty. *Id.*

e. Habeas *as a Remedy Against Other Forms of Civil Confinement*

Legal questions arose on *habeas* challenges to non-criminal confinement in several other circumstances. A number of decisions addressed challenges to confinement by a justice of the peace or lower court, often resulting in delineation of the scope of the confining entity's legal authority. *See, e.g.*, *C'wealth v. Ward*, 4 Mass. (Tyng) 497, 497 (1808) ("[t]he justice [of the peace] has wholly misconceived his authority" and "the commitment was illegal"); *C'wealth v. Morey*, 8 Mass. (Tyng) 78 (Mass. 1811) (same); *Hite v. Fitz-Randolph*, 3 Va. (1 Va. Cas.) 269 (1812) (on *habeas*, discharging creditor who had been arrested on contempt order for trying to collect on judgment subject to stay, on grounds that "county court [had] no right to make an order restraining [creditor] from proceeding on his judgment at law obtained in the superior court of law"); *C'wealth ex rel. Kerr v. Brady*, 3 Serg. & Rawle 309 (Pa. 1817) (on *habeas*, holding probate court lacked authority to confine relator on contempt and discharging prisoner); *Washburn v. Belknap*, 3 Conn. 502 (1821) (confinement to workhouse for

indefinite term by justice of peace contrary to statute); *State v. Applegate*, 13 S.C.L. (McCord) 110 (1822) (justice of peace not authorized to confine constable for act of contempt done outside presence of justice); *Ex parte Minor*, 17 F.

Cas. 457 (Cir. Ct. D.C. 1823) (on *habeas*, discharging debtor as arrest warrant exceeded authority of justice of peace). *See also McMullen v. Charleston*, 1 S.C.L. (Bay) 46 (S.C. 1787) (arrest for selling certain liquor by municipal "court of wardens" unauthorized by statute permitting municipality to regulate liquor).

In some instances, slaves sought writs of *habeas corpus* to win their freedom. *See, gen.* Arkin, *supra*, at 33-41; *see also Respublica v. Betsey*, 1 U.S. 469 (Mem.) (Pa. 1789) (construing Pennsylvania statute governing abolition of slavery as requiring discharge where owner failed to register slave by statutory deadline); *State v. Emmons*, 2 N.J.L. 6 (1806) (applying 1798 state statute governing freeing of slaves and holding execution of manumission did not satisfy statutory requirements); *State v. Quick*, 2 N.J.L. 393 (1807) (applying New York statute and granting slave's petition for freedom); *C'wealth ex rel. Lewis v. Holloway*, 6 Binn. 213 (Pa. 1814) (construing exception for slaves of members of Congress to state statute governing abolition of slavery and remanding); *Elkison v. Deliesseline*, 8 F. Cas. 493, 496 (Cir. Ct. D. S.C. 1823) (Johnson, J. on circuit) (declaring local Negro Seaman Act unconstitutional, but holding federal *habeas* statute did not reach person in state custody).

Finally, as in England, persons confined in mental health institutions occasionally petitioned for release on *habeas*. *See Oakes*, 8 Monthly Law Reporter 122 (Sup. Jud. Ct. Mass. 1845) (not officially reported), excerpted in Oaks, *supra*, at 267.

In short, the history of colonial and early post-colonial *habeas* practice demonstrates a strong continuity

with English traditions set forth in Part I, *supra*. At common law and pursuant to state and federal statutory enactments, the writ was plainly available to persons held in non-criminal confinement as a means to challenge the lawfulness of their custody. The writ was available to non-citizens. And, most importantly for the instant case, the rich history of early civil *habeas* practice confirms that state and federal judges regularly decided questions of law, including interpretation of statutes governing military enlistment, confinement of debtors, indentured servitude, abolition of slavery and desertion from foreign ships. These decisions provide significant support for the proposition that statutory claims, such as the statutory retroactivity claim asserted by Respondent Enrico St. Cyr, were subject to review on the writ of *habeas corpus* familiar to the Founders.