Habeas Corpus in Early Nineteenth-Century Mormonism: Joseph Smith's Legal Bulwark for Personal Freedom

Jeffrey N. Walker
Joseph Smith, 1805–1844. Joseph Smith had many interactions with the legal system and developed a keen understanding of the law. This article examines the writ of habeas corpus in a historical legal context and demonstrates that his use of it fell well within the authoritative precedents and proper judicial practices of his time. Engraving by Danquart Anthon Weggeland. Courtesy Church History Museum.
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I. Introduction

Habeas corpus has been referred to as the cornerstone of the common law. Indeed, it is the “Great Writ of Liberty.” Chief Justice John Marshall confirmed this singular status given to the writ of habeas corpus in 1807 when he called it the “great constitutional privilege.” This article explores the use of this most famous writ during the early nineteenth century and specifically how Joseph Smith used it against those who sought his incarceration.

A writ of habeas corpus is essentially an order directing one who has a person in custody to deliver that person to a court so that the reasons for the incarceration can be independently reviewed. The legal process typically starts with a petition by the prisoner requesting a writ of habeas corpus to a local court authorized to hear the petition. If the local court determines that the petition has merit, it orders the person who has custody of the prisoner, often a sheriff, to bring the prisoner before a court with jurisdiction to hear the writ (compared to a court with jurisdiction to grant the petition) at a specific time and place. This is referred to as the “return.” At the hearing on the writ of habeas corpus, the court determines whether the prisoner is remanded back to jail, allowed to post bail, or discharged and released.

2. Ex parte Bollman and Swartwout, 8 U.S. (4 Cranch) 75, 95 (1807).
During Joseph Smith’s life (1805–1844), he invoked the habeas corpus laws on several occasions: From seeking review of his incarceration in Liberty Jail to seeking approval for the charter for the City of Nauvoo (which included the right of the municipal court to hear writs of habeas corpus) to seeking review of his arrests during the various extradition efforts to return him to Missouri, Smith developed a keen understanding of the protections that habeas corpus afforded, and he needed that understanding. Joseph Smith believed, and accurately so, that if he were to be jailed in Illinois as he had been in Missouri, he would not survive his incarceration. It was in fact his jailing in Illinois that ended in his murder.

Historians and commentators, however, have almost uniformly acquiesced that Joseph Smith’s use of habeas corpus was unusual and overreaching. Some critics even assert that such improper use was a catalyst to his death. While it is true that some people in the 1840s were critical of Joseph’s

the Several States of the American Union; with References to the Civil and Other Systems of Foreign Law, 2 vols. (T. & J. W. Johnson, 1839), 1:454–57. Blackstone explained the writ of habeas corpus as follows: “The writ of habeas corpus, the most celebrated writ in the English law. Of this there are various kinds made use of by the courts at Westminster, for removing prisoners from one court into another for the more easy administration of justice. But the great and efficacious writ, in all manner of illegal confinement, is that of habeas corpus ad subjiciendum; directed to the person detaining; another, and commanding him to produce the body of the prisoner, with the day and cause of his caption and detention.” St. George Tucker, Blackstone’s Commentaries: With Notes of Reference, to the Constitution and Laws, of the Federal Government of the United States; and of the Commonwealth of Virginia, 5 vols. (Philadelphia: William Young Birch and Abraham Small, 1803), 4:129, 131. For purposes of this article, when addressing the writ of habeas corpus, the author is speaking about the writ of habeas corpus ad subjiciendum.


5. Robert Flanders, Nauvoo: Kingdom on the Mississippi (Urbana: University of Illinois Press, 1965), 99: “The habeas corpus clause of the charter and the cavalier fashion in which the Mormons used it generated much popular fear and hatred,
use of the right of habeas corpus, and while lawyers in that day still argued about the correct application of this writ in particular cases, the idea that Joseph's use of habeas corpus was not fully within the laws of his day is not supported by careful legal analysis.

This article is intended to clarify and examine the history of habeas corpus, specifically how it was understood and used during the first half of the nineteenth century in America. With that foundation, this article will trace Joseph Smith's use of the writ of habeas corpus from the first time he sought the writ while incarcerated in Liberty Jail through the enactments of various ordinances dealing with habeas corpus while in Nauvoo to his use of the writ during the first two of three attempts by Missouri officials to extradite him from Illinois to Missouri in June 1841 and July 1842. The author is preparing an accompanying article to complete this examination of Joseph Smith's use of the writ of habeas corpus through the end of his life, including the last extradition effort by the Missourians in June 1843, his use of the writ after an arrest in May 1844 based on a complaint filed by Francis Higbee, as well as his use of habeas corpus after the destruction of the Nauvoo Expositor, an anti-Mormon newspaper, in June 1844. Finally, this second article will examine Smith's rulings as chief judge of the Nauvoo Municipal Court when others brought petitions for writs of habeas corpus to the court.

There is a modern resurgence of interest in understanding the use of habeas corpus during the postarrest and preindictment phase arising from the imprisonment of prisoners accused of possible terrorist activities.

_6_ Francis Marion Higbee (1820–1850) was an early convert to Mormonism joining in 1832. He was excommunicated from the Church on May 18, 1844. Higbee was a key participant in the publication of the newspaper the _Nauvoo Expositor_ in June 1844.

_7_ During his tenure as the chief judge of the Nauvoo Municipal Court, Joseph Smith heard and ruled on at least eight petitions for writs of habeas corpus and subsequent hearings.

Interestingly, understanding the application of this writ during the nineteenth century provides useful insight and perspective to its use in our modern environment.

II. History of the Writ of Habeas Corpus Leading Up to the Nineteenth Century

As Sir Edward Coke appropriately opined, “He that knoweth not the reason of the law knoweth not the law.” A brief primer of the history of habeas corpus and its basic attributes is therefore appropriate before attempting a critical analysis of this most famous writ. Understanding the reason for the law of habeas corpus is a starting point to understanding how and why Joseph Smith used it.

The history of habeas corpus predates the Magna Carta of 1215 and can be traced to a series of writs from the Middle Ages providing protection from imprisonment unrecognized in law, which had the aggregate effect of


the modern writ. 12 The Magna Carta itself makes only an oblique reference to the writ of habeas corpus. 13 This is because the writ had already emerged as the law by the time of the Magna Carta and was thus already a fundamental part of the unwritten common law of the land.

The four hundred years following the Magna Carta saw a growing tension between the rights of the individual and those of the state. This tension was most prominently seen in the increased use of the writ of habeas corpus as a tool to check the power of the state and to preserve the rights of the individual against the potentially arbitrary power of the king, his counsel, and his courts. 14 As a result of this increased use coupled with the end of the English Civil Wars, the British Parliament codified the common law practice through the enactment of the Habeas Corpus Act of 1679. 15

Habeas corpus laws traveled across the ocean to the American colonies with the full panoply of English common law and practice. This right was regarded as a fundamental protection guaranteed to each citizen, and historical records confirm that petitions for writs of habeas corpus were filed in colonial America. 16 Indeed, the British restriction of this right was a major cause of the American Revolution. 17 So fundamental was the right of habeas corpus that the Founding Fathers placed it in the Constitution


13. “No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land.” Peter Linebaugh, The Magna Carta Manifesto: Liberties and Commons for All (Berkeley: University of California Press, 2008), 289.


15. “The English Habeas Corpus Act of 1679 is the most significant part of the English law of habeas corpus for its impact on American law at the Founding. . . . James Kent considered the Act of 1679 to be ‘the basis of all the American statutes on the subject.’ ” Forsythe, “Historical Origins of Broad Federal Habeas Review Reconsidered,” 1095–96.

16. Church, Treatise of the Writ of Habeas Corpus, 35: “In 1706, an application was made to Chief Justice Sewall [in Massachusetts] for a writ of habeas corpus, and, although it was refused for satisfactory reasons, there is nothing to indicate that the court regarded it as a novel application.”

17. The Declaration of Independence, para. 20 (articulating objections to King George III’s abuse of his detention power); see generally Allen H. Carpenter, “Habeas Corpus in the Colonies,” American Historical Review 8 (1902): 18.
itself: “The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”18 While other important, even fundamental, rights were added to the Constitution by way of the Bill of Rights two years later, the writ of habeas corpus was established from the outset.19 This protection was further delineated in the Judiciary Act of 1789, which provided state defendants with the right to take federal questions to the United States Supreme Court by writs of error.20

With such a storied history, it should be no surprise that each state’s original constitution included provisions for habeas corpus and that each of the fifty states currently has legislation authorizing state courts to issue writs of habeas corpus.21 Yet, throughout the history and evolution of the doctrine, the writ’s principal purpose has remained unchanged—to compel the person holding a prisoner to bring the prisoner before a court so that the propriety of the incarceration can be reviewed.

III. History of the Writ of Habeas Corpus in Nineteenth-Century America

A. Introduction

The primary objective of traditional legal research is to find the most recently enacted statute or reported case. Indeed, it is the fundamental principle of research taught to every aspiring lawyer. While older cases may be helpful for context or to be used analogously, the most current pronouncements control. This methodology cannot be used when doing historical legal research. An understanding of the laws today has no place in determining the law in a prior period. Even trying to understand the law

20. The Judiciary Act of 1789, ch. 20, sec. 25, 1 Stat. 73 (1789), was passed concurrently with the Bill of Rights. See also An Act to Provide Further Remedial Justice in the Courts of the United States, ch. 257, 5 Stat. 539, (1842). A writ of error allows a court of superior jurisdiction to examine the record of an inferior court and upon examination to affirm or reverse the same, according to law. Bouvier, Law Dictionary, 2:501–02; Giles Jacob, The Law-Dictionary (I. Riley, 1811) 2:398–414.
of a prior time within the context of a modern understanding of that law is inherently problematic, as interpretations and applications change over time. Doing so skews perspectives and often conclusions as well.

Historical legal research requires the discipline to not look forward to subsequent events or laws; it is not an exercise to determine whether a judge’s or attorney’s proposition was subsequently validated, followed, or even cited. The primary historical objective is to determine whether the law was being properly applied according to the practice and status of the law of that time. It requires an understanding of the judicial system that then existed, the statutes and case law of the time, and the nature of the practice. These understandings are prerequisites to forming any legitimate opinion about the prosecution or defense in a particular historical judicial proceeding.

B. Nineteenth-Century vs. Modern Habeas Corpus Practices

Such a historical understanding is necessary when analyzing the writ of habeas corpus in America’s nineteenth century, for many differences exist between the historical and modern use and interpretations. Between 1800 and 1850, there were 906 reported federal and state cases involving the use of habeas corpus (on average, less than eighteen per year). In contrast, today there are an average of more than twenty thousand reported habeas corpus cases each year, with that number rising yearly. While this increase in filings is certainly a result of the dramatic growth in the population in America coupled with the increased size and complexity of the American judiciary, the numbers alone do not tell the whole story.

An even more telling observation of how this fundamental legal vehicle has changed during the past two hundred years emerges when one separates the early nineteenth century cases into the three different phases in

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22. The author accessed LEXIS® searching in the all-federal and state courts database using the following search: “habeas w/2 corpus” with date restriction of 1/1/1800 and 12/31/1850. This search found 957 cases. Of the 957 cases, 906 dealt with habeas corpus while the others only made a mention of the writ.

23. In the twelve-year period from 2000 through 2011, the author located through the LEXIS® service 290,338 federal and state habeas corpus cases, thereby averaging more than 24,000 per year. The number steadily increased during that time. See also Nancy J. King, Fred L. Cheesman II, and Brian J. Ostrom, Final Technical Report: Habeas Litigation In U.S. District Courts: An Empirical Study of Habeas Corpus Cases Filed by State Prisoners Under the Antiterrorism and Effective Death Penalty Act of 1996 (Nashville, Tenn.: Vanderbilt University Law School, 2007), 9–10 (noting that each year since 1996, “more than 18,000 cases, or one out of every 14 civil cases filed in federal district courts, are filed by state prisoners seeking habeas corpus relief”).

https://scholarsarchive.byu.edu/byusq/vol52/iss1/2
which a writ may be sought and compares them to a sampling of such fil-
ings today.

Habeas corpus can be sought anytime after an arrest. For purposes of
discussion the application of habeas corpus is separated into three distinct
phases (chart 1):
(1) postarrest, but prior to indictment; 24
(2) postindictment, but prior to conviction; and
(3) postconviction.

During any of these three phases of the case, there are three principal
outcomes of a writ for habeas corpus. First, the prisoner’s writ could be
denied and he would be remanded back to jail to await the outcome of
the prosecution. Second, the prisoner’s writ for release could be denied,
but the prisoner would be offered bail pending trial. Third, the prisoner’s
writ could be granted in full and he would be discharged and released. The
process for determining which outcome should result has been the central
point of discussion of Joseph Smith’s use of habeas corpus.

A review of the writs for habeas corpus reported during the first half of
the nineteenth century shows that approximately 40 percent of the writs
were filed after arrest but before indictment; approximately 10 percent were
filed after indictment but before conviction; and 50 percent were filed after
conviction (chart 2).

In contrast, today less than 1 percent of the habeas corpus cases are filed
after arrest but before indictment; approximately 5 percent are filed after
indictment but before conviction; and more than 95 percent of the cases are
filed after conviction25 (chart 3).

The change in the timing of habeas corpus use not only highlights differ-
ences in the judiciary, but also further undermines looking at the historical
interpretation of habeas corpus through modern lenses. For example, today
habeas corpus can be used to attack pretrial custody on criminal charges—
to seek release on bail, to raise speedy trial or double jeopardy claims, to

24. An indictment is the written accusation of a crime found by a grand jury.
25. See generally Andrea Lyon, Emily Hughes, Mary Prosser, and Justin
Marceau, Federal Habeas Corpus: Cases and Materials (Durham, N.C.: Carolina
Academic Press, 2010), 5–7 (modern use of habeas corpus is almost entirely a post-
conviction procedure); Sara Rodriguez, “Appellate Review of Pretrial Requests for
Habeas Corpus Relief in Texas,” 32 Tex. Tech. L. Rev. 45 (2000) (modern use of
habeas corpus has limited pretrial application). Based on the commentary and the
authors’ sampling of modern habeas corpus cases, more than 95 percent are used
after conviction and sentencing. A very small fraction of cases are brought before
indictment and few after. Even in cases where allegations of pretrial errors exist,
most are only brought after a conviction and the prisoner is incarcerated.
**CHART 1. Three Periods in Which a Writ of Habeas Corpus May Be Used**

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Postarrest  →  Postindictment  →  Postconviction
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**CHART 2. 1800–1850 Use for Writs of Habeas Corpus**

<table>
<thead>
<tr>
<th>Period</th>
<th>Cases</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Postarrest</td>
<td>366</td>
<td>40%</td>
</tr>
<tr>
<td>Postindictment</td>
<td>98</td>
<td>10%</td>
</tr>
<tr>
<td>Postconviction</td>
<td>442</td>
<td>50%</td>
</tr>
</tbody>
</table>

Percentage out of 906 federal and state cases

**CHART 3. 2000–2011 Use for Writs of Habeas Corpus**

<table>
<thead>
<tr>
<th>Period</th>
<th>Cases</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Postarrest</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Postindictment</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Postconviction</td>
<td></td>
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</tbody>
</table>

Percentage out of approximately 20,000 federal cases per year
attack unconstitutional conditions of confinement, or to contest interstate extradition. But the most common use of habeas corpus in the United States today is as a postconviction remedy. As such, habeas corpus is used to challenge custody pursuant to a criminal conviction on grounds that the conviction or the sentence was obtained in violation of a constitutional or other fundamental right. It may alternatively be used on grounds unrelated to the validity of conviction and sentence, as where the convicted person’s parole was unlawfully revoked or denied or where the conditions of confinement are allegedly unconstitutional.26

Thus, a modern paradigm provides no assistance in understanding Smith and his colleagues’ use of habeas corpus during the 1830s and 1840s, since he was never convicted of any crimes in any court in any state.27

C. Applying the Writ of Habeas Corpus in Nineteenth-Century America

To properly understand the application of the habeas corpus laws during Joseph Smith’s time, we first look at the organization of the court system in that era. Next we consider the applicable legal commentary and case law that defined the use of habeas corpus in the various phases of litigation—from arrest to indictment to conviction—to determine how the application of the writ changed as the case moved through the legal process.

1. How the Nineteenth-Century American Judicial System Encouraged the Use of Habeas Corpus

Engaging in a discussion of Smith’s use of habeas corpus first requires an understanding of how the judicial process has evolved over the past two hundred years. One dramatic evolution for purposes of this discussion is the change from a “term-based” court system to a “standing” court system. In the nineteenth century, with the exception of the most local level of the


courts (typically the justices of the peace), a court would be in session only twice a year.28 These terms were most often held in the spring (the May Term, or Spring Term) and the fall (the October Term). In contrast, modern courts, both state and federal, are in session throughout the year. This difference is central to the corresponding change in trends of filing petitions for writs of habeas corpus.

The two-term system created a unique situation wherein a person could be arrested for an alleged crime and held until the next term began. For example, if a person were arrested for a crime in November, after the October Term had concluded, his or her charges would not be brought before a grand jury until the May Term began. Moreover, if the charges were not bailable, that person could be held for five or more months, based only on an affidavit or a preliminary hearing. During this period, a prisoner would have both significantly more time and opportunity to seek a review of his or her incarceration by petitioning for a writ of habeas corpus. These long incarceration periods obviously increased the incentive to contest the incarceration.

It is during this early phase of the litigation that we see the emergence of an American approach that diverges from the traditional British one. Under British jurisprudence habeas corpus was fundamentally a vehicle to protect from misuse of the judicial processes or procedures. A review by a court on a writ of habeas corpus under this approach would be curtailed to whether the procedural requirements were satisfied. In contrast, under the emerging American approach, while due process considerations remained important, the courts began “looking behind the writ” to review the underlying charges that allegedly supported an arrest and detention.

It was in this very situation that Joseph Smith most often petitioned for and obtained writs of habeas corpus. For example, Smith and his colleagues found themselves in this exact situation when they were incarcerated at Liberty Jail. They were imprisoned based only on the testimony solicited during a preliminary hearing, but as the charges were nonbailable, they would remain in jail for more than five months until the next term of the court where a grand jury would be empanelled. Smith sought a writ of habeas corpus to not only have a court review the procedures of their arrest, but also to look behind the writ itself to determine whether the underlying charges were supported by admissible and sufficient evidence.

2. Nineteenth-Century Writs of Habeas Corpus after Arrest but before Indictment (First Phase)

While the most recognized treatise on habeas corpus was not written until 1858,29 early commentaries are helpful in assessing Joseph Smith’s use of habeas corpus. For example, Joseph Chitty’s work on criminal law published in 181930 provides a general discussion regarding the propriety of looking behind the writ in ruling on a petition for habeas corpus during this first phase. Indeed, Chitty’s discussion of looking into the underlying factual allegations indicates that it was a common, even expected examination:

We do not find that the mere informality of the warrant of commitment [a procedural aspect] is, of itself, a sufficient ground for discharging or admitting to bail; for the court will look into the depositions returned, and if the facts there sworn to seem to amount to felony, they will remand the party to prison. And, on the other hand, even though the commitment be regular; the court will examine the proceedings, and if the evidence [the factual aspects] appear altogether insufficient, will admit him to bail; for the court will rather look to the depositions which contain the evidence, than to the commitment, in which the justice may have come to a false conclusion.31

Chitty’s explanation was further developed in 1827 by James Kent, who authored perhaps the most cited and authoritative treatise on nineteenth-century American law in his Commentaries on American Law. Kent traced American jurisprudence’s departure from the British common law principle of limited procedural review on a writ of habeas corpus during this first phase of a possible incarceration:

Upon the return of the habeas corpus, the judge is not confined to the face of the return, but he is to examine into the facts contained in the return. . . . [and] authorizes the judge to re-examine all of the testimony taken before

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29. “There is now but one work [on habeas corpus], to our knowledge, upon the subject, and the first edition of that appeared in 1858, followed by a second in 1876.” Church, Treatise of the Writ of Habeas Corpus, vii.
30. Joseph Chitty, A Practical Treatise on the Criminal Law; Comprising the Practice, Pleadings, and Evidence which Occur in the Course of Criminal Prosecutions, Whether by Indictment or Information: with a Copious Collection of Precedents of Indictments, Informations, Precedents, and Every Description of Practical Forms, with Comprehensive Notes as to Each Particular Offence, the Process, Indictment, Plea, Defence, Evidence, Trial, Verdict, Judgment, and Punishment (Edward Earle, 1819). Throughout his career, Chitty authored many treatises and other legal works, so many volumes that Chitty is considered to be the first “professional” legal writer. See Biographical Dictionary of the Common Law (London: Butterworth Legal Publishers, 1984).
the magistrate who originally committed, and to take further proof on the subject, for he is “to examine into the facts.”

Kent’s explanation on looking behind the writ in a petition for habeas corpus is further developed in Rollin Hurd’s seminal 1858 work, *A Treatise on the Right of Personal Liberty, and on the Writ of Habeas Corpus and the Practice Connected with It with a View of the Law of Extradition of Fugitives*, wherein he conducted a careful analysis of the United States Supreme Court 1807 case *Ex parte Bollman & Swartwout*. This case involved Erik Bollman and Samuel Swartwout’s use of habeas corpus to challenge the charges of treason brought against them for recruiting persons to participate in Aaron Burr’s failed attempt to create a separate nation in the West. Hurd examined how the Supreme Court addressed the use of extrinsic evidence in proving or defending the charge of treason, outside of that evidence presented in the charging pleadings used in the initial arrest.

Hurd noted that the Supreme Court addressed the issue again in the principal Burr case itself, finding,

> the presence of the witnesses to be examined by the committing justice, confronted with the accused, is certainly to be desired; and ought to be be

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32. James Kent, *Commentaries on American Law*, 1st ed. (1827), 2:26. Kent’s *Commentaries* was first published in 1827. Fifteen editions have been published, the last in 2002.


obtained, unless considerable inconvenience and difficulty exist in procuring his attendance. An *ex parte* affidavit, shaped perhaps, by the person pressing the prosecution, will always be viewed with some suspicion, and acted upon with some caution; but the court thought it would be going too far to reject it altogether. If it was obvious, that the attendance of the witness was easily attainable, but that he was intentionally kept out of the way, the question might be otherwise decided.

Thus, as the United States Supreme Court opined, the underlying affidavits that supported an arrest, while *ex parte* by their very nature, were admissible to support an arrest during a review by habeas corpus by a court. The Supreme Court also acknowledged additional scrutiny of the allegations made in the affidavits, noting that such scrutiny was both appropriate and preferable. It was this scrutiny that the courts applied to determine the proper scope for challenges to the incarceration of an accused.

Lastly, William Church’s 1884 treatise on the writ of habeas corpus provides some additional clarification. Church provides a summary of how the courts treated the postarrest, but preindictment, petition for habeas corpus during the nineteenth century:

The decisions on this point may be divided into two classes . . . 1. Those which hold that, upon a commitment regular and valid upon its face, the only open question before a court on the hearing of a return to a writ of habeas corpus is the jurisdiction of the committing magistrate [procedural]; and, 2. Those which hold that not only the proceedings but the evidence taken before the committing magistrate may be examined [factual], and the commitment revised if necessary, or a commitment made *de novo* by the court hearing the matter . . . The practice set down in the first rule seems to have been followed in many of the states, and is probably supported by a preponderance of authorities; but we consider the second to be the soundest, most in accord with the spirit which gave birth to the writ of habeas corpus, and one from which will flow the greatest and best results of this beneficent writ.

Church recognized the tension between the traditional common law approach (as derived under British precedents), which was that only the

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35. *Ex parte* means on the part of one side only.
37. Church, *Treatise of the Writ of Habeas Corpus*. William S. Church (b. 1851) studied the law in 1881 and was admitted the same year. It was the next year that he wrote his book on habeas corpus. Winfield J. Davis, *An Illustrated History of Sacramento County, California* (Chicago: Lewis Pub. Co., 1890), 376–77.
38. *De novo* means “from the beginning.”
form of the writ should be subject for examination, and the more expansive American approach, noted with approval from the United States Supreme Court, which permitted or even required inquiry into the underlying factual predicates. Church succinctly distills these competing approaches endorsing the American approach, stating:

As before intimated, we rather lend our approval to this rule [the American approach, allowing both procedural and factual review], which seems to have prevailed quite extensively, and to have stood side by side, in some of the states, with the more rigid one akin to that of the common law [the British approach, allowing only procedural review]. . . . In fact, it seems necessary for the court to look beyond the warrants and into the affidavits to see whether the committing magistrate had colorable jurisdiction. In all cases in habeas corpus proceedings previous to indictment, the court will look into the depositions before the magistrate or before the coroner’s inquest; and though the commitment be full, and in due form, yet if the testimony proves no crime, the court will discharge or bail.40

Courts and judges should have, and do have to a great extent where this rule prevails, authority to revise the cause of commitment, and to examine into the truth of the facts alleged in the return, and the officer may examine into the merits of the commitment, and hear the allegations and proofs arising thereon in a summary way, and dispose of the party as justice may require. . . . The doctrine of looking behind the commitment of the magistrate protects alike the interests of the accused and of the commonwealth.41

These legal commentators provide a consistent paradigm to view the use of habeas corpus during the nineteenth century as it evolved from a British model to an American one. This same evolution can be viewed through the courts. For example, in People v. Martin,42 the New York Supreme Court confronted the prosecution’s position “that the commitment of the magistrate is conclusive upon me, and that I have no right on this return to look beyond the question of its regularity or that if I do look beyond it, I can look only at the depositions taken before the magistrate.”43 The judge confessed that while such an approach appeared consistent with his “reading of [his] boyhood [rather] than of riper years,” because of the vital nature of the underlying principles of habeas corpus, he took the time for an “extended” examination, to ensure “an accurate and intimate knowledge of

40. Church, Treatise of the Writ of Habeas Corpus, 295.
41. Church, Treatise of the Writ of Habeas Corpus, 296.
42. 2 Edm. Sel. Cas. 28 (N.Y. 1848).
43. 2 Edm. Sel. Cas. 29 (N.Y. 1848).
the properties of this great instrument of personal liberty, the writ of habeas corpus." The judge summarized the law after arrest but before indictment:

If in custody on criminal process before indictment, the prisoner has an absolute right to demand that the original dispositions be looked into to see whether any crime is in fact imputed to him, and the inquiry will by no means be confined to the return. Facts out of the return may be gone into to ascertain . . . whether the commitment was not palpably and evidently arbitrary, unjust, and contrary to every principle of positive law or rational justice.

The same court in 1851 acknowledged the continuing fluid development of the American approach of looking behind the writs in *People v. Tompkins*, explaining:

It was very strenuously urged on the argument of this case, on the part of the public prosecutor, that on habeas corpus the court or officer had no right to go behind the warrant on which the prisoner was detained, and inquire from facts out of the return into the legality of the imprisonment. The effect of this principle would be, that the warrant of a committing magistrate, when legal upon its face, would be conclusive upon the prisoner, and he could have no relief from imprisonment, even if no charge whatever had in fact been preferred against him. . . . I have examined the subject very carefully, and rejoice to find that there is no authority to shake my previous convictions on this subject.

After reviewing the cases and authority cited by the prosecution advocating only a procedural review [the British approach], the *Tompkins* Court explained:

Of all the cases which I can find, or to which I have been referred in support of the doctrine contended for in behalf of the prosecution none of them sustain the doctrine, and it is well they do not, for the habeas corpus would be a mockery, whenever a magistrate might please to make the instrument of oppression and false imprisonment formal and regular on its face, and personal liberty would be at the mercy of ignorance or design, beyond anything yet known to our laws, careless as they too frequently are of freedom in the detail, from the abundance of it in the gross.

44. 2 Edm. Sel. Cas. 28–29 (N.Y. 1848).
45. 2 Edm. Sel. Cas. 38 (N.Y. 1848).
46. 2 Edm. Sel. Cas. 191, 191–92 (N.Y. 1851). Both the New York courts and legislature were leading voices for the development of jurisprudence and policy that would typically be adopted throughout the other states. James Kent, *Commentaries on American Law* (O. Halstead, 1827), 2:24.
47. 2 Edm. Sel. Cas. 194 (N.Y. 1851).
A sampling of cases from other jurisdictions involving a postarrest, but preindictment, scenario shows that the courts routinely allowed a substantive analysis of the underlying facts rather than just looking at the procedural formalities. State courts also interpreted the statutory provisions of their respective habeas corpus acts to permit close scrutiny of the factual predicates of the crime.

3. Nineteenth-Century Writs of Habeas Corpus after Indictment but before Conviction (Second Phase)

The American courts’ treatment of habeas corpus after indictment in the nineteenth century closely aligns with the traditional English common law. As articulated by the New York Supreme Court in People v. McLeod, “Nothing is better settled, on English authority, than that on habeas corpus, the examination as to guilt or innocence cannot, under any circumstances, extend beyond the depositions or proofs upon which the prisoner was committed.” This rule was repeatedly applied when the request for habeas corpus came after the prisoner had been indicted. This is fundamentally because grand jury testimony is not publicly available to scrutinize. Such a presumption of guilt for purposes of habeas corpus does not extend to the trial on the charges. These limitations on review after indictment but before conviction are not applicable when allegations of fraud or perjured testimony are involved. For example, in United States v. Burr, one of Aaron Burr’s central arguments accepted by the court against the indictments of treason was that they “had been obtained by perjury.” Similarly, in Commonwealth v. Carter, the Supreme Court of Massachusetts held that its Habeas Corpus Act itself provided for relief after indictment upon showing the prosecutor’s “witness is occasioned by fraud,” reasoning “that such avoidance is fraudulent, unlawful and collusive, and done or caused with a design to defeat the claims of justice.” As noted by the Arkansas Supreme Court in Ex parte White, in a postindictment but pretrial stage:

48. See, for example, State v. Doty, 1 Walk. 230 (Miss. 1826); State v. Best, 7 Blackf. 611, 612 (Ind. 1846); In re McIntyre, 10 Ill. (5 Gilm.) 422, 425 (1849); In re Powers, 25 Vt. 261, 269 (1853); Ex parte Mahone, 30 Ala. 49, 50 (Ala. 1857); People v. Stanley, 18 How. Pr. 179, 180 (N.Y. 1859).
49. See, for example, In re Clark, 9 Wend. 212, 220 (N.Y. 1832); Snowden et al. v. State, 8 Mo. 483, 486 (1844).
50. 25 Wend. 483, 568 (N.Y. 1841).
51. See, for example, State v. Mills, 13 N.C., 420, 421-22 (1830); People v. Martin, 2 Edm. Sel. Cas. 28, 31-32 (N.Y. 1848).
52. See, for example, Hight v. United States, 1 Morris 407, 410 (Iowa 1845).
53. 25 F.Cas. 55, 70 (D.Va. 1807).
54. 28 Mass. 277, 279 (Ma. 1831).
The law requires the party to make an affidavit of merits to warrant this court in going behind the indictment, and the affidavit must state such particular facts that, if proven to be false, the affiant [the person who signs an affidavit] could be indicted for perjury: otherwise, the requiring of an affidavit would be a merely idle form.\textsuperscript{55}

4. Nineteenth-Century Writs of Habeas Corpus after Conviction (Third Phase)

The nineteenth-century application of habeas corpus after conviction followed more closely the modern application in the same phase: “The writ of habeas corpus was not framed to retry issues of fact, or to review the proceedings of a legal trial.”\textsuperscript{56} Consequently, postconviction writs of habeas corpus are predominantly limited to constitutional challenges of the charges or procedure of the case and challenges to the implementation of the sentence.\textsuperscript{57}

5. Summary

As the foregoing illustrates, these three phases are really parts of a continuum. In a postarrest but preindictment phase, a person is in custody based on a complaint supported typically by an affidavit. In the postindictment but preconviction phase, a person is in custody based on a grand jury finding. Finally, in the postconviction phase, a person is in custody based on the trial itself. At each consecutive phase, there is an increased amount of information supporting the incarceration. The affidavit supporting an arrest does not carry much weight. There is more weight given to an indictment and even more weight given to a conviction. Thus, the ability to look behind the writ depends on where the case is heard, with the level of review decreasing or narrowing as the case makes its way through the judicial process.

Consequently, a proper examination of Joseph Smith’s use of habeas corpus must first identify in which phase of the case the petition was brought. Failure to do so results in an inaccurate determination of whether the sought-after review was legally available; this failure lies at the root of the misunderstanding by many historians and commentators of Joseph Smith’s use of this writ.

\textsuperscript{55} 9 Ark. 223, 226 (1848).
\textsuperscript{56} Ex Parte Bird, 19 Cal. 130, 131 (1851).
\textsuperscript{57} See, for example, Stewart’s Case, 1 App. Pr. 210, 212 (NY 1820); People v. Martin, 2 Edm. Sel. Cas. 28, 37 (N.Y. 1848).
IV. Joseph Smith’s Use of Habeas Corpus

Joseph Smith’s first use of habeas corpus was in response to the preliminary hearing before Circuit State Judge Austin A. King in November 1838, which hearing resulted in his incarceration in Liberty Jail. While in the Missouri jail he joined in two petitions for habeas corpus—one in January 1839 to the county judge in Clay County and a second to the Missouri Supreme Court in March 1839. In Nauvoo, Smith was involved in enacting ordinances that articulated the rights extended by the Nauvoo Charter for issuing and hearing writs of habeas corpus. Later, still in Illinois, Smith used the writ of habeas corpus again as a key protection during extradition attempts by the State of Missouri. These events provide a window into his understanding and application of this most important writ.

A. Habeas Corpus in Missouri (1838–1839)

1. Facts

On November 1, 1838, Major General Samuel D. Lucas arrested Joseph Smith and six of his colleagues outside of Far West, Missouri, thereby marking the effective end of the Missouri conflict and the start of a forced exodus by the Mormons from Missouri. More than sixty others who were charged with crimes ranging from arson, burglary, and robbery to treason and even murder, joined Smith. Because some of the alleged crimes occurred in Ray County, Missouri, the preliminary hearing (referred to as a Court of Inquiry) was held in Richmond, the county seat of Ray County, before Fifth


59. Document Containing the Correspondence, Orders, &C., in Relation to the Disturbances with the Mormons; and the Evidence Given before the Hon. Austin A. King, Judge of the Fifth Judicial Circuit of the State of Missouri, at the Court-house in Richmond, in a Criminal Court of Inquiry, Begun November 12, 1838, on the Trial of Joseph Smith, Jr., and Others, for High Treason and Other Crimes against the State (Fayette, Mo.: Boon’s Lick, 1841), 19–20, 34 (hereafter cited as Missouri Documents); Document Showing the Testimony Given before the Judge of the Fifth Judicial Circuit of the State of Missouri, on the Trial of Joseph Smith, Jr., and Others, for High Treason and Other Crimes against That State (Washington, D.C.: United States Senate, 1841), 119, 132, 140 (hereafter cited as Senate Documents).
Circuit State Court Judge Austin King.\(^60\) This hearing lasted two weeks, concluding on November 29, 1838, at which time Judge King found probable cause to charge thirty-four of the defendants. Bail was available for twenty-three of the thirty-four,\(^61\) leaving eleven to be held in custody pending a grand jury, wherein indictments would be considered. Of those eleven, Joseph Smith, Hyrum Smith, Lyman Wight, Alexander McRae, Caleb Baldwin, and Sidney Rigdon were charged with treason and sent to Liberty Jail in Clay County (because no jail existed in either Caldwell or Daviess County, where these alleged crimes had occurred) on December 1, 1838.\(^62\) There they were incarcerated to await a grand jury, which, the October Term having already concluded, would not occur until the 1839 Spring Term.

An attempt for the Missouri legislature to review the matter was made almost immediately after Judge King bound them over. On December 5, 1838, Governor Boggs provided the Missouri Legislature with a report of the Mormon dispute to support the charges for the incarcerated. The Mormons answered by providing the “Memorial of a Committee to the State Legislature of Missouri in Behalf of the Citizens of Caldwell County” on December 10, 1838.\(^63\) On December 18, 1838, a joint committee of the legislature charged with investigating the Mormon dispute submitted their preliminary findings, noting that the underlying record of Judge King’s preliminary hearing was “in a great degree \textit{ex parte}, and not of the character which should be desired for the basis of a fair and candid investigation. Moreover, the papers, documents, etc., have not been certified in such manner, as to satisfy the committee of their authenticity.”\(^64\) The committee concluded that a full investigation lasting several months was necessary, and that their findings should not be made public until after the grand jury had heard the case during the upcoming Spring Term.\(^65\) During this time, Smith and his

\(^{60}\) Austin A. King (1801–1870) was appointed judge of the Fifth Judicial Circuit Court in 1837. He remained on the bench until 1848, when he was elected governor of Missouri. After losing re-election to the governorship, King returned to the Fifth Judicial Circuit, where he remained until his death in 1870. William Van Ness Bay, \textit{Reminiscences of the Bench and Bar of Missouri} (F. H. Thomas and Co., 1878), 153–55.

\(^{61}\) Missouri Documents, 97, 150; Senate Documents, 1.

\(^{62}\) Missouri Documents, 150. Five were bound over for murder arising from the Battle of Crooked River. They included Parley P. Pratt, Norman Shearer, Darwin Chase, Lyman Gibbs, and Maurice Phelps.

\(^{63}\) Rough Draft Notes of History of the Church, 1838-038.

\(^{64}\) Missouri Documents, 2.

\(^{65}\) Rough Draft Notes of History of the Church, 1838-039. On January 16, 1839, this joint committee introduced a bill that was thereafter passed by both houses of the Missouri legislature entitled, “To provide for an investigation of the late disturbance in this State.” Missouri Documents, 4–8. The final report from the
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colleagues remained in Liberty Jail waiting for the empanelling of a grand jury in the 1839 Spring Term.

With the prospects of timely help from the Missouri legislature gone, Joseph Smith and the other prisoners looked to the courts for assistance. Smith recalled:

Under such circumstances, sir, we were committed to this jail, on a pretended charge of treason, against the State of Missouri, without the slightest evidence to that effect. We collected our witnesses the second time, and petitioned a habeas corpus: but were thrust back again into prison, by the rage of the mob; and our families robbed, and plundered: and families, and witnesses, thrust from their homes, and hunted out of the State.66

Sidney Rigdon prepared an extensive affidavit delineating his experiences in Missouri, including a summary of their efforts for review via this same petition for habeas corpus:

The trial at last ended, and Lyman Wight, Joseph Smith Senior,67 Hyrum Smith, Caleb Baldwin, Alexander McRea, and myself were sent to jail in the village of Liberty, Clay county Missouri. We were kept there from three to four months; after which time we were brought out on habeas corpus before one of the county judges. During the hearing under the habeas corpus, I had, for the first time, an opportunity of hearing the evidence, as it was all written and read before the court. It appeared from the evidence that they attempted to prove us guilty of treason in consequence of the militia of Caldwell County being under arms at the time that General Lucas' army came to Far West. This calling out of the militia, was what they founded the charge of treason upon—an account of which I have given above. The charge of murder was founded on the fact, that a man of their number, they said, had been killed in the Bogard battle. The other charges were founded on things which took place in Davies. As I was not in Davies county at that time, I cannot testify anything about them.68

These two accounts provide some useful insights into nineteenth-century application of habeas corpus. Both accounts note that the hearing included the examination of the evidence, Joseph Smith noting that they “collected [their] witnesses the second time” (the first being the King hearing), and Rigdon writing that all of the written evidence was “read before the court.” These examinations were in accord with the law of looking behind the investigation of the joint committee was not ready for publication until February 1841. Missouri Documents, 11.

66. Joseph Smith to Isaac Galland, March 22, 1839, Church History Library.
67. This affidavit was prepared in 1843, by which time Joseph Smith had begun to use the name Joseph Smith Senior, since his father had died.
68. Affidavit of Sidney Rigdon, July 2, 1843, Church History Library.
writ on a petition for habeas corpus when the petition was brought during the first phase (after arrest but before indictment), which was exactly the status of Smith, Rigdon, and their companions.

During this habeas corpus hearing before Clay County Judge Turnham, Alexander Doniphan recruited Peter Burnett,69 a local attorney, to assist him in representing Smith, Rigdon, and the other prisoners held at Liberty Jail. Burnett’s account of this hearing provides some additional details, as well as a flavor of the intensity of the persecution that the Mormons were experiencing. He recorded:

We had the prisoners out upon a writ of habeas corpus, before the Hon. Joel Turnham, the County Judge of Clay County. In conducting the proceedings before him there was imminent peril. . . . We apprehended that we should be mobbed, the prisoners forcibly seized, and most probably hung. Doniphan and myself argued the case before the County Judge. All of us were intensely opposed to mobs, as destructive of all legitimate government, and as the worst form of irresponsible tyranny. We therefore determined inflexibly to do our duty to our clients at all hazards, and to sell our lives as dearly as possible if necessary. We rose above all fear, and felt impressed with the idea that we had a sublime and perilous but sacred duty to perform. We armed ourselves, and had a circle of brave and faithful friends armed around us; and, it being cold weather, the proceedings were conducted in one of the smaller rooms in the second story of the Court-house in Liberty, so that only a limited number, say a hundred persons, could witness the proceedings.

Judge Turnham was not a lawyer, but had been in public life a good deal, and was a man of most excellent sense, very just, fearless, firm, and unflinching in the discharge of his duties. We knew well his moral nerve, and that he would do whatever he determined to do in defiance of all opposition. While he was calm, cool, and courteous, his noble countenance exhibited the highest traits of a fearless and just judge.

I made the opening speech, and was replied to by the District Attorney; and Doniphan made the closing argument. Before he rose to speak, or just as he rose, I whispered to him: “Doniphan! Let yourself out, my good fellow; and I will kill the first man that attacks you.” And he did let himself out, in one of the most eloquent and withering speeches I ever heard. The maddened crowd foamed and gnashed their teeth, but only to make him more and more intrepid. He faced the terrible storm with the most noble courage. All the time I sat within six feet of him, with my hand upon my pistol, calmly determined to do as I had promised him.

The Judge decided to release Sidney Rigdon, against whom there was no sufficient proof in the record of the evidence taken before Judge King. The other prisoners were remanded to await the action of the grand jury of Davis County. Rigdon was released from the jail at night to avoid the mob.70

Burnett’s account is consistent with both Smith’s and Rigdon’s accounts that Judge Turnham “looked behind the writ” and reviewed the underlying facts.71

At the conclusion of this hearing, Judge Turnham ruled that there was not sufficient evidence to hold Rigdon and released him. While there are several accounts noting Rigdon’s release, the basis for the release has remained largely uncertain. Burnett’s account helps to clarify the legal basis, which fits squarely within the legal parameters of the applicable habeas corpus laws.

Following Rigdon’s release in January, but before the grand jury was held in Daviess County in April 1839, Joseph Smith, his fellow prisoners, and others sought a second writ of habeas corpus from the Missouri Supreme Court in a series of documents simply titled “Petition,” dated March 1839. These petitions not only articulated procedural irregularities in the events leading up to their imprisonment in Liberty Jail but also noted irregularities


71. While there is some question to what extent Judge Turnham examined these underlying facts, at a minimum Judge Turnham reviewed the factual record generated during the King hearing. It is not clear in what form this record was available to Judge Turnham. Most likely it was a handwritten copy prepared during the hearing. Unfortunately, the record was incomplete.
in the underlying factual allegations altogether. They did this in two manners: first, they disputed the factual allegations themselves; and second, they argued that the facts testified of were insufficient to constitute the crime of treason. The Missouri Supreme Court refused to hear these petitions.

2. Charges

A review of the preliminary hearing before Judge King reveals that the treason charge that held Joseph Smith and his colleagues in Liberty Jail can be separated into two categories. The first is the alleged illegal activities that occurred in Daviess County in October 1838. The second category involves various speeches given by Sidney Rigdon in Far West, Caldwell County.

The following specific acts relating to this first category include: burning Jacob Stolling’s store in Gallatin; taking goods from the same store; burning a home just outside of Gallatin; taking household furnishings and livestock from homes in or near Gallatin to Adam-ondi-Ahman; and taking Addison Price and Jesse Kelley prisoner.

The charges against Joseph Smith, Hyrum Smith, Lyman Wight, Alexander McRae, and Caleb Baldwin were based on their alleged participation in the “expeditions” which resulted in these activities. The accused did not have equal involvement in the aforementioned activities; however, the prosecution claimed that each participated in the overall operation and was considered a leader. While multiple witnesses supported these allegations, the evidence was not consistent and was often contradictory.

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73. See Madsen, “Joseph Smith and the Missouri Court Inquiry,” 92, 115–19. Madsen provides a thorough analysis of the facts solicited during the preliminary hearing and whether they constituted treason.

74. From the record, it appears that Hyrum had the least direct involvement.

75. Three copies of the transcripts from the preliminary hearing are extant, in addition to the printed versions submitted to the Missouri legislature and the U.S. Senate. Copies of the transcripts include copies (1) held with the Violleyte Collection, Joint Collection: Western Historical Manuscript Collection and the State Historical Society of Missouri, University of Missouri, Columbia, (2) held at Missouri State Archives, Jefferson City, Missouri, and (3) held at Missouri Historical Society, St. Louis, Missouri. Unfortunately these records must be viewed with some skepticism: as Madsen notes in his article, the record kept of this preliminary hearing is problematic on several fronts. See Madsen, “Joseph Smith and the Missouri Court Inquiry.” No shorthand or stenographic record was kept. The record is a summary of the testimony proffered. Under the rules of evidence that existed at that time, such summaries were prepared by the judge or, more often, by his clerks and then signed by the witness, verifying the accuracy of the summary. The Revised
The second category of charges involves the alleged speeches that Sidney Rigdon gave in Far West in June 1838, also known as the “Salt Sermon,” and July 1838, known as the “July 4th Oration.” The Salt Sermon was directed to a purging of dissenters within the Church, and the July 4th Oration was directed at fighting those outside the Church. Both were viewed as incendiary speeches, and multiple witnesses testified that they were present during the original delivery.

It was these cumulative factual allegations that supported binding these men over for the grand jury and holding them in Liberty Jail until the grand jury would convene.

3. Discussion

The law of treason finds its roots in the United States Constitution. The Missouri Constitution directly borrows its language on treason from the

Statutes of the State of Missouri, Practice and Procedure in Criminal Cases, art. II, secs. 17 and 20, 2d ed. (St. Louis: Chambers, Knapp and Co., 1840). Unfortunately, such verifications are mostly missing. Further, the record was to include the direct and cross-examinations, as well as any questioning that was done by the judge. See Revised Statutes of the State of Missouri, secs. 14, 15, 18, and 19. The record does not contain any cross-examination or questions from Judge King, both of which clearly occurred. Finally, the record identifies forty-one witnesses, but contains the testimony of only thirty-eight. These problems are chronic and do not allow for a complete understanding of these events. However, it was the only record that existed and was thus all that was available to be reviewed on the writs of habeas corpus, assuming it was in some measure available. These problems are somewhat helpful in determining how the subsequent courts ruled.

76. See Manuscript of Austin King’s Court of Inquiry, Violette Collection, Joint Collection, Western Historical Manuscript Collection and the State Historical Society of Missouri, University of Missouri, Columbia, Mo., 28–31, 43, 47, 62, 75, 96, 106–7.

77. They were held in Liberty Jail because the first alleged activities occurred in Daviess County, and since there was no jail in Daviess County, the Liberty Jail was used, being the closest. And the speeches were given by Rigdon in Caldwell County, where no jail had been constructed, also leaving Liberty Jail as the closest available jail to hold him. The group of Mormons charged with murder, including Parley P. Pratt, was held in the Richmond Jail pending a grand jury hearing. During the Court of Inquiry held in Richmond, because the Richmond Jail was not large enough to hold all of the prisoners, the jailers used a local log home to house several of the accused, nailing down the windows and chaining the accused together and to the floor. It was in this makeshift jail that Smith made his famous rebuke of the guards as recorded by Parley P. Pratt, who was chained next to him. Parley P. Pratt, Autobiography of Parley Parker Pratt, One of the Twelve Apostles of the Church of Jesus Christ of Latter-Day Saints (Law, King, and Law, 1888), 227–34.

78. U.S. Constitution, art. 3, sec. 3: “Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them
United States Constitution.79 Judicial refinements of the law were defined early in American history through a series of cases arising out of Aaron Burr’s failed effort to create a separate nation from Spanish-owned Mexico, which included states west of the Mississippi Valley. The most applicable refinement was the affirmation by the United States Supreme Court that treason required an “overt act” to “levy war.”80 Justice Marshall, in the opinion for the Burr conspiracy case, further held that accessory rules, which make accessories equally guilty as the principal who actually commits the crime, were inapplicable to cases of treason; that is, advising, counseling, advocating, or even assisting in preparing for treasonous actions does not constitute treason.81

Applying the foregoing rules and factors to the habeas corpus hearing before Judge Turnham is relatively straightforward. As discussed above, if a petition for habeas corpus falls within the first phase (after arrest and before indictment), a judge may look behind the writ to assure that there are sufficient factual allegations to support the charges. While the evidence in the record implicating Joseph Smith, Hyrum Smith, Lyman Wight, Alexander McRae, and Caleb Baldwin would ultimately be insufficient to warrant a conviction, the record does articulate generally that these men were the leaders of or directed various military or riotous actions.82 Thus apparently Judge Turnham determined that sufficient evidence had been admitted to find that the minimum standard of probable cause was established. Consequently, the judge denied their request to be released from Liberty Jail. It is not clear whether Smith and his colleagues were allowed to affirmatively present additional testimony, although Smith indicates that they had at least prepared to do so.

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Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.”

79. Missouri Constitution, art. XIII, sec. 15 (1820), The Revised Statutes of the State of Missouri (J. W. Dougherty, 1845), 44: “That treason against the state can consist only in levying war against it, or in adhering to its enemies, giving them aid and comfort; that no person can be convicted of treason unless on the testimony of two witnesses to the same overt act, or on his own confession in open court.”

80. U.S. Constitution, art. 3, sec. 3.

81. See United States v. Burr, 8 U.S. (4 Cranch) 470, 473 (1807); Ex parte Bollman and Ex parte Swartwout, 8 U.S. (4 Cranch) 75, 126 (1807); see generally David Robertson, Trial of Aaron Burr for Treason (James Cockcroft and Company, 1875).

82. This conclusion is based on the testimony given during the Court of Inquiry. For purposes of this analysis such testimony is accepted as true. See Madsen, “Joseph Smith and the Missouri Court Inquiry,” 115–19, for a discussion about the chronic problem with the extant testimony of this preliminary hearing to establish treason.
In contrast, the only evidence implicating Sidney Rigdon was the two speeches he gave in Far West. While we have the text of only the July 4th Oration (which was printed and distributed in Far West), there are numerous sources (including witnesses at the preliminary hearing) that provide the general outline of the Salt Sermon.83 Both speeches included rhetoric of warfare, even calling for action. However, taking all of the statements presented in the preliminary hearing as fact does not constitute the crime of treason. As Justice Marshall articulated in the Burr case, speech alone is insufficient to constitute treason—there must be an actual overt action in levying war; none could be found in the record against Rigdon. As their attorney, Peter Burnett, recounted, “The Judge decided to release Sidney Rigdon, against whom there was no sufficient proof in the record of the evidence taken before Judge King.”84

This analysis illustrates that courts were allowed, during the period between arrest and indictment, to look behind the procedural niceties of an arrest and resulting incarceration, and examine the underlying facts of the matter. That is exactly what Judge Turnham did for Joseph Smith and his colleagues in hearing their collective petitions for a writ of habeas corpus.

4. Summary

Joseph Smith’s correct understanding of the writ of habeas corpus is demonstrated in his and others’ efforts to have the Missouri courts review their arrest and incarceration. These various petitions not only demonstrate Smith’s understanding of the law of treason as applied by Justice Marshall in the Burr opinions, but also his knowledge of the application of the writ of habeas corpus that allowed the court to look at both procedural and substantive issues.

Through these events, Smith became both a student and practitioner in the use of the writ of habeas corpus. He subsequently left Missouri in April 1839, with a growing understanding of the need to protect the right of

83. See for Rigdon’s Salt Sermon, John Corrill, “A Brief History,” manuscript version in the John Fletcher Darby Papers, Missouri History Museum Archives, St. Louis, Missouri, 29–30; Reed Peck, Manuscript, “Quincy, Illinois to Dear Friends,” September 18, 1839, L. Tom Perry Special Collections, Brigham Young University, 7–8; See for Rigdon’s July 4th sermon, “Oration Delivered by Mr. S. Rigdon on the 4th of July, 1838: At Far West, Caldwell County, Missouri” (Far West, Mo.: Journal Office, 1838), Church History Library.
84. Peter Hardman Burnett, Recollections and Opinions of an Old Pioneer (D. Appleton, 1880), 55.
habeas corpus. This skill became even more evident as he found himself in need of such protection while residing in Illinois.

B. Habeas Corpus in Illinois under the Nauvoo City Charter

The Nauvoo Charter, granted by the Illinois legislature on December 16, 1840, granted the city council the “power and authority to make, ordain, establish, and execute, all such ordinances, not repugnant to the Constitution of the United States or of this State, as they deem necessary for the peace, benefit, good order, regulation, convenience, and cleanliness, of said city.” Under this charter, the Nauvoo City Council had the power to enact laws pertaining to the use of habeas corpus in Nauvoo. The charter also provided for the creation of a court system, as follows:

Sec. 16: The Mayor and Aldermen shall be conservators of the peace within the limits of said city, and shall have all powers of Justices of the Peace therein, both in civil and criminal cases, arising under the laws of the State: . . .

Sec. 17: The Mayor shall have exclusive jurisdiction in all cases arising under the ordinances of the corporation, and shall issue processes as may be necessary to carry said ordinances into execution and effect; appeals may be had from any decision or judgment of said Mayor or Aldermen, arising under the city ordinances, to the Municipal Court, under such regulations as may be presented by ordinance; which court shall be composed of the Mayor, as the Chief Justice, and the Aldermen as Associate Justices, and from the final Judgment of the Municipal Court, to the Circuit Court of Hancock county, in the same manner as appeals are taken from judgments of Justices of the Peace; Provided, That the parties litigants shall have a right to a trial by a jury of twelve men, in all cases before the Municipal Court. The Municipal Court shall have power to grant writs of habeas corpus in all cases arising under the ordinances of the City Council.

These sections provided that the mayor and aldermen were “justices of the peace” within Nauvoo and together constituted the “municipal court.” The municipal court was the equivalent in some limited situations to the

85. For a discussion about the process for obtaining the Nauvoo City Charter, see generally James L. Kimball Jr., “A Wall to Defend Zion: The Nauvoo Charter,” BYU Studies 15, no. 4 (1975): 492–97; see also B. H. Roberts, The Rise and Fall of Nauvoo (Salt Lake City: Deseret News, 1900), 81.


87. Nauvoo City Charter, secs. 16–17, bold emphasis added.
Illinois circuit courts wherein appeals from the justices of the peace could be taken and where original jurisdiction was expanded. Such original jurisdiction expressly extended to the municipal court was the power to grant writs of habeas corpus. While some have viewed this inclusion as unique, two of the five city charters adopted in Illinois before the Nauvoo Charter contained similar judicial rights. For example, in 1839 the 1837 charter for the city of Alton, Illinois, was amended to grant that “the judge of the municipal court of the city of Alton shall have power, and is hereby authorized, to issue writs of habeas corpus” and other writs “within the jurisdiction of said court; and the same proceedings shall be had thereon before said judge and court as may be had in like cases before circuit judges and circuit courts of this State.”

Jurisdiction for issuing writs of habeas corpus as could a circuit court was also expressly granted in the city of Chicago’s charter in 1837, so that its municipal court had “jurisdiction concurrent with the circuit courts of the State, in all matters civil and criminal, arising within the limits of the city, and in all cases where either plaintiff and defendant or defendants, shall reside at the time of commencing the suit, within said city,” with the municipal judge possessing “all and singular the powers, and he is hereby required to perform all the judicial duties appertaining to the office of a judge of the circuit courts of this state, and to issue all such writs and process as is or may hereinafter, by statutory provision, be made issuable from the circuit courts of this state.”

The drafting of the Nauvoo charter was undoubtedly influenced by the Mormons’ experiences in Missouri and the perceived threat of additional efforts by the Missourians to apprehend Mormon leaders, especially Joseph Smith. Yet its grant of rights to issue writs of habeas corpus cannot be seen as entirely unique. The cumulative effect of these provisions in the charter was the progressive development of ordinances dealing with the rights and uses of habeas corpus. As will be discussed, it appears from these ordinances

88. “An Act to Amend an Act, Entitled ‘An Act to Incorporate the City of Alton,’” sec. 1, Incorporation Laws of the State of Illinois Passed by the Eleventh General Assembly, at Their Session Began and Held at Vandalia, on the Third of December, One Thousand Eight Hundred and Thirty-eight (Vandalia, Ill.: William Walters, 1839), 240. Further research would be required to determine whether any such writs were ever issued by cities other than Nauvoo.

89. “An Act to Incorporate the City of Chicago,” Laws of the State of Illinois Passed by the Tenth General Assembly, at Their Special Session, Commencing December 5, 1836, ending March 6, 1837 (Vandalia, Ill.: William Walters, 1837), 75, sec. 69.

that the leaders in Nauvoo understood that the charter provided them the right to enact these types of ordinances and that they were restricted only by the contours of the United States Constitution or the Illinois Constitution, whichever was broader. Consequently, these ordinances must therefore be read not only in light of the general law of habeas corpus as understood and applied in the first half of nineteenth-century America, but also in harmony with the broader provisions of the United States and Illinois Constitutions.

C. Missouri’s First Effort to Extradite Joseph Smith—June 1841

1. Facts

In early April 1839, Joseph Smith, Hyrum Smith, Lyman Wight, Alexander McRae, and Caleb Baldwin were taken from Liberty Jail, where they had been incarcerated since early December 1838, to Gallatin, Daviess County, where a grand jury was empanelled at the commencement of the Spring 1839 court term to consider the charges brought against them, including the nonbailable charge of treason. There, after a two-day hearing, they were indicted on several charges. At the close of the grand jury hearing, Judge Thomas Burch granted a request to change venue to Boone County due to the fact that he had been the prosecuting attorney in the preliminary hearing before Judge Austin King. En route to Boone County all of the prisoners either escaped or were released and made their way to Illinois to join the body of the Church.91

Sixteen months later, on September 1, 1840, Governor Boggs sent a requisition to Illinois Governor Thomas Carlin seeking the extradition of Joseph Smith and five others to Missouri based on these outstanding indictments.92 The extradition request was supported by the indictments,


92. The others noted in the requisition included Lyman Wight, Caleb Baldwin, Alanson Brown, Sidney Rigdon, and Parley Pratt. Smith, Wight, and Baldwin were indicted for several crimes, including treason. The same jury indicted Brown for burglary. Rigdon was not sought to be returned on the treason charge (from which he was discharged by Judge Turnham, as discussed above) but for being an accessory before the fact to the murders for which Pratt was indicted. Smith, Wight, and Baldwin had left Missouri after being released (some believed escaped) on route to Boone County after the change of venue. Brown had left Missouri prior to being indicted in April 1839. See Alanson Brown, Affidavit, Adams County, Illinois, January 8, 1840, in Mormon Redress Petitions: Documents of the 1833–1838 Missouri Conflict, ed. Clark Johnson (Provo, Utah: FARMS, 1992), 425–26. Rigdon had been
of which Governor Boggs had secured certified copies in July 1839. What is not clear is whether Governor Boggs knew that in August 1839 all of these indictments had been dismissed based on a motion by the Boone County prosecuting attorney. The judge in Boone County was Governor Boggs’s successor, Thomas Reynolds.

Unfortunately, the resulting arrest warrant issued by Illinois Governor Carlin based on the extradition request of the succeeding Missouri Governor Reynolds for the arrest of Joseph Smith and others is not extant. It apparently was carried to Nauvoo, where the legal officer could not locate

released by Judge Turnham and had shortly thereafter left Missouri for Illinois. Pratt, who after being indicted in Richmond for murder, escaped prior to him being transferred to Boone County on a separate change of venue.

93. Thomas C. Burch to James L. Minor, June 24, 1839, Mormon Papers, Missouri Historical Society, St. Louis, Mo.; Indictment [for treason], Gallatin, Missouri, April [11,] 1839, certified copy, 6 July 1839, Joseph Smith Extradition Records, Abraham Lincoln Presidential Library, Springfield, Ill.; Indictment [for burglary], Gallatin, Missouri, April [11,] 1839, certified copy, July 6, 1839, Joseph Smith Extradition Records, Lincoln Presidential Library; Parley Pratt’s Indictment [murder], Richmond, Missouri, April 24, 1839, certified copy, July 18, 1839, Joseph Smith Extradition Records, Lincoln Presidential Library.

94. See Circuit Court Record C, Boone County Circuit Court, Columbia, Missouri, 222, 261–62, 280–81, 316–17. Governor Boggs did not send these indictments to Illinois until near the close of his term as governor in December 1840. It is uncertain whether he attempted to forward these indictments earlier, although there is some evidence that he and Governor Carlin (the governor of Illinois at the time) had corresponded about them. As Governor Boggs did not run for a second term as governor, he knew that by waiting until the end of his term that the extradition would take place after his term had expired. While this timing is not critical by itself, it becomes more intriguing as a result of Thomas Reynolds becoming the successor governor in Missouri. Prior to being elected governor, Thomas Reynolds was a circuit judge in the state’s Second Circuit, which included Boone County. Judge Reynolds presided over the transferred cases from Daviess County involving Smith and others (for example, the treason case) and from Ray County involving Pratt and others (for example, the murder case). He was the judge that granted the Boone County Prosecutor’s motion and ordered the dismissal of all of the indictments in August 1840. He must have been fully aware that there were no outstanding indictments against any of the men identified in Governor Boggs’s requisition made in September 1840. Whether Boggs knew this is uncertain. Both of these cases were continued in August 1839 to the following August 1840 term. The Boone County Circuit records contain the following pleading for each case: “This day Came the attorney prosecuting for the State And on his motion. It is ordered by the Court That the Suit be dismissed, and that the Defendant(s) go hence without delay with his costs.” Circuit Court Record C, Boone County Circuit Court, Columbia, Missouri, 222, 261–62, 280–81, 316–17.
Smith or the others listed in it, and the warrant was consequently returned to Governor Carlin.95

No further action was taken until Joseph Smith, who was returning to Nauvoo with his brother Hyrum and William Law from a mission in the East, was arrested outside of Quincy, Illinois, on June 5, 1841.96 Upon arrest, Smith filed a petition for a writ of habeas corpus with Calvin Warren, the master in chancery for the Adams County Circuit Court.97 Warren granted Smith’s petition and issued the writ of habeas corpus. That same evening, Associate Illinois Supreme Court Justice Stephen Douglas arrived in Quincy and agreed to hear the writ98 at the Warren County Circuit Courthouse located in Monmouth. He scheduled the hearing for the following Monday, June 8, 1841, and after a one-day postponement to allow the state to better prepare, the matter was heard on June 9, 1841.

2. Hearing

Throughout the hearing a full panoply of attorneys represented Joseph Smith. The Times and Seasons noted that Calvin Warren, Sidney Little, and Orville Browning represented the accused,99 while other accounts add James Ralston, Cyrus Walker, and Archibald Williams.100

The hearing started on a procedural matter, since the underlying indictments from the Missouri courts had not been attached to the arrest warrant

95. See notes 106–9, wherein Douglas ruled that once attempts to serve the arrest warrant had occurred and the warrant was returned not having been served, it could not be subsequently used.


97. Circuit Courts in Illinois held equitable jurisdiction and as such were referred to as “courts in chancery,” as opposed to common law courts; a similar distinction is found in courts in England. Each circuit court was required to appoint a “Master-in-Chancery” in each county that the court covered, vesting such appointee with the right to issue of writs of habeas corpus. See “An Act Prescribing the Mode of Proceedings in Chancery,” sec. 1, in The Public and General Statute Laws of the State of Illinois (Stephen F. Gale, 1839), 139; “An Act to Provide for Issuing Writs of Ne Exeat and Habeas Corpus, and for Other Purposes,” secs. 1–2, in Public and General Statute Laws of the State of Illinois, 145.

98. Section 1 of the Illinois 1827 Act provides that both the supreme and circuit courts had jurisdiction to hear writs of habeas corpus while “in term.” At the time of arrest neither court was in session. Section 1 alternatively provides that “any judge thereof, [for example, supreme or circuit court judge] in vacation” could also hear the writ. “An Act Regulating the Proceeding on Writs of Habeas Corpus,” sec. 1, in Public and General Statute Laws of the State of Illinois, 322 (hereafter Illinois 1827 Act).

99. “Late Proceedings.”

as required by law. As this procedural irregularity could result in further postponement, both sides stipulated that such indictments existed. Ironically, had Joseph Smith’s counsel further investigated this issue, they would have discovered that in fact no indictments existed, all of them having been dismissed in August 1840 by the now sitting Missouri Governor Reynolds. Notwithstanding this oversight, Joseph Smith’s counsel argued that the indictments supporting the requisition from Missouri were obtained by “fraud, bribery and duress.” This phraseology closely paralleled the language in the Illinois 1827 Act for summarily ruling on a writ of habeas corpus.101 The Illinois 1827 Act appears in full in appendix C.

Joseph Smith’s counsel called four witnesses: Morris Phelps, Elias Higbee, Reynolds Cahoon, and George Robinson. The state objected that these witnesses should not be allowed to testify pertaining to the underlying merits of the case because the indictments sufficiently established the facts required at this stage of the litigation. Attorney Browning argued for the admissibility of the testimony for more than two hours, concluding his remarks as follows:

Great God! Have I not seen it? Yes, my eyes have beheld the blood stained traces, and the women and children, in the drear winter, who had travelled hundreds of miles barefoot, through frost and snow, to seek a refuge from their savage pursuers. Twas a scene of horror sufficient to enlist sympathy from an adamantine heart. And shall this unfortunate man, whom their fury has seen proper to select for sacrifice, be driven into such a savage band, and none dare to enlist in the cause of justice? If there was no other

101. Illinois 1827 Act, sec. 3, 323–24: “If it appear that the prisoner is in custody by virtue of process from any court, legally constituted, he can be discharged only for some of the following causes: . . . sixth, where the process appears to have been obtained by false pretense or bribery.”
voice under heaven ever to be heard in this cause, gladly would [I] stand alone, and proudly spent my latest breath in defence of an oppressed American citizen.102

In the end, Judge Douglas allowed the testimony from these witnesses, as well as several unidentified state witnesses before ruling the testimony’s admissibility.

3. Ruling and Rationale

Judge Douglas delivered his ruling the next morning. He sidestepped the issue as to whether the court could go beyond the indictments, noting that neither side presented authority. As discussed earlier in this article, law existed that could have been cited, and had it been cited, it would have on its face supported the government’s position that looking beyond the indictment was not permitted. The argument was straightforward, as stated in People v. Martin: “The testimony before the grand jury would not be written, and could not be looked into, the court or officer, on the habeas corpus, could not ascertain on what evidence the grand jury had acted, and could not entertain the question without receiving precisely the same testimony which the jury would be obliged to receive on the trial, and thus, in fact, usurp the province of the jury.”103

However, contrary authority could have been cited that such limitations do not extend to allegations of fraud, as established by statute in section 3 of the Illinois 1827 Act. As explained by the Arkansas Supreme Court in Ex parte White: “The law requires the party to make an affidavit of merits to warrant this court in going behind the indictment, and the affidavit must state such particular facts that, if proven to be false, the affiant could be indicted for perjury: otherwise, the requiring of an affidavit would be a merely idle form.”104

Yet, even without citing the applicable case law, Joseph Smith’s counsel made that exact argument—that the Missouri indictments were obtained “by fraud, bribery and duress.” This claim justified an examination into how the indictments were obtained both relevant and admissible.

However, instead of addressing this issue, Judge Douglas based his ruling on a narrow procedural issue—the validity of the warrant used to arrest Joseph Smith. It was undisputed that the arrest warrant actually used was the same warrant initially issued by Governor Carlin and returned to him

102. “Late Proceedings.”
104. 9 Ark. 223, 226 (1848).
after the legal officer failed to find Joseph Smith in Nauvoo. Douglas held that “the writ once being returned to the executive, by the Sheriff of Hancock County was dead and stood in the same relationship as any other writ which might issue from the Circuit Court and consequently the defendant [Smith] could not be held in custody on that writ.”105 Future Illinois Governor and former Illinois Supreme Court Justice Thomas Ford recorded in his work *History of Illinois* that Smith “was discharged upon the ground that the writ upon which he had been arrested had been once returned, before it had been executed, and was *functus officio*.106 (“*Functus officio*” is Latin for “having performed his office.” This term is applied to something which once had life and power, but which now has no virtue whatsoever.)

While some would argue that Douglas’s ruling was a political move to garner the Mormon vote and lacked legal merit, a review of the doctrine of *functus officio* shows that it was actually the proper legal ruling.107 For example, in *Hall v. Hall*, the Maryland Court of Appeals in discussing jury instructions noted that “if a jury believed the warrant to have been received and served by Sharer [the sheriff], and returned by the magistrate. . . . then the warrant was *functus officio*, and could not again be re-issued.”108 The New York Supreme Court created an even stricter standard in *Filkins v. Brockway* holding: “A seal which has been used by being affixed to any process which has been filled up, whether such process has been delivered to the sheriff or not, cannot be again used, or attached to another writ. It is *functus officio*, and to allow it to be again used, would lead to improper practices, and be a fraud on the clerk's office. We . . . shall set aside any writ or process to which such a seal shall be so affixed.”109

As these cases and their progeny demonstrate, Justice Douglas’s ruling, while on a technical rather than a substantive basis, was in accord with established law. Accordingly, Joseph Smith was properly discharged.

**D. Nauvoo City Council’s First Ordinances on Habeas Corpus—July and August 1842**

The Nauvoo City Council’s first ordinance regarding habeas corpus was passed on July 5, 1842 (the “July 1842 City Ordinance”). What precipitated the passage of this ordinance is not certain. Yet, it may have been in response

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105. “*Late Proceedings.*”
108. 6 G. & L. 386, 411 (Md. 1834).
to the publishing on July 2, 1842, by the Sangamon Journal the first of a series of letters by John C. Bennett, the former mayor of Nauvoo and leading antagonist against the Mormons, especially Smith. This first letter, in part, solicits Governor Reynolds to seek the extradition of Smith “alone” to Governor Carlin and should Governor Carlin issue a writ for the arrest of Smith “in my hands, I will deliver him up to justice, or die in the attempt.”

The July 1842 City Ordinance provides as follows:

Sec. 1. Be it, and it is hereby ordained by the city council of the city of Nauvoo, that no citizen of this city shall be taken out of the city by any writs without the privilege of investigation before the municipal court, and the benefit of a writ of habeas corpus, as granted in the 17th section of the Charter of this city. Be it understood that this ordinance is enacted for the protection of the citizens of this city, that they may in all cases have the right of trial in this city, and not be subjected to illegal process by their enemies.

Joseph Smith, Mayor.
Passed July 5, 1842.
James Sloan, Recorder.

This ordinance, while cryptic, is in accord with the Illinois 1827 Act. Section 3 provides, in pertinent part, for the following rights of the prisoner and responsibilities of the court hearing the writ of habeas corpus:

Sec. 3. . . . The said prisoner may deny any of the material facts set forth in the return, or may allege any fact to shew, either that the imprisonment or detention is unlawful, or that he is then entitled to his discharge; which allegations or denials shall be made on oath.

The July 1842 City Ordinance, which gives the prisoner the right to investigate the basis for his incarceration and the right to a trial arising from such investigation, does not broaden the right of habeas corpus further than section 3 of the Illinois 1827 Act. This ordinance therefore appears to be in accord with the rights extended in Nauvoo City’s charter.

On August 8, 1842, the Nauvoo City Council refined the July 1842 City Ordinance by further delineating the procedures for an investigation. This ordinance (the “August 1842 City Ordinance”) provides as follows:

Sec. 1. Be it ordained by the city council of the city of Nauvoo, that in all cases where any person or persons, shall at any time hereafter, be arrested or under arrest in this city, under any writ or process, and shall be brought...
before the municipal court of this city, by virtue of a writ of habeas corpus, the court shall in every such case have power and authority, and are hereby required to examine into the origin, validity and legality of the writ of process, under which such arrest was made, and if it shall appear to the court, upon sufficient testimony that said writ or process was illegal, or not legally issued, or did not proceed from proper authority, then the court shall discharge the prisoner from under said arrest; but if it shall appear to the court that said writ or process had issued from proper authority, and was a legal process, the court shall then proceed and fully hear the merits of the case, upon which said arrest was made, upon such evidence as may be produced and sworn before said court, and shall have power to adjourn the hearing, and also issue process from time to time, in their discretion, in order to procure the attendance of witnesses, so that a fair and impartial trial and decision may be obtained in every such case.

Sec. 2. And be it further ordained that if upon investigation it shall be proven before the municipal court, that the writ or process has been issued, either through private pique, malicious intent, or religious or other persecution, falsehood or misrepresentation, contrary to the constitution of this state, or the Constitution of the United States, the said writ or process shall be quashed and considered of no force or effect, and the prisoner or prisoners shall be released and discharged therefrom.

Red Brick Store. Completed in 1841, the large second floor room of the store was used for governmental meetings, including Nauvoo City Council meetings, as well as for the municipal and mayor’s courts. This photograph was taken by B. H. Roberts circa 1885–86. Courtesy Church History Library. © Intellectual Reserve Inc.
Sec. 3. And be it also further ordained that in the absence, sickness, debility, or other circumstances disqualifying or preventing the mayor from officiating in his court, as chief justice of the municipal court, the aldermen present shall appoint one from amongst them to act as chief justice, or president pro tempore.\footnote{This section appears to be enacted to address the reality that Smith, who was then the mayor, was a target which the habeas corpus laws were intended to protect. Consequently, as mayor he would be the chief justice of the municipal court that was empowered to rule on these matters. When Smith was the target, this section provided a mechanism for the municipal court to replace him.}

Sec. 4. This ordinance to take effect and be in force from and after its passage.\footnote{Nauvoo City Council, Minutes, August 8, 1842, underlining in original. This act was signed by Hyrum Smith acting as vice mayor and president pro tempore, since Joseph Smith was under arrest at the time. It was published in the \textit{Wasp} on August 13, 1842.}

The following charts compare the August 1842 City Ordinance procedures to those provided in the Illinois 1827 Act. The August 1842 City Ordinance can be separated into two parts: The first part examines the process of the arrest, and the second part examines the substance of the charges (looking behind the writ).

### 1. Challenging the process of the arrest

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<thead>
<tr>
<th>August 1842 City Ordinance</th>
<th>Illinois 1827 Act</th>
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<tr>
<td>“upon sufficient testimony” (sec. 1)</td>
<td>“by hearing the testimony and arguments” (sec. 3)</td>
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<tr>
<td>“that said writ or process was illegal” (sec. 1)</td>
<td>“second, where, though the original imprisonment was lawful, yet by some act, omission, or event, which has subsequently taken place, the party has become entitled to his discharge” (sec. 3)</td>
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<tr>
<td>“that said writ or process was not legally issued” (sec. 1)</td>
<td>“third, where the process is defective in some substantial form required by law; fourth, where the process, though in proper form, has been issued in a case, or under circumstance where the law does not allow process, or orders for imprisonment or arrest to issue” (sec. 3)</td>
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“that said writ or process did not proceed from proper authority” (sec. 1)

“first, where the court has exceeded the limits of its jurisdiction, either as to the matter, place, sum, or person . . . ; fifth, where, although in proper form, the process has been issued or executed by a person either unauthorized to issue or execute the same, or where the person having the custody of the prisoner under such process is not the person empowered by law to detain him” (sec. 3)

2. Challenging the substance of the arrest

August 1842 City Ordinance

“fully hear the merits of the case, upon which said arrest was made, upon such evidence as may be produced and sworn before said court” (sec. 1)

Illinois 1827 Act

“The said prisoner may deny any of the material facts set forth in the return, or may allege any fact to shew, either that the imprisonment or detention is unlawful, or that he is then entitled to his discharge; which allegations or denials shall be made on oath. The said return may be amended by leave of the court or judge, before or after the same is filed, as also may all suggestions made against it, that thereby material facts may be ascertained” (sec. 3)

“and shall have power to adjourn the hearing, and also issue process from time to time, in their discretion, in order to procure the attendance of witnesses, so that a fair and impartial trial and decision may be obtained in every such case.” (sec. 1)

“If any person shall be committed for a criminal, or supposed criminal matter, and not admitted to bail, and shall not be tried on or before the second term of the court having jurisdiction of the offence, the prisoner shall be set at liberty by the court, unless the delay shall happen on the application of the prisoner. If such court, at the second term, shall be satisfied that due exertions have been made to procure the evidence for, and on behalf of the people, and that there are reasonable grounds to believe that such evidence may be procured at the third term, they shall have power to continue such case till the third term. If any such prisoner shall have been admitted to bail for a crime other than a capital offence, the court may continue the trial of said cause to a third term, it shall appear by oath or affirmation that the witness for the people of the state are absent, such witnesses being mentioned by name, and the court shewn wherein their testimony is material” (sec. 9)
As these charts demonstrate, section 1 of the August 1842 City Ordinance was drafted in accord with corresponding rights and duties found in the Illinois 1827 Act. Thus, the Nauvoo City Council acted within its rights as granted under section 11 of the Nauvoo Charter.\textsuperscript{115}

Section 2 of the August 1842 City Ordinance further articulates the duty of the municipal court to assure that the underlying charges were not brought “through private pique, malicious intent, or religious or other persecution, falsehood or misrepresentation”; if so, the prisoner would be “discharged.” Similar provisions are found in section 3 of the Illinois 1827 Act.\textsuperscript{116} Interestingly, the Illinois 1827 Act further provides for monetary penalties being assessed if such wrongful conduct is discovered.\textsuperscript{117} The August 1842 City Ordinance does not provide any remedy beyond the discharge. This section provides further evidence that this ordinance was created within the bounds granted under the Nauvoo Charter.

The term “discharged,” as used in the August 1842 City Ordinance and the Illinois 1827 Act, rendered into modern terminology, means “dismissed without prejudice.” This means that should other facts or theories of law be discovered, the person released may be rearrested on the same or different charges arising from the same set of events. Stated another way, the doctrine of “double jeopardy” does not attach to a person discharged (or released) based on a writ of habeas corpus.\textsuperscript{118} The Illinois 1827 Act has a similar provision in section 7,\textsuperscript{119} again evidencing the validity of the August 1842 City Ordinance.

\begin{itemize}
\item \textsuperscript{115} See Nauvoo City Charter.
\item \textsuperscript{116} Illinois 1827 Act, secs. 3, 12 at 323–24, 326.
\item \textsuperscript{117} Illinois 1827 Act, sec. 12, at 326.
\item \textsuperscript{118} Kent, \textit{Commentaries}, 2:30–31: “A person discharged upon habeas corpus is not to be reimprisoned for the same cause; but it is not to be deemed the same cause if he be afterwards committed for the same cause by the legal order of the court in which he was bound to appear, or in which he may be indicted and convicted; or if the discharge was for defect of proof, or defect in the commitment in a criminal case, and he be again arrested on sufficient proof and legal process; or if in a civil case, or discharged on mesne process, he be arrested on execution, or on mesne process in another suit, after the first suit is discontinued”; see also Ex parte Bollman, 8 U.S. 75, 136–37, 4 Cranch 75 (1807); Gerard v. People, 4 Ill. 362, 363, 3 Scam 362 (1842).
\item \textsuperscript{119} Illinois 1827 Act, sec. 7, at 325: “No person who has been discharged by order of a court or judge, on a habeas corpus, shall be again imprisoned, restrained, or kept in custody, for the same cause, unless he be afterwards indicted for the same offence, or unless by the legal order or process of the court wherein he is bound by recognizance to appear.”
\end{itemize}
E. Second Extradition Attempt—July 1842

1. Facts

On May 6, 1842, former Missouri Governor Lilburn W. Boggs was shot at his home in Independence, Missouri. Although serious, the injuries were not fatal. A local citizens’ committee headed by Samuel Lucas conducted an initial investigation focusing on a silversmith, but they could find no legitimate suspects. Early insinuations about a possible Mormon

120. Boggs was hit in the head and neck from a shot through his home’s window. For additional discussion about his injuries, see William M. Boggs, “A Short Biographical Sketch of Lilburn W. Boggs by His Son, ” ed. F. A. Sampson, Missouri Historical Review 4 (1910): 106–8.

121. His injuries were so serious that several reported them as fatal. These erroneous reports quickly reached Nauvoo. See “Assassination of Ex-Governor Boggs of Missouri,” Wasp, May 28, 1842, 4; Andrew H. Hedges, Alex B. Smith, and Richard Lloyd Anderson, eds., Journals, Volume 2: December 1841–April 1843, vol. 2 of the Journals series of The Joseph Smith Papers, ed. Dean C. Jessee, Ronald K. Esplin, and Richard Lyman Bushman (Salt Lake City: Church Historian’s Press, 2011), 57 (hereafter cited as JSP Journals 2).

122. Samuel D. Lucas (1799–1868), an active anti-Mormon, was an early settler of Independence as a merchant. In 1833, Lucas was part of the citizenry who forced the Mormons from Independence, acting as the secretary for the movement. A court clerk and then judge, Lucas also was a colonel and later major general of the fourth division of the Missouri militia. In that capacity, he pursued the Mormons at Far West, taking Smith and other key leaders into custody, holding a military court that resulted in ordering their execution. When Alexander Doniphan refused to carry out the order, Lucas took the prisoners to his headquarters in Independence and then to Richmond, where they were charged with various crimes, including treason. From Richmond, Smith and others were bound over to Liberty Jail to await a grand jury. Roger D. Launius, Alexander William Doniphan: A Portrait of a Missouri Moderate (Columbia: University of Missouri Press, 1997), 62–66.

123. Identified only as “Tompkins,” this suspect was apparently a silversmith who claimed to have told others of his intent to kill Boggs. So confident was the citizen committee of his guilt that they offered a $200 reward for his arrest. Governor Reynolds authorized an additional $200 for his arrest and another $300 for his conviction. An advertisement in the Jeffersonian Republican that ran on May 14, 1842, noted that “on the evening of the assassination, [he] was seen in the vicinity of Independence—which with many other corroborating circumstances, leaves no doubt of his guilt.” See Monte B. McLaws, “The Attempted Assassination of Missouri’s Ex-Governor, Lilburn W. Boggs,” Missouri Historical Review 60, no. 1 (1965): 50. Yet, despite the apparent evidence indicating his guilt, the Jeffersonian Republican noted just a week later that he had been fully acquitted. McLaws, “Attempted Assassination,” 55.

124. This committee reported to Governor Reynolds that “no Shadow of suspicion rests upon any one. And our community yet remains in painful ignorance of their greatest foe.” Citizens of Jackson County to Governor Reynolds, May 13, 1842, Thomas Reynolds, 1840–44, Office of Governor, Record Group 3.7, Missouri State Archives,
involvement\textsuperscript{125} gained traction in July 1842 with the published claims of dissident and former Nauvoo mayor John C. Bennett, alleging that Orrin Porter Rockwell, who was in Independence at the time,\textsuperscript{126} committed the crime under the direction of Joseph Smith.\textsuperscript{127} While there was never any direct evidence implicating either Rockwell or Joseph Smith, Boggs’s pivotal

Jefferson City, Mo. Lucas wrote separately to Governor Reynolds on May 16, 1842, recommending a “Reward of $1000.00 for his apprehension and Conviction” of the perpetrator of the crime. Samuel D. Lucas to Governor Reynolds, May 16, 1842, Thomas Reynolds, 1840–44, Office of Governor, Record Group 3.7, Missouri State Archives.

\textsuperscript{125}. For example, D. W. Kilbourne, an anti-Mormon in Montrose, Iowa, wrote to Governor Thomas Reynolds on May 14, 1842: “Almost every Mormon here rejoicing over it & I have heard many of them Say that he ought to have been Killed long ago; and one leading Mormon remarked that he had no doubt but a Mormon had done it. You will pardon the liberty I have taken in addressing you on this subject. My only object is to make you acquainted with the Manour in which these Mormons receive the news of Gov Boggs’s death, and if the perpetrator has not been discoverd and his name Known, it may be well to direct publick attention in this direction & towards a man too who has even prophesized that he would come to an awful End.” D. W. Kilbourne to Governor Reynolds, May 14, 1842, Thomas Reynolds, 1840–44, Office of Governor, Record Group 3.7, Missouri State Archives.

\textsuperscript{126}. Rockwell had apparently brought his wife to Independence to be with her parents when she delivered their fourth child. Rockwell was using the alias “Brown” while in Independence. William Franklin Switzler, \textit{Switzler’s Illustrated History of Missouri, from 1541 to 1877} (C. R. Barns, 1879), 251. Rockwell married Luana Beebe in Independence, Missouri, in 1832. “A List of Saints in Jackson County,” comp. Thomas Bullock, Church History Library.

\textsuperscript{127}. As noted above, Bennett wrote a series of published letters attacking the Mormon leadership, especially Joseph Smith. These letters were published initially in the Springfield newspaper \textit{Sangamo Journal}. \textit{See Sangamo Journal}, July 2, 15, 22, and 29, 1842. Bennett claimed that when Rockwell left Nauvoo for Independence with his wife, he asked Joseph Smith where he was going, to which Smith replied, “to fulfill prophesy.” Such claims were communicated to Governor Reynolds by L. B. Fleak, the postmaster in Keokuk, Iowa. In a letter dated July 12, 1842, to Governor Reynolds, he wrote, “Genl Bennet, late a Mormon leader, now a dissenter goes to you as he tells me for the purpose of giving information touching the attempted assassination of Ex Gov Boggs. It is not doubted here in the least but that the information which he intends to convey to you is literally correct, i.e. that he knows who the person is that shot Boggs and that he /Bennet/ can prove Smiths agency in the matter sufficiently clear to satisfy any person of his participation in the matter.” L. B. Fleak to Governor Reynolds, July 12, 1842, Thomas Reynolds, 1840–44, Office of Governor, Record Group 3.7, Missouri State Archives. In one of his letters Bennett penned: “Smith said to me, speaking of Governor Boggs, “The Destroying Angel has done the work, as predicted, but Rockwell was not the man who shot; the Angel did it.” \textit{Quincy Whig}, July 16, 1842. This reference was the origin of Rockwell’s nickname, “The Destroying Angel.”
role in the displacement of the Mormons from Missouri in 1838 during his governorship made him a supposed target of the Mormons.

Boggs fueled this notion of Mormon involvement with an affidavit dated July 20, 1842, stating that he had information leading him to believe that Smith was an accessory before the fact in orchestrating the assassination attempt. Based on this affidavit, on July 22, 1842, Missouri Governor Thomas Reynolds issued a requisition for the extradition of Smith and Rockwell from Illinois to Missouri. As a result of this requisition, Illinois Governor Carlin issued an arrest warrant for Smith and Rockwell. Adams County Sheriff Thomas C. King arrested Smith and Rockwell in Nauvoo on August 8, 1842, on the governor’s warrant.

128. Affidavit of Lilburn W. Boggs, July 20, 1842, Lincoln Presidential Library.
129. Discussing Orrin Porter Rockwell’s involvement and circumstances connected to these events is beyond the scope of this article. In brief, Rockwell and his wife, Luana, left Nauvoo in late February 1842 for Independence. Luana was eight months pregnant. Their fourth child was born in Independence on March 25, 1842. Rockwell stayed several weeks caring for his wife and child. Rockwell was likely back in Nauvoo on May 15 to hear Smith’s Sunday sermon, which included references to Boggs being shot. As rumors emerged about his involvement as the shooter, he vehemently denied any involvement. See, for example, Wasp—Extra, July 27, 1842. Rockwell was living in Nauvoo when he and Smith were arrested on August 8, 1842, pursuant to Carlin’s arrest warrant. After Nauvoo marshal Dimick Huntington released Rockwell on August 8, 1842, he travelled to Philadelphia, where he spent the winter. He was arrested in St. Louis in March 1843 as he was returning to Nauvoo, and he was taken to Independence. An empanelled grand jury in Independence failed to indict him on the assassination attempt (charged as attempted murder) of Boggs. Yet during his incarceration he and a fellow prisoner made an unsuccessful jail break. A grand jury thereafter did indict him for the assassination attempt (charged as attempted murder) of Boggs. Yet during his incarceration he and a fellow prisoner made an unsuccessful jail break. A grand jury thereafter did indict him for jail breaking and he was tried and found guilty. Alexander Doniphan was his lawyer with funds sent from Nauvoo. The case was tried before Judge Austin King. Upon being found guilty, he was sentenced to “five minutes” in jail. He was released in December 1843, when he finally returned to Nauvoo on Christmas Eve. See generally McLaws, “Attempted Assassination”; Circuit Court Records, Jackson County, Mo., August term, Record Book E, 106; Fifth Judicial District Court of Missouri, Record Book G, no. 4, 236; Millennial Star 22 (August 18, 1860): 517–20, 535–37; Harold Schindler, Orrin Porter Rockwell: Man of God, Son of Thunder, 2d ed. (Salt Lake City: University of Utah Press, 1983), 67–91, 94–102; Richard L. Dewey, Porter Rockwell, A Biography, 10th ed. (New York City: Paramount Books, 1996), 49, 50, 55–77.
130. This was done in accord with the Illinois “Act Concerning Fugitives from Justice,” in Public and General Statute Laws of the State of Illinois, 318–20.
131. Smith’s journal notes that Sheriff King was accompanied by “two other officers.” These two officers were most likely James M. Pitman, constable of Adams County, and Edward R. Ford, the person designated by Governor Carlin to receive Smith and Rockwell. JSP Journals 2 (August 8, 1842) 81, n. 317.
Anticipating that Joseph Smith and Rockwell would petition for a writ of habeas corpus, the Nauvoo City Council convened in the morning of August 8, 1842, and enacted the August 1842 City Ordinance. Some critics have highlighted section 2 of this act as expanding the scope of habeas corpus. Yet, as discussed above, the scope of review permitted under this ordinance is in accord and finds parallel references in the Illinois Habeas Corpus Act of 1827.

Of significantly greater application were the additional procedures articulated in section 3 of the August 1842 City Ordinance: “And be it also further ordained that in the absence, sickness, debility, or other circumstances disqualifying or preventing the mayor from officiating in his court, as chief justice of the municipal court, the aldermen present shall appoint one from amongst them to act as chief justice, or president pro tempore.”

This section directly addressed the situation that the Nauvoo Municipal Court anticipated, and actually did face, on August 8, 1842, after Mayor Joseph Smith was arrested.

Both Smith and Rockwell retained Sylvester Emmons as their counsel to prepare and argue their petitions for writs of habeas corpus. The basis for the petition included both the procedural claim as to the “insufficiency of the Writ,” as well as the factual claim as to “the utter groundlessness of

132. Nauvoo City Council Proceedings (August 8, 1842), Church History Library.

133. Dinger, “Joseph Smith and the Development of Habeas Corpus,” 149–50. Noting about section 2: “This section of the new ordinance also greatly expanded the municipal court’s authority to void writs against Church leaders. I am aware of no other court that invalidates a writ issued for ‘malicious intent’ or ‘religious . . . persecution.’” In this regard, section 3 of the Illinois 1827 Act provides for relief upon a showing from a litany of bases including if the charges were obtained by “false pretense” or “where there is no general law . . . to authorize the process.” Illinois 1827 Act, sec. 3, 323–24. Each of the delineated bases noted in section 2 of the August 1842 City Ordinance (for example, “private pique, malicious intent, Religious or other persecution, falsehood or misrepresentation”) would certainly fall within the ambit of section 3 of the Illinois 1827 Act.

134. Nauvoo City Council Proceedings (August 8, 1842).

135. Smith’s journal for August 8, 1842, notes that the Nauvoo City Council convened immediately after Smith’s and Rockwell’s arrest that morning. JSP Journals 2, 81. This ordinance appears to have been enacted in the morning, because by 1:00 p.m. the Nauvoo Municipal Court held a “special meeting.” At that time, the minutes note, “Present, Aldermen Marks, Whitney, Harris, Spencer, and Hills. Alderman Spencer was selected, and elected by vote, to act as Chief Justice, or President pro tem, (in absence of the Chief Justice, who was under arrest,) and he took his seat accordingly.” Nauvoo Municipal Court docket (August 8, 1842), Church History Library.
the charge preferred in said Writ.”

The municipal court “heard the Petition read, and the reasons adduced by Counsellor Emmons upon behalf of the Prisoner, and the nature of the Case, and prayer of the Petition,” and granted the petition issuing a writ of habeas corpus for both Joseph Smith and Rockwell. The return was “directed to Thomas C. King, to forthwith bring the body of Joseph Smith before this Court.” The minutes of this hearing ended with the court being adjourned “until the first Monday in September next.”

However, no hearing on the return of the writ of habeas corpus was held at that time.

Sheriff King left Smith and Rockwell in the custody of the Nauvoo Marshal Dimick B. Huntington. However, Sheriff King took with him the original arrest warrant from Governor Carlin, as well as the writs of habeas corpus granted by the municipal court. Without the arrest warrant, there was no legal basis for Marshal Huntington to keep Smith and Rockwell in custody, and for that reason they were released.

Upon learning of these proceedings, coupled with Rockwell’s and Smith’s release, Governor Carlin took the position that the municipal court

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136. Petition of Joseph Smith for Writ of Habeas Corpus, August 8, 1842, Church History Library.
137. Nauvoo Municipal Court Docket, August 8, 1842, Church History Library.
139. Sharalyn Howcroft, an archivist on the Joseph Smith Papers Project, recently discovered the original copy of this writ of habeas corpus in the United States District and Circuit Courts files in the National Archives and Records Administration Great Lakes Region, Chicago, Illinois.
140. Having the arrest warrant “in hand” was a threshold requirement for detaining a person. “An Act to Regulate the Apprehension of Offenders, and for Other Purposes,” sec. 7, in The Public and General Statutes of the State of Illinois, 239.
lacked judicial authority to rule on the warrant and that the ordinances passed by the Nauvoo City Council overstepped its legislative authority. Specifically, Governor Carlin contested the interpretation of sections 16 and 17 of the Nauvoo Charter that created the municipal court and articulated its jurisdiction, including its right to grant “writs of habeas corpus in all cases arising under the ordinances of the City Council.”141 Carlin argued that this provision only extended to cases that originated under a violation of a Nauvoo City Council ordinance. Carlin's position was that the underlying charge (accessory before the fact) and the resulting warrant did not arise from a Nauvoo ordinance and therefore was beyond the scope of the municipal court and the city council.

Nauvoo officials, however, argued that these sections must be read in conjunction with section 11 of the Nauvoo Charter that gave the Nauvoo City Council “power and authority to make, ordain, establish, and execute, all such ordinances, not repugnant to the Constitution of the United States or of this State.”142 Nauvoo officials argued that the laws protecting the citizens of Nauvoo (for example, rights pertaining to writs of habeas corpus) were well within the contours of both the U.S. and Illinois Constitutions and therefore fell directly within the jurisdiction of the municipal court and city council.

Most commentators unfortunately miss the legal dichotomy raised by Carlin and the Nauvoo officials. The issue was not whether the July, August, or November ordinances passed by the Nauvoo City Council were in legal accord with state or federal law, but whether the Nauvoo City Council could enact habeas corpus laws that applied to alleged crimes that did not occur in Nauvoo. Therefore, the issue for Carlin was not how the Nauvoo Municipal Court handled a petition for a writ of habeas corpus, but rather whether it could handle a petition.

As discussed earlier, none of the ordinances passed by the Nauvoo City Council conceptually violated the established application of habeas corpus in the nineteenth century. While some would criticize language in these city ordinances that permitted a look “behind” the procedures of an arrest, such action clearly fell within statutory interpretation and American court’s common law usage of habeas corpus. In fact, the Illinois Habeas Corpus Act of 1827 had express language that permitted a court to look behind the procedures. Still others would criticize language in these city ordinances that allowed a prisoner to be discharged if the alleged charges were brought in bad faith, with malice, or based on falsehoods; yet such efforts were explicitly

141. Nauvoo City Charter, secs. 16, 17 (1842).
142. Nauvoo City Charter, sec. 11.
allowed by both case law and comparable statute. In fact, the scope of remedies available under a writ of habeas corpus is not one of guilt or innocence, but rather remand, bail, or discharge—all intermediate rulings.\textsuperscript{143}

This author believes that Carlin's position that the Nauvoo Municipal Court lacked the authority to either grant a petition for or hear the writ of habeas corpus was legally flawed. Such a position results in a restrictive reading of the Nauvoo Charter that limits the Nauvoo Municipal Court's jurisdiction to grant writs of habeas corpus to specific subject matter. As discussed above, the cities of Alton and Chicago also had by charter municipal courts with the rights of issuing and hearing writs of habeas corpus. These rights were considered “as may be had in like cases before circuit judges and circuit courts of this State.”\textsuperscript{144} No state courts with similar jurisdiction were restricted in the manner suggested by Carlin.\textsuperscript{145} If, for example, Smith and Rockwell had petitioned for a new writ of habeas corpus in a circuit court outside of Nauvoo, there would be no concern as to whether the circuit court had jurisdiction even though the crime did not take place within the circuit court's jurisdictional boundaries. Indeed, Joseph Smith and Rockwell contemplated such a legal move shortly after learning of Carlin's opposition to the Nauvoo Municipal Court's granting of the writ. Smith notes on August 9, 1842, that he “prepared a writ of Habeas Corpus from the Master in Chancery.”\textsuperscript{146}

The first extradition effort is a perfect example of how Illinois law allowed any circuit court to issue a writ of habeas corpus, regardless of where the alleged offence or arrest warrant originated. In the first extradition context, Joseph Smith was arrested outside of Quincy, Warren County, Illinois. Upon arrest, Joseph Smith filed a petition for a writ of habeas corpus in the Warren County Circuit Court.\textsuperscript{147} Remember, none of the matters contained in the arrest warrant and ensuing writ of habeas corpus occurred in Warren County. Nevertheless, section 1 of the Illinois 1827 Act provides that both the supreme and circuit courts had jurisdiction to issue and hear writs of habeas corpus while “in term.”\textsuperscript{148} Thus Associate Supreme Court Justice Stephen Douglas had authority to hear the writ. The Warren County Circuit Court

\textsuperscript{143} See, for example, Illinois 1827 Act, sec. 2, 323 (provides for contesting the factual basis of the imprisonment) and sec. 3 (allows the “prisoner may deny any of the material facts set forth in the return, or may allege any facts to shew, either that the imprisonment or detention is unlawful, or that he is entitled to his discharge”).

\textsuperscript{144} “An Act to Amend an Act, Entitled ‘An Act to Incorporate the City of Alton,’” sec. 1, Incorporation Laws of the State of Illinois, 240; see generally notes 88–90.

\textsuperscript{145} Illinois 1827 Act, sec. 1, 322.

\textsuperscript{146} JSP Journals 2 (August 9, 1842), 83.

\textsuperscript{147} Rough Draft Notes of History of the Church, 1841-011.

\textsuperscript{148} Illinois 1827 Act, sec.1, at 322.
was as remote for the first extradition arrest as the Nauvoo Municipal Court was for the second.

The fact that no case or appeal was ever filed in any Illinois court to challenge the legality of any of these ordinances based on the Nauvoo City Council’s interpretation of the Nauvoo Charter further evidences their validity despite open hostility to the Mormons generally. In the end, the only remedy that was sought was to repeal the Nauvoo Charter itself. These actions in great measure legitimized these ordinances as being in accord with a charter that the Illinois legislature enacted for the operations of Nauvoo.

Governor Carlin attempted to circumvent the issue of the legality of these ordinances by simply offering a reward for the capture of Smith and Rockwell. Captioned as a “Proclamation,” Governor Carlin on September 20, 1842, announced a $200 reward each for the arrest of Smith and Rockwell. The basis of the proclamation was that “the said Rockwell and Joseph Smith resisted the Laws by refusing to go with the officers who had them in custody as fugitives from Justice, and escaped from the custody of said officers.”149 Such a basis is belied by (1) the facts of the petitions for habeas corpus being made by Smith and Rockwell, (2) the proceedings before the Nauvoo Municipal Court granting the writs, (3) the decision of Sheriff King to take the arrest warrants with him when he left Nauvoo to report to Carlin, and (4) the release of Smith and Rockwell by Marshal Huntington based on not having the arrest warrants. Nevertheless, Joseph Smith and Porter Rockwell thereafter went into hiding to avoid being rearrested.150

150. Smith initially spent time across the Mississippi River in the Iowa Territories in an effort to avoid arrest in Illinois. The governor of Iowa, John Chambers, later issued an arrest warrant for Smith and Rockwell based on a requisition from

THOMAS FORD. As a former Illinois Supreme Court Justice before his election as governor, Ford gave Joseph Smith legal advice about how to resolve the requisition issued by his predecessor Governor Thomas Carlin. Abraham Lincoln Presidential Library & Museum (ALPLM).
Thomas Ford was elected Illinois governor in November 1842, replacing Thomas Carlin.151 With this change in administration, a delegation representing Joseph Smith traveled from Nauvoo to Springfield in early December to determine, in part, Governor Ford’s disposition regarding the Missouri extradition efforts.152 After meeting with several prominent attorneys and judges, including Judge Douglas and Governor Ford, the delegation concluded that if Joseph Smith would voluntarily appear in Springfield, the entire situation could be acceptably resolved.153 The delegation also

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Missouri Governor Reynolds. It was apparently returned to him as not served. He wrote to John Cowan on March 10, 1843, that he planned on taking no additional action on the matter unless the Missouri governor made a new requisition. John Chambers to John Cowan, March 10, 1843, Church History Library.

151. Thomas Ford was a replacement Democratic candidate for governor of Illinois. Adam W. Snyder, a state senator, was selected as the Democratic candidate at the Illinois state Democratic convention in December 1841. Snyder enjoyed the support of the Mormons, having been in the Senate during, and a supporter of, the passage of the Nauvoo City Charter. Joseph Duncan was selected as the Whig candidate in spring 1842. Duncan campaigned, in part, against the Nauvoo Charter. Snyder died unexpectedly in May 1842. Thomas Ford was named as his replacement. At the time, Ford was a member of the Illinois Supreme Court. Ford enjoyed the benefit of the Mormon support of Snyder. He never openly supported the Nauvoo Charter during his abbreviated campaign and announced his concern over it in his inaugural address. Ford, History of Illinois, 267–78; “Gov. Ford’s Inaugural Address,” Sangamo Journal, December 15, 1842.

152. This trip to Springfield had been previously scheduled to hopefully conclude Smith’s bankruptcy. Smith and several other prominent Mormon leaders had filed under the newly enacted bankruptcy laws on April 28, 1842. An initial hearing was held on June 6, 1842, with a final hearing scheduled for October 1, 1842, to discharge him of his debts. U.S. Attorney Justin Butterfield had filed an objection to the discharge, claiming that Smith had improperly transferred property to avoid paying an obligation with the U.S. Government for the purchase of a riverboat. Consequently, the hearing was rescheduled for December 15, 1842. See Dallin H. Oaks and Joseph I. Bentley, “Joseph Smith and Legal Process: In the Wake of the Steamboat Nauvoo,” BYU Law Review (1976): 735–82. The delegation left Nauvoo on December 9, 1842, arriving in Springfield on December 13. The delegation included Hyrum Smith, Willard Richards, William Clayton, Henry Sherwood, Benjamin Covey, Peter Haws, Heber Kimball, Reynolds Cahoon, and Alpheus Cutler. See JSP Journals 2 (December 9–20, 1842), 173.

153. Stephen A. Douglas, an associate justice of the Illinois Supreme Court, advised that Smith should petition Governor Ford to rescind the arrest warrant and reward. The next day (Wednesday) they met Justin Butterfield, who agreed to prepare such a petition to Governor Ford. Butterfield also had several supporting affidavits prepared. Armed with these pleadings, as well as a copy of the Boggs affidavit, Butterfield met with Governor Ford to discuss the warrant. Governor Ford indicated that while the arrest warrant was likely illegal, he doubted whether he had the authority to rescind
met and retained Justin Butterfield,\textsuperscript{154} the United States Attorney for the District of Illinois, to represent Joseph Smith in this matter.\textsuperscript{155}


\textsuperscript{155} Justin Butterfield to Joseph Smith, December 17, 1842; Law of the Lord, 215; \textit{JSP Journals 2} (December 17, 1842), 181–82.
Consistent with the delegation’s findings, on December 27, 1842, Joseph Smith, accompanied by a few close colleagues, left for Springfield, arriving on December 30, 1842. Upon their arrival, Butterfield’s initial efforts were to make sure the niceties of the procedural requirements were satisfied. Wilson Law, a general in the Nauvoo militia, officially “arrested” Joseph Smith. The group included Wilson Law, Hyrum Smith, John Taylor, William Marks, Levi Moffitt, Peter Hawes, Lorin Walker, Willard Richards, and Orson Hyde. William Clayton and Henry Sherwood left Nauvoo the day before for Carthage to seek a writ of habeas corpus from the master in chancery. JSP Journals 2 (December 27, 1842), 195. By law, circuit judges in each county of the judge’s judicial circuit appointed a master in chancery. Masters in chancery were empowered by statute to order writs of habeas corpus. “An Act to Provide for Issuing Writs of Ne Exeat and Habeas Corpus, and for Other Purposes,” secs. 1–2, in Public and General Statute Laws of the State of Illinois, 145. They apparently did obtain an order for the writ from the master in chancery (Chauncey Robison) but could not get it issued by the court clerk, Jacob C. Davis, as he was unavailable, having won a state senatorial seat. JSP Journals 2 (December 27, 1842), 195. Davis was implicated in the murder of Joseph and Hyrum Smith in June 1844. One of the enumerated duties of a court clerk was to issue writs ordered by the court. “An Act Concerning Justices of the Peace and Constables,” sec. 36, in Public and General Statute Laws of the State of Illinois, 402, 410; People v. Town, 4 Ill. (3 Scam.) 18 (1841), the Illinois Supreme Court held that a master in chancery could not issue a writ of habeas corpus, but only order the court clerk to do so. It is not clear on what basis Master in Chancery Robison found cause for ordering the writ of habeas corpus. As discussed above, the failure for Smith to have the original arrest warrant required obtaining a new one before petitioning for a writ of habeas corpus. The record does not identify what documents or arguments Clayton or Sherwood used in getting Robison to order the writ.

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157. The party ate dinner at Judge James Adams’s residence that evening, where Justin Butterfield joined them. JSP Journals 2 (December 30, 1842), 197.
Smith pursuant to the September 20 proclamation of Governor Carlin. However, because the arrest warrant that Carlin had previously issued was still in the possession of Sheriff King and it became apparent that getting the arrest warrant from King in a timely manner might prove difficult, Butterfield recommended seeking a new arrest warrant from Governor Ford. The new warrant could then be used as the legal basis for filing a new petition for a writ of habeas corpus.

The next morning (December 31), Butterfield prepared a petition to Governor Ford for a new arrest warrant. Ford granted the petition and issued the warrant. Butterfield then filed a petition in the United States Circuit Court in Springfield for a writ of habeas corpus to review the arrest the same day.

158. JSP Journals 2 (December 27, 1842), 195.
159. This decision was based on two factors: First, that Clayton/Sherwood had been unable to secure a new writ of habeas corpus from the master in chancery in Carthage. Second, no one was certain as to when they could get the original arrest warrant. During the dinner at Judge Adams’s on December 30, William Smith, Joseph’s brother and then member of the Illinois State House of Representatives, noted that he had seen Sheriff Pitman in Springfield but did not know whether he still had the warrant. Pitman was apparently evasive when asked by the Illinois Secretary of State Lyman Trumbull whether he had the warrant. The group decided to try and get the original warrant from Pitman, but if they were unsuccessful to seek a new arrest warrant. JSP Journals 2 (December 30, 1842), 197–98. The following day, Butterfield attempted to get the original warrant from Pitman, who told him that sheriff Thomas King had it in Quincy, but that King was bringing it to Springfield as requested by Trumbull. JSP Journals 2 (December 31, 1842), 200, 203.
160. The petition articulated that the arrest warrant was to be an “alias warrant” based “upon the same requisition” as prepared by the governor “for the sole purpose of having this question settled by the Judicial Tribunal.” Petition to Governor Ford for New Arrest Warrant, December 31, 1842, Lincoln Presidential Library, spelling regularized.
161. The “alias warrant” noted, in part, as follows: “Whereas it has been made known to me by the Executive Authority of the state of Missouri that one Joseph Smith stands charged by the affidavit of Lilburn W Boggs made on the 20th day of July 1842 . . . being accessory before the fact to an assault with intent to kill made by one O. P. Rockwell on Lilburn W Boggs on the night of the sixth day of May AD 1842 . . . and that the said Joseph Smith has fled from Justice of said State and taken refuge in the State of Illinois.” Arrest Warrant issued by Governor Ford, December 31, 1842, Lincoln Presidential Library, spelling regularized. Butterfield then had both Wilson Law (under the auspices of the Proclamation) and Sangamon County Sheriff William Elkins (under the auspices of the new arrest warrant) take Smith to Judge Nathaniel Pope’s courtroom in Springfield.
TINSLEY BUILDING. This three-story brick building was built circa 1840–41, located on the corner of Adams and Sixth Streets in Springfield, Illinois. It was owned by Seth Tinsley, who operated a dry goods store there. The United States Federal Court rented space on the second floor. It was here that Justin Butterfield represented Joseph Smith before Federal Judge Nathaniel Pope. From 1843 to 1852, Abraham Lincoln, with Stephen Logan and William Herndon, had a law office on the third floor of the building. Abraham Lincoln Presidential Library & Museum (ALPLM).

With the filing of the petition, Federal Judge Nathaniel Pope permitted Butterfield to address the court. Butterfield articulated the procedural

162. The petition signed by Joseph Smith for a writ of habeas corpus read, in part, as follows: “The petition of Joseph Smith respectfully sheweth that he has been arrested and is detained . . . upon a warrant issued by the Governor of the State of Illinois upon the requisition of the Governor of Missouri as a fugitive from justice . . . And your Petitioner is also arrested by Wilson Law and by him also held and detained in custody (Jointly with the said Sheriff of Sangamon Co.) upon a proclamation issued by the Governor of the state of Illinois, a copy of which proclamation is hereto annexed.—Your Petition prays that a writ of Habeus Corpus may be issued by this Court directed to the said William F. Elkin and Wilson Law commanding them furtherwith and without delay to bring your petitioner before this Honorable Court to abide such order and direction as the said Court may make in the premises.” Smith’s Petition for a Writ of Habeas Corpus issued by Governor Ford, December 31, 1842, Lincoln Presidential Library, spelling regularized.

163. Nathaniel Pope (1784–1850) was appointed by President James Monroe to the federal bench for the District of Illinois in 1819. Paul M. Angle, Nathaniel Pope, 1784 to 1850, a Memoir (Springfield, Ill.: Privately printed, 1937); Linder, Reminiscences of the Early Bench, 215–17.
posture of the matter (the requisition from Governor Reynolds, the proclamation of Governor Carlin and the new arrest warrant from Governor Ford), as well as the substantive position of Joseph Smith (that the requisition was flawed because Joseph Smith never fled from Missouri as alleged). He then introduced Joseph Smith to the court, read the petition for a writ of habeas corpus, and requested a hearing on the underlying extradition effort and for bail pending the hearing. Judge Pope granted the writ of habeas corpus, set bail at $4,000, and scheduled the hearing on the return of the writ for the following Monday, January 2, 1843.

164. *JSP Journals 2* (December 31, 1842), 200–204.
165. The writ of habeas corpus ordered by Judge Pope and issued by the court clerk James Owing noted, in part, as follows: “We command you, that you do forthwith, without excuse or delay, bring or cause to be brought, before the Circuit Court of the United States for the District of Illinois; at the District Court Room in the City of Springfield the body of Joseph Smith . . . and who is unlawfully detained in your custody. . . . And hereof make due return, under the penalty of what the law directs.” Writ of Habeas Corpus ordered by Judge Nathaniel Pope, December 31, 1842, Lincoln Presidential Library, spelling regularized.
166. Section 4 of the Illinois 1827 Habeas Corpus Act required that if bail is admitted, the prisoner (Smith, in this case) “shall enter into recognizance with one or more securities.” The record indicates that Judge James Adams and Wilson Law acted as securities for Smith. *JSP Journals 2* (December 31, 1842), 204.
2. Hearing

On Monday morning, Joseph Smith was represented before Judge Pope by two attorneys: Justin Butterfield, who lived in Chicago, and Benjamin S. Edwards, who lived in Springfield. Illinois Attorney General Josiah Lamborn represented the state of Illinois.

Lamborn immediately sought a continuance to have additional preparation time for the hearing on the return of the writ. Judge Pope granted the request and moved the hearing to Wednesday, January 4, 1843. Butterfield then moved to file objections to the factual basis of the extradition warrant upon which the writ of habeas corpus was taken. It does not appear that Lamborn objected to the motion. Butterfield’s motion was supported by an affidavit of Joseph Smith that noted:

Joseph Smith being brought up on Habeas Corpus before this Court comes and denies the matter set forth in the return to the same in this, that he is not a fugitive from the justice of the State of Missouri; but alleges and is ready to prove that he was not in the State of Missouri at the time of the Commission of the alleged crime set forth in the affidavit of L. W. Boggs, nor had he been in said State for more than three years previous to that time, nor has he been in that State since that time—but on the contrary at the time the said alleged assault was made upon the said Boggs as set forth in said Affidavit the said Smith was at Nauvoo in the County of Hancock in the State of Illinois, and that he has not fled from the justice of the State of Missouri and taken refuge in the State of Illinois, as is most untruly stated in the warrant upon which he is arrested and that the matter set forth in the requisition of the Governor of Missouri and in the said Warrant are not supported by oath.

Joseph Smith


168. Josiah Lamborn (1809–1847) was “described by his contemporaries as an able and brilliant man, but of convivial habits and unscrupulous to such a degree that his name was mixed up with a number of official scandals. Separated from his family, he died of delirium tremens, at Whitehall, Greene County, [Illinois].” Bateman and Selby, *Historical Encyclopedia of Illinois*, 1:327. *Transactions of the Illinois State Historical Society* (Springfield, Ill.: Phillips Bros., 1903), 218. Linder, *Reminiscences of the Early Bench*, 258–59.

169. JSP Journals 2 (January 2, 1843), 210, 387.

170. Affidavit of Joseph Smith, January 2, 1843, Church History Library.
After the Monday hearing, Joseph Smith, his counsel, and various colleagues further discussed the preparation for the hearing, including whether additional affidavits should be prepared supporting the fact that Smith was not in Missouri when Boggs was shot. Jacob Backenstos even volunteered to go to Carthage to get affidavits from people who had dined with Smith in Nauvoo on May 7, 1842. In the late afternoon of the day of the hearing, Attorney General Lamborn and Marshal William Prentiss visited Joseph Smith and had a “jovial” meeting.

The following day, Butterfield drafted two additional affidavits—one to be signed by a group of Mormons and the other by a group of non-Mormons, both affirming Joseph Smith’s presence in Nauvoo around the date that Boggs was shot. It appears that these affidavits were prepared to make sure that this evidence became part of the record, as Butterfield probably anticipated the forthcoming objections from Lamborn. Both of these affidavits were submitted and read into the record at the beginning of the hearing the following day.

On Wednesday, January 4, 1843, the court convened at 9 a.m., all parties being present. The court started by inquiring whether either party had any preliminary motions. Both did. Lamborn had two—the first was a motion to dismiss the issuance of the writ of habeas corpus on the ground that the court had no jurisdiction to hear the matter, and the second was effectively a motion in limine (a motion before the trial to resolve evidentiary rulings) to prevent any inquiry into any facts “behind the writ.” Butterfield and Edwards countered the two motions, first articulating that the court not only had jurisdiction over this matter but exclusive

171. Jacob Backenstos (1811–1857) was a friendly non-Mormon. He was sheriff of Hancock County in 1845, where he defended the rights of the Mormons from mob violence.


173. See *JSP Journals 2* (May 7, 1842), 54–55, identifying that Smith was in Nauvoo on the date that Boggs was shot, where he both reviewed the Nauvoo Legion and had dinner with a group of “distinguished Strangers,” including Stephen A. Douglas.

174. Numerous accounts report that Judge Pope had several young ladies sit on either side of him at the bench during these proceedings, including his daughters, Butterfield’s daughter, and Mary Todd Lincoln, who had recently married Abraham Lincoln. *History of Sangamon County, Illinois*, 103–4; Angle, Nathaniel Pope, 1794–1850, 56; Isaac Newton Arnold, *Reminiscences of the Illinois Bar Forty Years Ago* (Fergus Printing Co., 1881), 6–7; *JSP Journals 2* (January 2, 1843), 211–12. Marshal William Prentiss noted that this “was the first time in his administration that the Ladies had attended court on a trial.” *JSP Journals 2* (January 2, 1843), 211.

jurisdiction, because Joseph Smith was in custody “under color of U.S.
Law.”

Concerning Lamborn’s second motion, Butterfield argued that the facts were undisputable—Smith could not be a fugitive from a crime that occurred in Missouri when he was in Illinois at the time. Butterfield then had read into the record the two prepared affidavits. The first affidavit, signed by ten Mormons, itemized the times they knew Smith was in Nauvoo, making it impossible for him to have been in Missouri participating in the attempt on Boggs’s life.

The second affidavit, signed by Stephen A. Douglas and Jacob Backenstos, confirmed “that [they] were at Nauvoo, in the County of Hancock in this State, on the seventh day of May last, that they saw Joseph Smith on

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177. JSP Journals 2 (January 4, 1843), 222–24.
178. Before reading into the record the affidavits, the court put under oath the signers, including Wilson Law, Henry Sherwood, Theodore Turley, Shadrach Roundy, William Clayton, John Taylor, William Marks, Lorin Walker, and Willard Richards. After the joint affidavit was read, the court swore in Stephen Douglas and Jacob Backenstos and their joint affidavit was read. JSP Journals 2 (January 4, 1843), 216. This was done in accordance with section 3 of “An Act Concerning Oaths and Affirmations,” in Public and General Statute Laws of the State of Illinois, 514. Both affidavits note that they were “sworn to and subscribed in Open Court” on January 4, 1843.
179. The affidavit read, in part: “Being duly sworn say that Joseph Smith was in Nauvoo . . . during the whole of the Sixth & Seventh days of May last; That on the sixth day of May Aforesaid the said Smith attended an officer drill at Nauvoo from Ten O’clock in the forenoon to about four o’clock in the afternoon at which drill the Said Joseph Smith was present: . . . —and these deponents . . . were with the said Smith at his dwelling house, in Nauvoo, on and during the evening of the fifth day of May last, & conversed with him; — and all of the deponents aforesaid do say that on the seventh day of May aforesaid the Said Smith reviewed the Nauvoo Legion, & was present with the said Legion all that day, in the presence of many thousand people and it would have been impossible for the Said Joseph Smith to have been at any place in the State of Missouri, at any time, on or between the sixth & seventh days of May aforesaid; and these deponents . . . say that they have seen & conversed with the said Smith at Nauvoo aforesaid daily from the Tenth of February last until the first of July last and know that he has not been absent from said city of Nauvoo at any time, during that time, long enough to have been in the State of Missouri.—that Jackson county in the State of Missouri, is about three hundred miles from Nauvoo.” Collaborative Affidavits of Wilson Law, Henry Sherwood, Theodore Turley, Shadrach Roundy, William Clayton, Hyrum Smith, John Taylor, William Marks, Lorin Walker, and Willard Richards, January 4, 1843, Church History Library, spelling and punctuation regularized. While Hyrum Smith apparently signed the affidavit, his name is not recorded as being present and sworn in by the court. Further, his name is struck out on the Affidavit. Consequently, it is likely that Hyrum was not present at the hearing.
that day reviewing the Nauvoo Legion at that place, in the presence of several thousand persons.”

a. Jurisdiction to hear the return of the writ of habeas corpus. Lamborn argued that because the extradition effort was between the states of Missouri and Illinois, state court was the only place that had jurisdiction. In support he cited the famous Supreme Court case *Ex parte Bollman* for the proposition that the federal court’s jurisdiction was at common law and could be restricted by statute. Lamborn argued that the above-cited Illinois statute preempted federal jurisdiction. Lamborn furthered this position, claiming an Illinois statute governed the incident.

Edwards responded by simply noting that Lamborn was “in the dark” on this issue. Citing Kent Commentaries, Edwards argued that the federal court had jurisdiction in any case involving habeas corpus that “arises under U.S. law.” Edwards continued that the right of habeas corpus was so central to the American ideal that it was expressly written into the Constitution itself. Edwards concluded that the Revolutionary War was won to extract such powers from the Crown. Certainly, the Founders never intended those powers to be given to a governor.

180. Collaborative Affidavits of Stephen A. Douglas, James H. Ralson, Almeron Wheat, J. B. Backenstos, January 4, 1843, Church History Library, spelling and punctuation regularized. Only Douglas and Backenstos were in court and signed the affidavit.


182. Reported as *Ex parte Bollman and Swartwout*, 8 U.S. (4 Cranch) 75 (1807). This case arose from the Aaron Burr treason conspiracy. Lamborn apparently cited the following parts of Chief Justice John Marshall’s opinion in support of his argument: “As preliminary to any investigation of the merits of this motion, this court deems it proper to declare that it disclaims all jurisdiction not given by the constitution, or by the laws of the United States. The inquiry therefore on this motion will be, whether by any statute, compatible with the constitution of the United States, the power to award a writ of habeas corpus, in such a case as that of Erick Bollman and Samuel Swartwout, has been given to this court.” In Bollman the court concluded that such statutory authority existed under the Judiciary Act of 1789. Consequently, the Bollman case did not support Lamborn’s argument.


187. U.S. Constitution, art. 1, sec. 9, cl. 2.

Butterfield rose and next addressed the court. His opening lines have been recorded in numerous reports\footnote{See, for example, “Opening in Joe Smith’s Case,” \textit{New Orleans Daily Picayune}, February 24, 1842; “Justin Butterfield’s Defence of Joe Smith,” \textit{Central Law Journal} 2 (1875), 776; History of Sangamon County, Illinois, 103; Angle, Nathaniel Pope, 1784–1850, 56; Paul M. Angle, “Here I Have Lived”: A History of Lincoln’s Springfield 1826–1835 (New Brunswick, N.J.: Rutgers University Press, 1950), 126.} and were so poetic and classic that they bear repeating. As reported by a fellow attorney who was present:

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Mr. Butterfield . . . rose with dignity and amidst the most profound silence. Pausing, and running his eyes admiringly from the central figure of Judge Pope, along the rows of lovely women on each side of him, he said: “May it please the Court: I appear before you today under circumstances most novel and peculiar. I am to address the ‘Pope’ (bowing to the Judge) surrounded by angels (bowing still lower to the ladies), in the presence of the holy Apostles, in behalf of the Prophet of the Lord.”\footnote{Arnold, \textit{Reminiscences of the Illinois Bar}, 3.}
\end{quote}

Butterfield then reaffirmed Edwards’s arguments generally and continued that the federal court not only had jurisdiction but also had exclusive jurisdiction to hear the return. Butterfield turned Lamborn’s argument on itself, arguing that state law could not preempt federal law, but rather federal law preempted state law.\footnote{U.S. Constitution, art. 3, sec. 2: “In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the Supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the} Butterfield specifically argued that no state law could preempt the U.S. Constitution.\footnote{JSP Journals 2 (January 4, 1843), 220.} In support, Butterfield cited \textit{Jack v. Martin}, a New York case involving the return of a slave from Louisiana. The New York Court of Errors

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Benjamin Edwards. Edwards was the often forgotten co-counsel with Justin Butterfield in representing Joseph Smith. While Butterfield would receive most of the accolades, Edwards provided important contributions to the legal arguments that resulted in the discharge of Joseph Smith. Abraham Lincoln Presidential Library & Museum (ALPLM).
\end{flushright}
held that the state process could not circumvent federal process, noting that “whenever the terms in which a power is granted to Congress, or the nature of the power requires that it should be exercised exclusively by Congress, the subject is as completely taken from the state legislature as if they had been expressly forbidden to act.” Butterfield opined, “Has not my client, Joseph Smith, the rights of a [slave]?" Butterfield concluded, “This Court not only has Jurisdiction, but, it is the only court I could bring this case to. . . . Judicial power shall extend to all cases arising under the constitution and laws of the United States. . . . I hope the Gentlemen of the bar will not give their opinions without reading their books—these out door opinions are a disgrace to the profession.”

b. Jurisdiction to look behind the arrest warrant. With that concluding jab at Lamborn, Butterfield turned to the second and substantive issue before the court, framing it as follows: “Has the court power to issue Habeas Corpus? It has. Is the return sufficient to hold the prisoner in custody without further testimony? Unless it appears on the testimony that he is a fugitive, it is not sufficient.” Butterfield then dissected the affidavit of ex-Missouri Governor Boggs and the requisition from Missouri Governor Carlin. First Butterfield noted that Boggs’s affidavit never alleges that Smith was in Missouri when the crime occurred. Next, he cited Carlin’s requisition that claimed that Smith was a “fugitive from justice.” Butterfield continued stating that to qualify as a fugitive Smith had to have “fled” from

Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.”


195. JSP Journals 2 (January 4, 1843), 222, spelling, grammar, and punctuation regularized.

196. JSP Journals 2 (January 4, 1843), 220, 222, spelling and punctuation regularized.

197. Governor Reynolds went beyond the allegations in the Boggs affidavit in making the requisition, noting: “WHEREAS, it appears by the annexed document which is hereby certified as authentic, that one Joseph Smith is a fugitive from justice, charged with being accessory before the fact to an assault with intent to kill, made by one O P. Rockwell on Lilburn W. Boggs in this State and, it is represented to the Executive Department of this State, has fled to the State of Illinois.” Affidavit of Lilburn W. Boggs, July 20, 1842, Lincoln Presidential Library (emphasis added). The Boggs Affidavit never alleged that Smith had “fled to the State of Illinois.”
Missouri. Butterfield summarizes the validity of these efforts: “Governor Carlin would not have given up his dog on such a requisition.”

Butterfield examined the facts supported by the two affidavits previously read into the record that Joseph Smith was in Nauvoo at the time the crime occurred in Missouri: “He [Smith] was at officer’s drill until 6 and in the Lodge from 6 to 9 o’clock. . . . 300 miles off in uniform reviewing the Nauvoo Legion, instead of running away from Boggs in uniform. Judge Douglas partook of the hospitality of General Smith[;] instead of fleeing from Justice, he was dining with the highest court judge in our land.”

Butterfield then articulated the established status of the law as to when one could look behind the writ on a return for a writ of habeas corpus stating that “[the] power of Habeas Corpus is pretty well settled.” Citing a case involving a conviction for embezzlement, Butterfield noted that on a return for a writ of habeas corpus one “cannot go behind the Judgment. [When a] judgment is not issued, [one] can go behind the writ.” Butterfield’s final example was an 1835 New York case involving the requisition request of

198. *JSP Journals* 2 (January 4, 1843), 222, spelling, grammar, and punctuation regularized.
199. *JSP Journals* 2 (January 4, 1842), 222–23; see notes 182–83 and accompanying text.
200. *JSP Journals* 2 (January 4, 1843), 223, spelling, grammar, and punctuation regularized. Butterfield cited *Ex Parte Watkins*, 32 U.S. (7 Pet.) 568 (1833), application having been made in 1830 at 28 U.S. (3 Pet.) 193, for the proposition that after judgment the appeal (here in the form of a writ of habeas corpus) cannot revisit the basis for the judgment. He then cited *Ex Parte Burford*, 7 U.S. (3 Cranch) 448, 451–52 (1806), for the proposition of the rights of a prisoner to look at the underlying facts in some cases. In this regard, the Burford court noted, “By the 6th article of the amendments to the constitution of the United States, it is declared, ‘that no warrants shall issue but upon probable cause, supported by oath or affirmation.’ By the 8th article it is declared, that in all criminal prosecutions, the prisoner shall enjoy the right to be informed of the nature and cause of his accusation, and to be confronted with the witnesses against him.”

Butterfield also cited to *In re Clark*, 9 Wend. 212, 220–21 (Supreme Court of Judicature of New York, 1832) that spoke to the process and scope of looking behind a writ. The Clark court held: “We are next to inquire into our own duties. These are to be found in our statutes. They direct, 2 R. S., 567–569, that the court or officer authorized to allow the habeas corpus shall, upon the return thereof, proceed to examine into the facts contained in the return. If no legal cause be shown for the imprisonment, the party shall be discharged; but if he is legally detained, he shall be remanded. The 48th section, p. 569, permits the party, upon the return of the habeas corpus, to deny on oath any of the material facts set forth in the return, or allege any fact to show the detention unlawful; and then the court or officer shall, in a summary way, proceed to hear proofs and allegations, and dispose of the party as justice may require; . . . whether he is guilty or not, is not the question to be decided.
the governor of Alabama to the governor of New York for the extradition of abolitionist William G. Williams. Williams had been indicted in Alabama for sedition based on him publishing an antislavery newspaper, *The Emancipator*, and distributing it in Alabama. The central issue was whether Williams had “fled” from justice (the state of Alabama). While the indictment from a grand jury in Alabama found that Williams had fled and the requisition relied upon the indictment, the governor of New York refused to comply, asserting that the facts, as alleged by Williams, were that he had never left the state of New York, the newspaper was printed in New York, he lived in New York, and the newspaper was simply shipped to Alabama.  

The New York Governor concluded, in his yearly address to the New York senate and assembly on January 5, 1836: “The accused was not an actual fugitive from justice, and it did not appear that he had any other participation in the alleged crime than what arose from acts done within this State. I, was, therefore, convinced that neither the constitution or laws of the United States, nor of this State, imposed on me a duty, or conferred the right, to surrender him, and I declined to do so.”

Butterfield closed his argument with the following summation:

That an attempt should be made to deliver up a man who has never been out of the State strikes at all the liberty of our institutions. His fate today may be yours tomorrow. I do not think the defendant ought under any circumstances to be delivered up to Missouri. It is a matter of history that he and his people have been murdered and driven from the state. He had

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202. *Documents of the Assembly of the State of New-York, Fifty-Ninth Session*, 1:38. Butterfield had previously explained this case to Rigdon by letter dated October 20, 1842, concluding that “the governor of a state has no jurisdiction over the body of a citizen to arrest and surrender him up to a foreign state unless he is a fugitive from that state, unless he has fled from that state to evade justice or in other words to evade being tried for the offence with which he is charged. In a despotic form of government, the sovereign power is the will of the monarch who can act in every instance as may suit his pleasure. But can the governor of one of our states of his own mere will, without any authority from the Constitution or the legislative power of the State arrest and deliver up to a foreign government any person whatever; if he can do this, then is the liberty of the citizen wholly at his disposal.” Butterfield to Rigdon, October 20, 1842, 2–3, spelling, grammar, and punctuation regularized. See appendix A.
better been sent to the gallows. He is an innocent and unoffending man. The difference is this people believe in prophecy and others do not. Old prophets prophesied in poetry and the modern in prose.203

After a short recess, Lamborn made his final argument, attempting to use the same Williams case to support the state’s position. Lamborn noted that the Williams case stood for the proposition that the issue of extradition was one between the governors of two states, not the courts. He summarized, “no court could compel him [the governor of New York] to act.”204

c. Ruling and rationale. With Lamborn’s final argument, the case was submitted to Judge Pope. The judge indicated that the court would issue its opinion at 9:00 a.m. the following day.205 Willard Richards provides us with a succinct summary of the day’s hearing:

The courtroom was crowded the whole of the trial and the utmost decorum and good feeling prevailed. Esquire Butterfield managed the case very learned and judiciously. Preceded by Esquire Edwards who made some very pathetic allusions to our sufferings in Missouri. Esquire Lamborn was not severe apparently saying little more than the nature of his situation required—and no more than would be useful in satisfying the public mind—that there had been a fair investigation of the whole matter.206

The following morning Judge Pope rendered his opinion in open court, ruling in Joseph Smith’s favor and discharging him.207 Pope’s written opinion was published in the Sangamo Journal on January 19, 1843.208 Mormon-operated newspapers the Times and Seasons and the Wasp ran the opinion

203. JSP Journals 2 (January 4, 1843), 224, spelling, grammar, and punctuation regularized.
204. JSP Journals 2 (January 4, 1843), 225, spelling, grammar, and punctuation regularized.
205. JSP Journals 2 (January 4, 1843), 225.
206. JSP Journals 2 (January 4, 1843), 225, spelling, grammar, and punctuation regularized.
207. JSP Journals 2 (January 5, 1843), 233.
208. Apparently, Pope noticed Willard Richards taking notes throughout the hearings. Afterwards Pope asked if Richards would assist him in preparing the written version of his ruling, to which Richards agreed. Richards prepared a draft of the opinion taken from his notes. Pope then used this draft preparing the version for publication. Richards Draft of Pope’s Opinion, Springville, Ill., January 5, 1842, Ex Parte JS for Accessory to Boggs Assault, Church History Library. Based on this assistance, Smith asked Pope if the Wasp could publish the opinion first. Pope replied that Mr. Francis would have the right to publish the opinion first. Simeon Francis was the editor of the local Sangamo Journal. JSP Journals 2 (January 6, 1843), 235, n. 234.
The opinion was cited in federal and state courts for more than a hundred years.\textsuperscript{210} 

The importance of the case was not lost on Judge Pope, who introduced the opinion as follows:

The importance of this case, and the consequences which may flow from an erroneous precedent, affecting the lives and liberties of our citizens, have impelled the court to bestow upon it the most anxious consideration. . . When the patriots and wise men who framed our constitution were in anxious deliberation to form a perfect union among the states of the confederacy, two great sources of discord presented themselves to their consideration; the commerce between the states, and fugitives from justice and labor. The border collisions in other countries had been seen to be a fruitful source of war and bloodshed, and most wisely did not the constitution confer upon the national government, the regulation of those matters, because of its exemption from the excited passions awakened by conflicts between neighboring states, and its ability alone to adopt a uniform rule, and establish uniform laws among all the states in those cases.\textsuperscript{211}

Pope first addressed the issue of jurisdiction. The state's argument was that state law exclusively governed the case and therefore jurisdiction lay with the state. Pope disagreed. He reasoned: “The warrant on its face purports to be issued in pursuance of the constitution and laws of the United States, as well as of the state of Illinois. To maintain the position that this warrant was not issued under color or by authority of the laws of the United States, it must be proved that the United States could not confer the power on the executive of Illinois.”\textsuperscript{212}


\textsuperscript{210} Ex parte Smith, 6 Law Rep. 57, published in 1843, was the earliest legal version and contains both a syllabus and the opinion from Judge Pope. The first “official” legal version was published in 1847 in \textit{Reports of Cases Argued and Decided in the Circuit Court of the United States for the Seventh Circuit} (Cincinnati, Ohio: Derby, Bradley and Co., 1847) as 3 McLean 121 and includes a synopsis of the case, selected pleadings (Boggs’s affidavit, Reynolds’s request for extradition, and Ford’s arrest warrant), and the opinion from the court. Finally, the preferred official version was published in 1896 as 22 F. Cas. 373 in \textit{The Federal Cases Comprising Cases Argued and Determined in the Circuit and District Courts of the United States}. It includes the syllabus from the Law Rep. version and the opinion from the McLean Version. No pleadings are included. For a list of federal and state courts that have cited the \textit{Ex parte Smith} opinion, see appendix B.

\textsuperscript{211} Ex parte Smith, 22 F. Cas. 373, 376 (C.C.D. Ill. 1843) (No. 12,968).

\textsuperscript{212} Ex parte Smith, 22 F. Cas. 376. Pope did not rule on whether the state courts had jurisdiction, noting that “this court is not called upon to decide.” Ex parte Smith, 22 F. Cas. 377.
Judge Pope declared that the state did not do this, and this failure was “enough to dispose of that point.” Pope then easily dismissed Lamborn’s corollary argument that there was “greater sanctity in a warrant issued by the governor, than by an inferior officer.” Pope poetically responded:

Magna Charta established the principles of liberty; the habeas corpus protected them. It matters not how great or obscure the prisoner, how great or obscure the prison-keeper, this munificent writ, wielded by an independent judge, reaches all. It penetrates alike the royal towers and the local prisons, from the garret to the secret recesses of the dungeon. All doors fly open at its command, and the shackles fall from the limbs of prisoners of state as readily as from those committed by subordinate officers.213

Pope then turned his attention to the second issue before him: Could the factual basis of the moving pleadings be questioned—here the Boggs affidavit and the Reynolds requisition. To answer this question, Pope focused on what “proof” existed to support the extradition. Pope identified that the “proof is ‘an indictment or affidavit,’ to be certified by the governor demanding. The return brings before the court the warrant, the demand and the affidavit.” Pope concluded that the “affidavit being thus verified, furnished the only evidence upon which the Governor of Illinois could act.” He acknowledged that Joseph Smith presented opposing “affidavits proving that he was not in Missouri at the date of the shooting of Boggs.” While the state objected to such testimony on the basis that it required looking behind the return, Pope determined that such evidence was unnecessary, “inasmuch as it thinks Smith entitled to his discharge for defect in the affidavit.”214

The affidavits presented by Joseph Smith all focused on the fact that Smith was not in Missouri when the crime was committed and therefore could not have fled from the justice of Missouri. Pope succinctly reasoned:

As it is not charged that the crime was committed by Smith in Missouri, the governor of Illinois could not cause him to be removed to that state, unless it can be maintained that the state of Missouri can entertain jurisdiction of crimes committed in other states. The affirmative of this proposition was taken in the argument with a zeal indicating sincerity. But no adjudged case or dictum was adduced in support of it. The court conceives that none can be.215

Some commentators have pointed out that the crime of being an accessory was somehow different in the early nineteenth century than it is today,

213. Ex parte Smith, 22 F. Cas. at 377.
214. Ex parte Smith, 22 F. Cas. at 377.
215. Ex parte Smith, 22 F. Cas. 378.
and that Smith would not have to be in Missouri to be an accessory today. Of course, being physically in Missouri is not a requisite then or today to conspire to commit a crime. The issue was not whether Smith had committed a crime, but whether the extradition by Missouri was proper. Extradition is based on one committing a crime in one state, under its laws, and then fleeing that state to avoid prosecution. The state where the crime was committed can seek to have the person extradited back. Such a procedure does not circumvent a state from charging its own citizen for a crime committed in its state that involves a second state. For example, someone that published libelous statements that are distributed between different states could be guilty of the crime of libel in several venues. If the publisher never was in the second state, that state could still charge him with libel, but could not have him extradited if he had never been in the state to flee from. In the present situation, the substantive legal question was not whether Smith had conspired with Rockwell, but whether Missouri had the right to extradite him for an alleged crime that occurred, if at all, in Illinois. Such a conspiracy would have violated Illinois law, and the Illinois authorities would have had the duty to prosecute. But handing Smith over to Missouri for a crime that occurred in Illinois would not have been available based on a requisition demand from Missouri.

Pope's reasoning is instructive to understand the legal basis of his ruling, as it was indeed not necessary to engage in further factual findings:

It is the duty of the state of Illinois to make it criminal in one of its citizens to aid, abet, counsel, or advise, any person to commit a crime in her sister state. Any one violating the law would be amenable to the laws of Illinois, executed by its own tribunals. Those of Missouri could have no agency in his conviction and punishment. But if he shall go into Missouri, he owes obedience to her laws, and is liable before her courts, to be tried and punished for any crime he may commit there; and a plea that he was a citizen of another state, would not avail him. If he escape, he may be surrendered to Missouri for trial. But when the offence is perpetrated in Illinois, the only right of Missouri is, to insist that Illinois compel her citizens to forbear to annoy her. . . . The court must hold that where a necessary fact is not stated in the affidavit, it does not exist. It is not averred that Smith was accessory before the fact, in the state of Missouri, nor that he committed a crime in Missouri: therefore, he did not commit the crime in Missouri—did not flee from Missouri to avoid punishment.\(^{216}\)

Pope then criticized and dismissed the facts asserted in the Boggs affidavit, finding that “beliefs” without facts are insufficient, as are “legal

\(^{216}\) Ex parte Smith, 22 F. Cas. 378.
conclusions.” Pope simply found that the “affidavit is fatally defective.” Pope then, in preparation for the inevitable conclusion, provided a context to his ruling:

The return is to be most strictly construed in favor of liberty. . . . No case can arise demanding a more searching scrutiny into the evidence, than in cases arising under this part of the constitution of the United States. It is proposed to deprive a freeman of his liberty—to deliver him into the custody of strangers, to be transported to a foreign state, to be arraigned for trial before a foreign tribunal, governed by laws unknown to him—separated from his friends, his family and his witnesses, unknown and unknowing. Had he an immaculate character, it would not avail him with strangers. Such a spectacle is appalling enough to challenge the strictest analysis. The framers of the constitution were not insensible of the importance of courts possessing the confidence of the parties.217

Pope’s ruling was clear and concise: “The affidavit is insufficient—1st. because it is not positive; 2d. because it charges no crime; 3d. it charges no crime committed in the state of Missouri. Therefore, he [Smith] did not flee from the justice of the state of Missouri, nor has he taken refuge in the state of Illinois.”218 Joseph Smith was discharged.

F. Nauvoo City Council’s Final Ordinance on Habeas Corpus—November 1842

The Nauvoo City Council made its final additions to the Municipal Code regarding habeas corpus in November 1842 (the “November 1842 City Ordinance”).219 The November 1842 City Ordinance was the most detailed ordinance passed by the city council regarding writs of habeas corpus. It was this ordinance that some later writers claimed was abusive and over-reaching. However, a careful reading of the November 1842 City Ordinance demonstrates that the Nauvoo City Council merely adopted, in substance, the entire Illinois 1827 Act. It is reproduced in full in appendix C.

More than 80 percent of the Illinois 1827 Act was incorporated verbatim by the Nauvoo City Council in the November 1842 City Ordinance. Yet, while the similarities are striking, looking at the differences is crucial. These differences highlight both the sophisticated understanding that the Nauvoo City Council had of the habeas corpus laws, as well as the rights it understood were extended to the city’s inhabitants through the Nauvoo Charter.

217. Ex parte Smith, 22 F. Cas. at 379.
218. Ex parte Smith, 22 F. Cas. at 379.
219. Rough Draft Notes of History of the Church, 1842b-015, Church History Library.
See appendix C for a line-by-line comparison of the Illinois 1827 Act with the November 1842 City Ordinance.

Section 1 of the November 1842 City Ordinance differs from the Illinois 1827 Act only in that the November 1842 City Ordinance refers to the city of Nauvoo and the Nauvoo Municipal Court (as authorized to hear writs of habeas corpus in section 17 of the Nauvoo Charter) instead of referring to the state of Illinois and the courts of Illinois. The other change in section 1 centers on the process to file a petition requesting a writ of habeas corpus. While the Illinois 1827 Act describes the process, the November City Ordinance provides sample forms to use for a petition.

Section 2 defines who can file for a petition for a writ of habeas corpus, beyond those arrested for a crime. The November 1842 City Ordinance adds a penalty for violating these provisions of accepting a petition under both sections 1 and 2.

Sections 3–7 of the November 1842 City Ordinance are materially identical to the corresponding sections in the Illinois 1827 Act, including provisions dealing with the hearings on writs of habeas corpus (sections 3), issues of bail, recognizance, and security (sections 4), procedures for remand (sections 5), second writs of habeas corpus after discharge (sections 6), and procedures for discharge (sections 7).

Section 8 of the November 1842 City Ordinance omitted the corresponding section of the Illinois 1827 Act in its entirety. In the Illinois 1827 Act, this section excluded federal claims, war claims, slavery claims, and high crimes from the act, leaving them to the federal courts. The November 1842 City Ordinance does not include these exclusions. This was done in apparent reliance on section 11 of the Nauvoo Charter that provides that the city council could enact “all such ordinances, not repugnant to the Constitution of the United States or of this State.” As the Constitution of the United States provided for relief under a writ of habeas corpus for these exclusions, the Nauvoo City Council included them within the scope of its municipal code.

No material differences are found in section 9, with the exception that the November 1842 City Ordinance does not grant as much discretion to the court to delay the resolution of a habeas corpus hearing as does the Illinois 1827 Act.

Section 10 of the Illinois 1827 Act is omitted in the November 1842 City Ordinance. This section deals with the moving of a prisoner from one county to another that would have the impact of delaying or avoiding a trial. As the interest of the Nauvoo City Council was to allow its citizens to have their concerns addressed in Nauvoo, the issue of moving a prisoner out of Nauvoo was apparently deemed unnecessary.
Section 11 of the November 1842 City Ordinance does not include a provision for moving a prisoner to a different jail should an overcrowding issue arise, or moving to a different jail based on a federal law or executive demand. Basically, it said that if prisoners were in Nauvoo, they would stay in Nauvoo until the habeas corpus matter was resolved.

Sections 12–17 of the November 1842 City Ordinance are virtually identical to the corresponding provisions of the Illinois 1827 Act.

Finally, section 18 of the November 1842 City Ordinance differs from the last section of the Illinois 1827 Act in the fact that the Act provided that the supreme and circuit courts shall have power to grant petitions for writs of habeas corpus. The November City Ordinance deleted these provisions, since section 17 of the Nauvoo Charter provides that the “Municipal Court shall have power to grant writs of habeas corpus in all cases arising under the ordinances of the City Council.”

As this summary evidence shows, the Nauvoo City Council, under the leadership of Mayor Joseph Smith, adopted a consistent, albeit increasingly detailed, approach to the use of habeas corpus in Nauvoo. This approach is characterized by three guiding principles. First, the Nauvoo Municipal Court was fully vested with the power to grant and hear writs of habeas corpus. Second, the Nauvoo City Council was empowered with the rights to enact ordinances for the city of Nauvoo to the extent permitted by the United States Constitution or the Illinois Constitution, whichever was broader. Lastly, the municipal court had a duty when hearing a writ of habeas corpus to look at both the procedural legality of an arrest and the substantive merits of the underlying charges.

V. Conclusion

Any credible analysis of Joseph Smith’s use of the writ of habeas corpus must start with an understanding of the law as it existed and applied in the early nineteenth century. Without this indispensible perspective, the legal theories, arguments, enactments, and actions raised by or for Smith under the rubric of “habeas corpus rights” cannot be properly understood. With this understanding, the actions of the various witnesses, lawyers, clerks, aldermen, council members, sheriffs, and judges involved in Joseph Smith’s world begin to make legal sense.

While placing the right of habeas corpus in the United States Constitution itself evidenced the importance that the Founding Fathers placed on this great writ, America’s jurisprudence of the writ diverged quickly and distinctively from English law. A central aspect of this evolution was the allowance of an expanded review of the underlying charges allegedly
supporting an arrest and detention. The courts often referred to this review as “looking behind the writ.” Nineteenth-century legal scholars and practitioners recognized this development and provided useful legal analysis and rules of application. The need for a review of both the procedural and substantive aspects of a case necessarily decreased as a case moved through the system: a person who claimed he was incorrectly arrested could demand looking at both; a need to examine the substance of a detention decreases once a grand jury indicts the accused, absent fraud or bad faith; and if a trial resulted in a conviction, the need to look at the substance of the detention would be only to challenge the trial itself.

This methodology is crucial in understanding how Joseph Smith (most often through his lawyers) employed the use of habeas corpus when he was arrested and/or detained. Critics have argued that Smith attempted to use habeas corpus in an overreaching, even abusive manner. Their critique is principally based on his repeated efforts to have the court “look behind the writ” and determine the legitimacy (or illegitimacy, as he argued) of the underlying charges. Yet these critics have failed to acknowledge that these cases all involved the first phase of the litigation or arose in cases where fraud and bad faith were alleged. In these circumstances, his request to look behind the writ was supported both by the applicable law and the facts.

Peter Burnett, one of Joseph Smith’s lawyers during the habeas corpus hearing in Missouri in January 1839, similarly noted that he and his co-counsel, Alexander Doniphan, prepared to re-examine the evidence adduced at the preliminary hearing before Judge Austin King. Indeed, Rigdon’s release makes legal sense only in light of his lawyers’ successful application of this rule.

Joseph Smith’s lawyer during the second extradition efforts, Justin Butterfield, articulated clearly this legal approach discussing the Boggs affidavit. He said, “Under the laws of our own Habeas Corpus Act, [Joseph Smith] has a right to show that the [Boggs] affidavit as false and that the order for his arrest was obtained by false pretenses.”220

This approach is also evidenced in the various maturations of the ordinances passed in Nauvoo articulating the scope and use of the writ of habeas corpus.

In the end, it is clear that Joseph Smith and his advisors had a very sophisticated and accurate understanding of the scope and application of the right to habeas corpus in his day. This scope included the important evolution that the writ experienced as it was transformed from an English prerogative writ of the king to a constitutionally based right of all Americans. Upon his return to Nauvoo on June 30, 1843, being under arrest

220. Butterfield to Rigdon, October 20, 1842. See appendix A.
pursuant to a third and final extradition request from the governor of Missouri, and in anticipation of having his petition for a writ of habeas corpus heard the next day, Smith, in speaking to the citizens of Nauvoo, aptly and passionately summarized how he saw the right of habeas corpus: “The Constitution of the United States declares that the privilege of the writ of Habeas Corpus shall not be denied. Deny me the right of Habeas Corpus, and I will fight with gun, sword, cannon, whirlwind, and thunder, until they are used up like the Kilkenny cats.”

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221. Joseph Smith, in *Journal of Discourses*, 26 vols. (Liverpool: F. D. Richards, 1855–86), 2:163, 167. The term “Kilkenny cat” refers to anyone who is a tenacious fighter. To “fight like a Kilkenny cat” refers to an anonymous Irish limerick about two cats that fought to the death and ate each other up so that only their tails were left.
Appendix A

Justin Butterfield to Sidney Rigdon, October 20, 1842, Sidney Rigdon Collection, Church History Library, Salt Lake City.¹

Chicago, October 20, 1842

Sidney Rigdon, Esq.

Dear Sir –

In answer to your favor of the 17th instant Mr. Warner was correct in the information he gave you of my opinion of the illegality of the requisition made by the governor of Missouri upon the governor of this state for the surrender of Joseph Smith, and that if the governor of this state should cause him to be arrested, for the purpose of being surrendered I had no doubt but the Supreme Court of this State would discharge him upon habeas corpus. Subsequent examination has confirmed me in that opinion. I understand from your letter and from the statement of facts made to me by Mr. Warner that the requisition of the governor of Missouri is accompanied by an affidavit of ex-Governor Boggs stating in substance that on the 6th day of May last he was shot while sitting in his house with intent to kill and as he verily believes the act was committed by O.[rrin] P.[orter] Rockwell and that Joseph Smith was accessory to the crime before its commission and that he had fled from justice; that it can be proved that Joseph Smith was not in the state of Missouri at the time the crime was committed, but was in this state; that it is untrue that he was in the state of Missouri at the time of the commission of the said crime nor has been there any time since and therefore could not have fled from that state since the commission of the said crime. The right on the part of the governor of Missouri to demand Smith and the duty on to the part of the governor of this state to deliver him up, if they exist, are given and imposed by that clause in the Constitution of the United States, which declares, “that a person charged in any State with treason, felony, or other crime who [p. 1] shall flee from justice and be found in another state; shall on demand of the executive authority of the state to which he fled, be delivered up to be removed from the state having jurisdiction of the crime.”

It is unnecessary to refer to the Acts of Congress in relation to the delivering up of fugitives from justice, as Congress has just so much, however and no more than is expressly given by the said clause in the Constitution – the Constitution is the best exponent of itself that persons then can be surrendered up by the governor of one state to the governor of another.

¹. The author thanks Melisa Walker for completing the initial transcription of this letter. The author and Pierce Walker completed a double blind transcription verifying the initial transcription. This transcription has the spelling, punctuation and grammar regularized to create a clear text of the letter. Underlining is retained from the original.
First, “he must be a person charged with treason, felony or other crime.” It is sufficient if he is charged with the commission of crime, either by indictment found or by affidavit.” Second, “he must be a person who shall flee from justice and be found in another State.” It is not sufficient to satisfy this branch of the Constitution, that he should be “charged” with having fled from justice, unless he has actually fled from the state where the office was committed to another state the governor of this state has no jurisdiction over his persons and cannot deliver him up. When Mr. Smith is brought up on a habeas corpus he will have a right under the 3rd Section of our Habeas Corpus Act to introduce testimony and show that the “process upon which he is arrested was obtained by false pretense” that it is untrue that he fled from the state of Missouri to evade being brought to justice there for the crime of which he is charged he will have the right to place himself upon the platform of the Constitution of the United States and say, “I am a citizen of the state of Illinois, I have not fled from the state of Missouri or from the ‘justice’ of that state on account of the commission of the crime with which I am charged. I am ready to prove that the charge of having fled from that state is false, and I am not therefore subject under the Constitution of the United States to be delivered up to that state for trial.”

You say, in your letter to me, that you doubt whether on a writ of habeas corpus the court would have a right to try the question whether Smith was in Missouri at the [p. 2] time of the commission of the crime of which he is charged. To this I answer that upon a writ of habeas corpus the court would be bound to try the question whether Smith fled from justice from Missouri to this state. The affidavit of Mr. Boggs is not conclusive on this point. It may be rebutted unless Smith is a person who has fled from justice. He is not subject to be delivered up under the specific provisions of our own Habeas Corpus Act. He has a right to show that the affidavit as false evidence and that the order for his arrest was obtained by false pretenses. Again, the affidavit on its face was not sufficient to authorize the arrest of Smith, it is evasive and deceptive – it does not show that he fled from the state of Missouri to evade justice for the commission of the crime of which he is charged by Governor Boggs.

Robert G. Williams in the year 1835 was indicted in the state of Alabama for attempting to incite rebellion and insurrection in that state. He was demanded by the governor of that state, of the governor of New York, and the requisition stated that he had fled from justice. The governor of the state of New York (Marcy) took notice that the said Williams was a citizen of the state of New York and had not fled from justice from Alabama and on that ground alone refused to surrender him up. This was a stronger case than that of Smith’s as an indictment had been found. Governor Marcy put his refusal upon the express grounds that by the Constitution of the United States the governor of one state had no right to demand nor had the governor of another state a right to surrender up one of his citizens unless he had fled from justice and it was the right and the duty of the governor upon whom the demand was made to inquire into the fact whether he had fled from justice.
before he made the surrender. I have the book containing all the proceedings in this case of Williams. There are several other cases equally on point, and they all proceed upon the ground that the governor of a state has no jurisdiction over the body of a citizen to arrest and surrender him up to a foreign state unless he is a fugitive from that state, unless he has fled from that state to evade justice or in other words to evade being tried for the offence with which he is charged. In a despotic form of government, the sovereign power is the will of [p. 3] the monarch who can act in every instance as may suit his pleasure. But can the governor of one of our states of his own mere will, without any authority from the Constitution or the legislative power of the State, arrest and deliver up to a foreign government any person whatever; if he can do this, then is the liberty of the citizen wholly at his disposal.

The writ of habeas corpus is a suit that every person imprisoned or unlawfully detained has a right to prosecute for the recovery of his liberty, and if he is in custody by due process from a competent power, he is entitled to his discharge when the jurisdiction has been exceeded.

The governor of this state has no power or jurisdiction over the person of a citizen of this state to arrest and cause him to be delivered up and transported to another state, except the power expressly given to him by the Constitution of the United States. And what is that power? It only authorizes the governor of one state to surrender up a fugitive from justice to return him back to the state from whence he has fled. First, the person to be surrendered up must be a fugitive from justice to which it is attempted, to surrender him. Second, he must be a fugitive from justice in other words he must have been in the state when and where the crime was committed and have [p. 4] fled from that state to evade being apprehended and tried for that crime. Third, unless he is in fact such a fugitive from justice the governor has no power by the laws or Constitution to deliver him up. Fourth, if he is charged with being a fugitive from justice and the governor cause him to be apprehended on that charge, he has a right to sue out a writ of habeas corpus; and when brought up on the writ he has the undoubted right of showing that the governor has no constitutional power to deliver him up to another state; that he has not “fled from justice into this state,” and is not such a person as the Constitution authorizes the governor to deliver up; and that it would be an excess of jurisdiction on the part of the governor to deliver him up.

The question to be examined into upon the return of the habeas corpus would be a mere question of locality. The question would be, was Smith in this state, or not, at the time the crime was committed in Missouri? If he was in this state at that time, then he could not be a fugitive from justice from Missouri, in the sense of the Constitution; and the governor would have no power to deliver him up.

The argument that because Governor Boggs has made affidavit that Smith has fled from justice, his affidavit is to be taken as conclusive on that point, and that upon the return of habeas corpus, Smith would be precluded from controverting or showing the falsity of the affidavit, is too
absurd to require a serious answer. [p. 5] The liberties of the citizens of the state are not held on quite so feeble a tenure, nor does the Constitution authorize the governor to transport the citizens of this state upon a mere “charge” made by a citizen of another state; such is not the reading of the constitution; that instrument only authorizes the delivery up of such persons “who shall flee” upon the demand of the executive authority of the state from which they “fled.” There must have been a “flight” in fact and in deed from the state where the offense was committed, or the governor has no jurisdiction to “deliver up.” If the charge of having “fled” is made, and the governor acting in pais\(^2\) is attempting to deliver up upon that charge, the person attempted to be made the victim has a clear, undoubted, constitutional right by the means of a writ of habeas corpus to test its truth before a judicial tribunal of the country; and if the charge is proven to be false, the governor is ousted of his jurisdiction over the person of the prisoner and he is restored to his liberty before he has undergone the penalty of the transportation to a foreign country, upon the mere charge of an interested or partial witness.

The power of the executive of a state to surrender up a citizen to be transported to a foreign state for trial is a most tremendous power which might be greatly abused were it not limited by constitutional checks, and the citizen secured against its despotic use by the writ of habeas corpus. In the case of Williams the governor of New York in his reply to the Governor of Alabama says, “What occurs daily in the ordinary course of criminal proceedings may take place in regard to persons transported [p. 6] to a distant jurisdiction for trial. It may happen that an innocent man will be accused and if demanded he must be delivered up, should your exposition of the Constitution be sanctioned, under these circumstances his condition would be perilous indeed, dragged from his home, far removed from friends, borne down by the weight of imputed guilt, and unable, probably, to obtain the evidence by which he might vindicate his innocence. If appearances were against him, he could scarcely hope to escape merciless condemnation.”

The American colonists regarded the exercise of this power as an act of revolting tyranny, and assigned it in the Declaration of Independence as one of the prominent causes that impelled them to a separation from the British Empire. A power that may be then oppressively used should be resorted to with the greatest caution. Where its exercise is invoked, it is not sufficient that the case may apparently come within the letter of the Constitution. It is the duty of the Executive before yielding a blind obedience to the letter of the law, to see that the case comes within the spirit and meaning of the Constitution. It may be pleasing as well as instructive to

look into the proceedings of the executive of our sister state, and witness that by faithfully administering the law in relation to the delivery up of fugitives from justice, according to its spirit and meaning, they have saved at least two of the citizens of Illinois from becoming victims to its abuse. In the year 1839, the governor of the state of New York was presented with the copy of an indictment by a grand jury in the city of New York against John and Nathan Aldrich, for fraud in obtaining goods by false pretenses, and was requested to make an requisition upon the governor of Illinois to surrender them up as fugitives from justice. Now here was a case which came exactly within the letter of the law of Congress in [p. 7] relation to fugitives from justice. An indictment had been found charging them with having committed a crime. But did the governor of New York make the “requisition”? No; he referred the application to the Honorable John C. Spencer, now Secretary of War, and one of the most enlightened lawyers of the age.

The following is an extract of Mr. Spencer’s opinion upon the case: “The Constitutional provisions under which requisitions may be made by the governor of our state upon the governor of another was a substitute for the principal recognized, by the law of nations, by which one sovereign is bound to deliver to another fugitives who have committed certain offences. These offenses are of the deepest grade of criminality, and robbers, murderers, and incendiaries, and these enumerated, as proper to be surrendered. Following the analogy this suggested, the provision in our Constitution it would seem should be construed to embrace similar cases only, except perhaps these offenses which arise from an abuse of the same constitutional provision. That provision must be guarded with the utmost care or it will become intolerable.

I do not think the circumstances of the case before me are of such grave import, or the offense itself of such high grade, as to justify the requisition desired. The power given by the Constitution ought not to be cheapened, nor applied to trifling offenses, nor indeed to any that was not originally contemplated.

For the reasons stated in Mr. Spencer’s opinion the governor of New York refused to make the requisition upon the governor of Illinois. The case certainly came within the letter of the law [p. 8] but not within its spirit and meaning. So with the affidavit of Governor Boggs, when he swears that Smith had fled from justice. It may come within the letter of the Constitution, but does it come within its spirit and meaning? Does it show that Smith was in Missouri at the time of the commission of the crime and that he fled from that state to evade being brought to justice for that crime? Or does it refer to the flight of Smith and the Mormons from Missouri some years since?

I will refer to one more case of a similar nature. Lord Campbell, formerly Attorney General in England, in a recent debate in Parliament upon the subject of the Creole made the following remarks: “To show how cautious states should be in making such concessions one to the other reciprocally, he would mention a case that occurred when he was Attorney General. A treaty had been agreed upon between the state of New York and
the province of Canada, by which the government of each agreed reciprocally to deliver up the citizen or subject of the other against whom grand juries had found a bill, and who had sought refuge within the territories of the other. It happened that a slave had escaped from his master at New York and had got to Canada. To facilitate his escape he rode a horse of his master’s for a part of the way, but turned him back on his reaching the frontier. The authorities of New York well knew that England would not give up a runaway slave and that as they could not claim under the treaty, they therefore had a bill of indictment against him before a New York grand jury for stealing the horse, though it was clear the animus furandi3 [p. 9] was wanting. The grand jury, however, found a true bill against him for the felony, and he was claimed under the treaty. The governor under such circumstances refused to give him up until he had consulted the government in England. He (Lord Campbell) was consulted, and gave it as his opinion that the man ought not to be given up, as the true bill where no felony had been committed, did not bring the case within the treaty. The man was not given up, and there the matter rested. This, he repeated, showed the necessity of the greatest caution where reciprocal rights of surrender were granted between states.

It is not to be presumed that the executive of this state would knowingly lend his aid in dragging one of our citizens who is not a fugitive from justice into a foreign state for trial. The governor has undoubtedly been misled by the evasive affidavit that accompanied the requisition. I would advise that Mr. Smith procure respectable and sufficient affidavits to prove beyond all question that he was in this state and not in Missouri at the time the crime with which he is charged was committed, and upon these affidavits apply to the governor to countermand the warrant he has issued for his arrest. If he should refuse so to do, I am clearly of the opinion that upon the above state of facts, the Supreme Court will discharge him upon habeas corpus.

Respectfully your obedient servant,

Justin Butterfield [p. 10]

Appendix B

Citations to *Ex Parte Smith*, 22 F. Cas. 373, 376 (C.C.D. Ill. 1843) (No. 12,968).

The following is a list of federal courts that have cited *Ex parte Smith*:

- *Ex parte Brown*, 28 F. 653 (D.N.Y. 1886)
- *In re Leary*, 10 Ben. 197, 15 F. Cas. 106, F. Cas. No. 8162, 6 Abb. N. Cas. 43 (S.D.N.Y. 1879)
- *Day v. Keim*, 2 F. 2d 966 (4th Cir. W. Va. 1924)
- *Ex parte Hart*, 63 F. 249 (4th Cir. Md. 1894)
- *Ex parte Lane*, 6 F. 34 (D. Mich. 1881)
- *In re Kahley*, 2 Biss. 383, 14 F. Cas. 71, F. Cas. No. 7593 (7th Cir. 1870)
- *Ex parte Dawson*, 83 F. 306 (8th Cir. Ark. 1897)
- *In re Bloch*, 87 F. 981 (D. Ark. 1898)
- *Ex parte Morgan*, 20 F. 298 (D. Ark. 1883)
- *In re Doo Woon*, 9 Sawy. 417, 18 F. 898 (D. Or. 1883)
- *In re Cook*, 49 F. 833 (C.C.D. Wis. 1892)
- *In re Robb*, 9 Sawy. 568, 19 F. 26 (C.C.D. Cal. 1884)
- *Burford v. Klippell*, 4 F. Cas. 725, F. Cas. No. 2151 (C.C.D. Ind. 1878)
- *Buerk v. Imhaeuser*, 4 F. Cas. 597, F. Cas. No. 2108 (C.C.S.D.N.Y. 1876)
- *In re Jackson*, 13 F. Cas. 199, F. Cas. No. 7126 (C.C.D. D.C. 1857)
- *McDermott v. Naylor*, 16 F. Cas. 15, F. Cas. No. 8747, 4 D.C. 527 (1845).

The following is a list of state courts that have cited *Ex parte Smith*:

- *Ex parte Spears*, 88 Cal. 640, 26 P. 608 (1891)
- *Emnist v. Baden*, 158 Fla. 141, 28 So. 2d 160 (1946)
- *State ex rel. Peck v. Chase*, 91 Fla. 413, 107 So. 541 (1926)
- *State ex rel. Arnold v. Justus*, 84 Minn. 237, 87 N.W. 770 (1901)
- *Ex parte Hagan*, 295 Mo. 435, 245 S.W. 336 (1922)
- *Smith v. State*, 21 Neb. 552, 32 N.W. 594 (1887)
- *People ex rel. Cornett v. Warden*, 60 Misc. 525, 112 N.Y. S. 492, 23 N.Y. Cr. 37 (N.Y. Sup. Ct. 1908)
- *Ex parte Hill*, 34 Okla. Crim. 120, 245 P. 663 (1926)
- *Stump v. Roberts*, 23 F. Cas. 300, 3 Tenn. 350, 1 Cooke 350 (1853)
- *Ex parte Chittenden*, 124 Tex. Crim. 228, 61 S.W.2d 1008 (Tex. Crim. App. 1933)
McClendon v. Callahan, 46 Wn. 2d 733, 284 P.2d 323 (1955)
Armstrong v. Van De Vanter, 21 Wash. 682, 59 P. 510 (1899)
In re Eldred, 46 Wis. 530, 1 N.W. 175 (Wis. 1879)
Appendix C
Habeas Corpus Acts

Comparing Illinois’ Habeas Corpus Act of 1827 and Nauvoo’s Habeas Corpus Act enacted on November 12, 1842. Differences are marked with bolded italics. See pages 72–73 for comments.

Illinois’ Habeas Corpus Act of 1827 (“Illinois 1827 Act”)

SEC. 1. Be it enacted by the people of the State of Illinois, represented in the General Assembly, That if any person shall be, or stand committed, or detained for any criminal or supposed criminal matter, it shall and may be lawful for him to apply to the supreme or circuit courts in the term time, or any judge thereof, in vacation, for a writ of habeas corpus, which application shall be in writing, and signed by the prisoner, or some person on his or her behalf, setting forth the facts concerning his imprisonment, and in whose custody he is detained; and shall be accompanied by a copy of the warrant or warrants of commitment, or an affidavit that the said copy had been demanded of the person in whose custody the prisoner is detained, and by him refused or neglected to be given; the said court or judge, to whom the said application shall be made, shall forthwith award the said writ of habeas corpus, unless it shall appear from the petition itself, or from the documents annexed that the party can neither be discharged nor admitted to bail, nor in any other manner relieved. Which said writ, if issued by the court, shall be under the seal of the court; if by a judge, under the hand of the judge; and shall be directed to the person in whose custody the prisoner is detained, and made returnable forthwith; to

Nauvoo’s Habeas Corpus Act enacted on November 12, 1842 (“November 1842 City Ordinance”)

SEC. 1. Be it ordained by the city council of the city of Nauvoo, that if any person or persons shall be or stand committed or detained for any criminal or supposed criminal matter, it shall and may be lawful for him, her, or them to apply to the municipal court, when in session, or to the clerk thereof in vacation, for a writ of habeas corpus; which application shall be in writing and signed by the prisoner, or some person on his, her, or their behalf, setting forth the facts concerning his, her, or their imprisonment, and in whose custody he, she, or they are detained, and shall be accompanied by a copy of the warrant, or warrants of commitments, or an affidavit that the said copy had been demanded of the person or persons in whose custody the prisoner or prisoners are detained, and by him or them refused or neglected to be given. The said court or clerk to whom the application shall be made, shall forthwith award the said writ of habeas corpus, unless it shall appear from the petition itself, or from the documents annexed, that the party can neither be discharged nor admitted to bail, nor in any other manner relieved. Which said writ shall be issued under the hand of the clerk, and the seal of the court; which seal may be a written one, until another shall be obtained, and shall be in the following words, to wit: “Seal of the Municipal Court of the city
the intent that no officer, sheriff, jailer, keeper, or other person, to whom such writ shall be directed, may pretend ignorance thereof, every such writ shall be endorsed with these words, “by the habeas corpus act;” and whenever the said writ shall by any person be served upon the sheriff, jailer, keeper, or other person whatsoever, to whom the same shall be directed, or being brought to him, or being left with any of his under officers or deputies at the jail, or place where the prisoner is detained, he or some of his under officers or deputies shall upon payment or tender of the charges of bringing the said prisoner, to be ascertained by the court or judge awarding the said writ, and endorsed thereon; not exceeding ten cents per mile; and upon sufficient security given to pay the charges of carrying him back, if he shall be remanded, make return of such writ, and bring, or cause to be brought, the body of the prisoner before the court or judge who granted the said writ; or in case of the adjournment of the said court, or absence of the judge, then before any other of the judges aforesaid, and certify the true cause of his imprisonment within three days thereafter, unless the commitment of such person be in a place beyond the distance of twenty miles from the place where the writ is returnable: if beyond the distance of twenty miles, and not above one hundred miles, then within ten days; and if beyond the distance of one hundred miles, then within twenty days after the delivery of the writ as aforesaid, and not longer.

of Nauvoo,” and said writ shall be in substance as follows, to wit;

State of Illinois
City of Nauvoo

The People of the State of Illinois, to the Marshal of said City, Greeting:

Whereas application has been made before the municipal court of said city that the body (or bodies) of A B, &c., is or are in the custody of C D, &c., of &c., these are therefore to command, the said C D, &., of &c., to safely have the body (or bodies) of said A B, &c., in his custody, detained, as it is said, together with the day and cause of his (her or their) caption and detention by whatsoever name the said A B, &c., may be known or called, before the municipal court of said city, forthwith to abide such order as the said court shall make in his behalf; and further, if the said C D, &c., or other person or persons having said A B, &c., in custody shall refuse, or neglect to comply with the provisions of this writ, you, the marshal of said city, or other person authorized to serve the same, are hereby required to arrest the person or persons so refusing or neglecting to comply as aforesaid, and bring him or them, together with the person or persons in his or their custody, forthwith before the municipal court aforesaid, to be dealt with according to law; and herein fail not, and bring this writ with you.

Witness, J. S., clerk of the municipal court at Nauvoo, this day of in the year of our Lord one thousand eight hundred and

J. S., Clerk.

And be directed to the city marshal, and shall be served by delivering a
copy thereof to the person or persons in whose custody the prisoner or prisoners are detained, and said writ shall be made returnable forthwith, and the form and substance thereof, as herein set forth, and be taken and considered as part and parcel of this ordinance. To the intent that no officer, sheriff, jailer, keeper, or other person, or persons, upon whom such writ shall be served, may pretend ignorance thereof, every such writ and copy thereof served shall be endorsed with these words, “By the Habeas Corpus Act;” and whenever the said writ shall be served upon the sheriff, jailor, keeper, or other person or persons whomsoever, holding said prisoner or prisoners, or being brought to him or them, or being served upon any of his or their under-officers or deputies at the jail, or place where the prisoner or prisoners are detained, he or they, or some of his or their under-officers or deputies shall, upon payment or tender of the charges of bringing the said prisoner or prisoners, to be ascertained by the court awarding the said writ, and endorsed thereon, not exceeding ten cents per mile; and upon sufficient security given to pay the charges of carrying him, her, or them back, if he, she, or they shall be remanded, make return of such writ, and bring or cause to be brought, the body or bodies of the prisoner or prisoners before the municipal court forthwith, and certify the true cause of his, her, or their imprisonment, unless the commitment of such person or persons shall be to the county jail in Hancock County, in which case the time shall be prolonged till five days after the delivery of the writ as aforesaid, and not longer.

Provided, nevertheless, that in case any person or persons may at any
SEC. 2. Where any person not being committed or detained for any criminal, or supposed criminal matter, shall be confined, or restrained of his or her liberty, under any color or pretense whatever, he or she may apply for a writ of habeas corpus, as aforesaid, which application shall be in writing, signed by the party, or some person on his or her behalf, setting forth the facts concerning his or her imprisonment, and wherein the illegality of such imprisonment consists, and in whose custody he or she is detained; which application or petition shall be verified by the oath or affirmation of the party applying, or some other person on his or her behalf, if the confinement or restraint is by virtue of any judicial writ or process, or order, a copy thereof shall be annexed thereto, or an affidavit made that the same had been demanded and refused: the same proceedings shall thereupon be had in all respects, as are directed in the preceding section.

time hereafter be taken and lodged in the city or county jail, under any writ or process, as provided by the city charter of the city of Nauvoo and shall require a writ of habeas corpus to issue to bring him, her, or them before the municipal court of said city, said writ shall issue to bring him, her, or them before said court, and be directed to the city marshal to be served upon the person or persons in whose custody such prisoner or prisoners may then be detained.

SEC. 2. Where any person or persons not being committed or detained for any criminal or supposed criminal matter shall be confined or restrained of his, her, or their liberty, under any color or pretense whatever, he, she, or they may apply for a writ of habeas corpus, as aforesaid, which application shall be in writing, signed by the party, or some person on his, her, or their behalf, setting forth the facts concerning his, her, or their imprisonment, and wherein the illegality of such imprisonment consists, and in whose custody he, she or they are detained; which application or petition shall be verified by the oath or affirmation of the party applying, or some other person on his, her, or their behalf. If the confinement or restraint is by virtue of any judicial writ or process, or order, a copy thereof shall be annexed thereto, or an affidavit made that the same had been demanded and refused: the same proceedings shall thereupon be had in all respects, as are directed in the preceding section, and any officer, person, or persons, knowing that he or they have an illegal writ, or not having any writ, who shall attempt through any false pretext to take or intimidate any of the inhabitants of this city, through such pretext, shall forfeit for every such offense a sum not exceeding one thousand dollars, or
SEC. 3. Upon the return of the writ of habeas corpus, a day shall be set for the hearing of the cause of imprisonment or detainer, not exceeding five days thereafter, unless the prisoner shall request a longer time. The said prisoner may deny any of the material facts set forth in the return, or may allege any fact to shew, either that the imprisonment or detention is unlawful, or that he is then entitled to his discharge; which allegations or denials shall be made on oath. The said return may be amended by leave of the court or judge, before or after the same is filed, as also may all suggestions made against it, that thereby material facts may be ascertained. The said court or judge shall proceed in summary way to settle the said facts, by hearing the testimony and arguments, as well of all parties interested civilly, if any there be, as of the prisoner, and the person who holds him in custody, and shall dispose of the prisoner as the case may require. If it appear that the prisoner is in custody by virtue of process from any court, legally constituted, he can be discharged only for some of the following causes: first, where the court has exceeded the limits of its jurisdiction, either as to the matter, place, sum, or person; second, where, though the original imprisonment was lawful, yet by some act, omission, or event, which has subsequently taken place, the party has become entitled to his discharge; third, where the process is defective in some substantial form required by law; fourth, where the process, though in proper form, has been issued in a case, or under circumstance where the law does not allow process, or orders for

in case of failure to pay such forfeiture, to be imprisoned not more than twelve months nor less than six months.

SEC. 3. Upon the return of the writ of habeas corpus, a day shall be set for the hearing of the cause of imprisonment or detainer, not exceeding five days thereafter, unless the prisoner or prisoners shall request a longer time. The said prisoner or prisoners may deny any of the material facts set forth in the return, or may allege any fact to show either that the imprisonment or detention is unlawful, or that he, she, or they, is or are then entitled to his, her, or their discharge, which allegations or denials shall be made on oath. The said return may be amended, by leave of the court, before or after the same is filed, as also may all suggestions made against it, that thereby material facts may be ascertained. The said court shall proceed in a summary way to settle the said facts, by hearing the testimony and arguments, as well of all parties interested civilly, if any there be, as of the prisoner or prisoners and the person or persons who holds him, her, or them in custody, and shall dispose of the prisoner or prisoners as the case may require. If it appear that the prisoner or prisoners are in custody by virtue of process from any court, legally constituted, he, she, or they can be discharged for the following causes: First, where the court has exceeded the limits of its jurisdiction, either as to the matter, place, sum, person, or persons; second, where, though the original imprisonment was lawful, yet by some act, omission, or event which has subsequently taken place, the party has become entitled to his, her, or their discharge; third, where the process is defective in some substantial form required by
imprisonment or arrest to issue; fifth, where, although in proper form, the process has been issued or executed by a person either unauthorized to issue or execute the same, or where the person having the custody of the prisoner under such process is not the person empowered by law to detain him; sixth, where the process appears to have been obtained by false pretense or bribery; seventh, where there is no general law, nor any judgment, order, or decree of a court, to authorize the process, if in a civil suit, nor any conviction, if in a criminal proceeding. No court or judge, on the return of a habeas corpus, shall, in any other matter, inquire into the legality or justice of a judgment, or decree of a court legally constituted. In all cases where the imprisonment is for a criminal, or supposed criminal matter, if it shall appear to the said court or judge, that there is sufficient legal cause for the commitment of the prisoner, although such commitment may have been informally made, or without due authority, or the process may have been executed by a person not duly authorized, the court or judge shall make a new commitment, in proper form, and directed to the proper officer, or admit the party to bail, if the case be bailable.

SEC. 4. When any person shall be admitted to bail, on habeas corpus, he shall enter into recognizance with one or more securities, in such sum as the court or judge shall direct, having regard to the circumstances of the prisoner, and the nature of the offence, conditioned for his or her appearance at the next circuit court, to be holden in and for the county where the offence was committed, or where the same is law; fourth, where the process though in proper form has been issued in a case, or under circumstances where the law does not allow process, or orders for imprisonment or arrest, to issue; fifth, where although in proper form the process has been issued or executed by a person or persons, either unauthorized to issue or execute the same, or where the person or persons having the custody of the prisoner or prisoners under such process is not the person or persons empowered by law to detain him, her, or them; sixth, where the process appears to have been obtained by false pretense or bribery; seventh, where there is no general law, nor any judgment, order, or decree of a court, to authorize the process, if in a civil suit, nor any conviction, if in a criminal proceeding. In all cases where the imprisonment is for a criminal or supposed criminal matter, if it shall appear to the said court that there is sufficient legal cause for the commitment of the prisoner or prisoners, although such commitment may have been informally made, or without due authority, or the process may have been executed by a person or persons not duly authorized, the court shall make a new commitment, in proper form, and directed to the proper officer or officers, or admit the party to bail, if the case be bailable.

SEC. 4. When any person or persons shall be admitted to bail on habeas corpus, he, she, or they shall enter into recognizance with one or more securities, in such sum as the court or judge shall direct, having regard to the circumstances of the prisoner or prisoners, and the nature of the offense, conditioned for his or her appearance at the next circuit court to be holden in and for the county where the offense was committed, or where the same is
to be tried: where any court or judge shall admit to bail, or remand any prisoner brought before him or them, on any writ of habeas corpus, it shall be the duty of the said court or judge to bind all such persons as do declare any thing material to prove the offence with which the prisoner is charged, by recognizance, to appear at the proper court having cognizance of the offence, on the first day of the next term thereof, to give evidence touching the said offence, and not to depart the said court without leave; which recognizance, so taken, together with the recognizance entered into by the prisoner when he is admitted to bail, shall be certified and returned to the proper court on the first day of the next succeeding term thereof. If any such witnesses shall neglect or refuse to enter into a recognizance as aforesaid, when thereunto required, it shall be lawful for the court or judge to commit him to jail until he shall enter into such recognizance, or be otherwise discharged by due course of law; if any judge shall neglect or refuse to bind any such witness or prisoner, by recognizance as aforesaid, or to return any such recognizance, when taken as aforesaid, he shall be deemed guilty of a misdemeanor in office, and be proceeded against accordingly.

SEC. 5. Where any prisoner, brought up on a habeas corpus, shall be remanded to prison, it shall be the duty of the court or judge remanding him, to make out and deliver to the sheriff, or other person, to whose custody he shall be remanded, an order in writing, stating the cause or causes of remanding him. If such prisoner shall obtain a second writ of habeas corpus, it shall committed, or where the same is to be tried. Where the court shall admit to bail, or remand any prisoner or prisoners brought before the court, on any writ of habeas corpus, it shall be the duty of said court to bind all such persons as do declare any thing material to prove the offense, with which the prisoner or prisoners are charged by recognizance to appear at the proper court having cognizance of the offense, on the first day of the next term thereof, to give evidence touching the said offense, and not to depart the said court without leave; which recognizance so taken, together with the recognizance entered into by the prisoner or prisoners, when he, she, or they are admitted to bail, shall be certified and returned to the proper court, on the first day of the next succeeding term thereof. If any such witness or witnesses shall neglect or refuse to enter into a recognizance as aforesaid, when thereunto required, it shall be lawful for the court to commit him, her, or them to jail until he, she, or they shall enter into such recognizance, or be otherwise discharged by due course of law. If the court shall neglect or refuse to bind any such witness or witnesses, prisoner or prisoners, by recognizance as aforesaid, or to return any such recognizance, when taken as aforesaid, the court shall be deemed guilty of a misdemeanor in office, and be proceeded against accordingly.

SEC. 5. Where any prisoner or prisoners brought up on a habeas corpus shall be remanded to prison, it shall be the duty of the municipal court remanding him, her, or them to make out and deliver to the sheriff, or other person or persons to whose custody he, she, or they shall be remanded, an order in writing, stating the cause or causes of remanding him, her, or them.
be the duty of such sheriff or other person to whom the same shall be directed, to return therewith the order aforesaid: and if it shall appear that the said prisoner was remanded for an offence adjudged not bailable, it shall be taken and received as conclusive, and the prisoner shall be remanded without further proceedings.

SEC. 6. It shall not be lawful for any court or judge, on a second writ of habeas corpus, obtained by such prisoner, to discharge the said prisoner, if he is clearly and specifically charged in the warrant of commitment with a criminal offence; but the said court or judge shall, on the return of such second writ, have power only to admit such prisoner to bail, where the offence is bailable by law, or remand him to prison where the offence is not bailable; or being bailable, where such prisoner shall fail to give the bail required.

SEC. 7. No person who has been discharged by order of a court or judge, on a habeas corpus, shall be again imprisoned, restrained, or kept in custody, for the same cause, unless he be afterwards indicted for the same offence, or unless by the legal order or process of the court wherein he is bound by recognizance to appear. The following shall not be deemed to be the same cause: first, if after a discharge for a defect of proof, or any material defect in the commitment in a criminal case, the prisoner should be again arrested on sufficient proof, and committed by legal process for the same offence; second, if in a civil suit the party has
been discharged for any illegality in the judgment or process, and is afterwards imprisoned by legal process for the same cause of action; third, generally, whenever the discharge has been ordered on account of the non-observance of any of the forms required by law, the party may be a second time imprisoned, if the cause be legal, and the forms required by law observed.

SEC. 8. No person shall be discharged under the provisions of this act who is in custody under a commitment, for any offence exclusively cognizable by the courts of the United States, or by order, execution, or process issuing out of such courts, in cases where they have jurisdiction, or who is held by virtue of any legal engagement or enlistment in the army, or who being subject to the rules and articles of war, is confined by any one legally acting under the authority thereof, or who is held as prisoner of war under the authority of the United States, or who is in custody for any treason, felony, or other high misdemeanor, committed in any other state or territory of the United States, and who by the constitution and laws of the United States, ought to be delivered up to the executive power of such state or territory; nor shall any negro or mulatto, held as a slave within this state, try his right to freedom, or be discharged from slavery under the provision of this act, but for that purpose shall be put to his suit for freedom.

SEC. 9. If any person shall be committed for a criminal, or supposed criminal matter, and not admitted to bail, and shall not be tried on or before the second term of the court having jurisdiction of the offence, the process, for the same offense; second, if in a civil suit the party or parties have been discharged for any illegality in the judgment or process, and are afterwards imprisoned by legal process, for the same cause of action; third, generally whenever the discharge has been ordered on account of the non-observance of any of the forms required by law, the party or parties may be a second time imprisoned, if the cause be legal and the forms required by law observed.

[None]
prisoner shall be set at liberty by the court, unless the delay shall happen on the application of the prisoner. If such court, at the second term, shall be satisfied that due exertions have been made to procure the evidence for, and on behalf of the people, and that there are reasonable grounds to believe that such evidence may be procured at the third term, they shall have power to continue such case till the third term. If any such prisoner shall have been admitted to bail for a crime other than a capital offence, the court may continue the trial of said cause to a third term, if it shall appear by oath or affirmation that the witnesses for the people of the state are absent, such witnesses being mentioned by name, and the court shewn wherein their testimony is material.

SEC. 10. To prevent any person from avoiding or delaying his trial, it shall not be lawful to remove any prisoner on habeas corpus under this act, out of the county in which he or she is confined, within fifteen days next preceding the term of the court at which such person ought to be tried, except it be to convey him or her into the county where the offence with which he or she stands charged is properly cognizable.

Sec. 11. Any person being committed to any prison, or in the custody of any officer, sheriff, jailer, keeper, or other person, or his under officer or deputy, for any criminal, or supposed criminal matter, shall not be removed from the said prison or custody into any other prison or custody, unless it be by habeas corpus, or some other legal writ, or where the prisoner shall be delivered to the constable, or other inferior officer, to be carried to some common jail, or shall be removed from one place to another, within the county, in order to his discharge or court may adjourn from time to time at its discretion, provided they decide upon the case within thirty days, if it shall appear by oath or affirmation that the witness or witnesses for the people of the state are absent, such witness or witnesses being mentioned by name, and the court shewn wherein their testimony is material.

SEC. 9. Any person or persons being committed to the city or county jail, as provided in the Charter in the City of Nauvoo, or in the custody of any officer, sheriff, jailer, keeper, or other person or persons, or his or their under-officer or deputy, for any criminal or supposed criminal matter, shall not be removed from said prison or custody into any prison or custody, unless it be by habeas corpus, or by an order of the municipal court, or in case of sudden fire, infection, or other necessities; if any person or persons shall, after such commitment as aforesaid, make out,
trial in due course of law, or in case of sudden fire, infection, or other necessity, or where the sheriff shall commit such prisoner to the jail of an adjoining county, for the want of a sufficient jail in his own county, as is provided in the act concerning jails and jailers, or where the prisoner, in pursuance of a law of the United States, may be claimed or demanded by the executive of any of the United States or territories. If any person or persons shall, after such commitment as aforesaid, make out, sign, or countersign, any warrant or warrants for such removal, except as before excepted, then he or they shall forfeit to the prisoner or party aggrieved a sum not exceeding three hundred dollars, to be recovered by the prisoner or party aggrieved, in the manner hereinafter mentioned.

SEC. 12. Any judge empowered by this act to issue writs of habeas corpus, who shall corruptly refuse to issue such writ, when legally applied to, in a case where such writ may lawfully issue, or who shall, for the purposes of oppression, unreasonably delay the issuing of such writ, shall, for every such offence, forfeit to the prisoner or party aggrieved, a sum not exceeding five hundred dollars.

SEC. 13. If any officer, sheriff, jailer, keeper, or other person, to whom any such writ shall be directed, shall neglect or refuse to make the returns as aforesaid, or to bring the body of the prisoner according to the command of the said writ, within the time required by this act, all, and every such officer, sheriff, jailer, keeper, or other person, shall be guilty of a contempt of the court or judge who issued said writ, or countersign any warrant or warrants for such removal, then he or they shall forfeit to the prisoner or prisoners aggrieved a sum not exceeding five hundred dollars, to be recovered by the prisoner or prisoners aggrieved, in the manner hereinafter mentioned.

SEC. 10. If any member of the municipal court, or the clerk of said court shall corruptly refuse or neglect to issue writ or writs of habeas corpus when legally applied to in a case where such writ or writs may lawfully issue, or who shall for the purpose of oppression unreasonably delay the issuing of such writ or writs, shall for every such offense forfeit to the prisoner or prisoners, party or parties aggrieved, a sum not less than five hundred dollars and not exceeding one thousand dollars, and be imprisoned for six months.

SEC. 11. If any officer, sheriff, jailer, keeper, or other person or persons upon whom any such writ shall be served, shall neglect or refuse to make the returns as aforesaid, or to bring the body of the prisoner or prisoners according to the command of the said writ within the time required by this ordinance, all and every such officer, sheriff, jailer, keeper, or other person or persons shall be guilty of a contempt of the municipal court.
writ; whereupon, the said court or judge may, and shall issue an attachment against such officer, sheriff, jailer, keeper, or other person, and cause him or them to be committed to the jail of the county, there to remain without bail or mainprize, until he or they shall obey the said writ; such officer, sheriff, jailer, keeper, or other person, shall also forfeit to the prisoner or party aggrieved, a sum not exceeding five hundred dollars, and shall be incapable of holding or executing his said office.

SEC. 14. Any one having a person in his custody, or under his restraint, power or control, for whose relief a writ of habeas corpus is issued, who, with intent to avoid the effect of such writ, shall transfer such person to the custody, or place him or her under the control of another, or shall conceal him or her, or change the place of his or her confinement, with intent to avoid the operation of such writ, or with intent to remove him or her out of the state, shall forfeit for every such offence one thousand dollars, and may be imprisoned not less than one year, nor more than five years. In any prosecution for the penalty incurred under this section, it shall not be necessary to show that the writ of habeas corpus had issued at the time of the removal, transfer, or concealment therein mentioned, if it be proven that the acts therein forbidden were done with the intent to avoid the operation of such writ.

SEC. 15. Any sheriff, or his deputy, any jailer, or coroner, having custody of any prisoner, committed on any civil or criminal process, of any court who issued said writ: whereupon the said court may and shall issue an attachment against said officer, sheriff, jailer, keeper, or other person or persons, and cause him or them to be committed to the city or county jail as provided for by the City Charter of the City of Nauvoo, there to remain without bail or mainprize, until he or they shall obey the said writ; such officer, sheriff, jailer, keeper, or other person or persons shall also forfeit to the prisoner or prisoners, party or parties aggrieved, a sum not exceeding one thousand dollars, and not less than five hundred dollars.

SEC. 12. Any person or persons having a prisoner or prisoners in his or their custody, or under his or their restraint, power, or control, for whose relief a writ or writs of habeas corpus is issued, who, with intent to avoid the effect of such writ or writs, shall transfer such person or persons to the custody of, or place him, her, or them under the control of any other person or persons, or shall conceal him, her, or them, or change the place of his, her, or their confinement, with intent to avoid the operation of such writ or writs, or with intent to remove him, her, or them out of the state, shall forfeit for every such offence one thousand dollars, and may be imprisoned not less than one year, nor more than five years. In any prosecution for the penalty incurred under this section, it shall not be necessary to show that the writ or writs of habeas corpus had issued at the time of the removal, transfer, or concealment therein mentioned, if it be proven that the acts therein forbidden were done with the intent to avoid the operation of such writ or writs.

SEC. 13. Any sheriff, or his deputy, any jailer or coroner having custody of any prisoner or prisoners committed on any civil or criminal process,
or magistrate, who shall neglect to give such prisoner a copy of the process, order, or commitment, by virtue of which he is imprisoned, within six hours after demand made by said prisoner, or any one on his behalf, shall forfeit five hundred dollars.

SEC. 16. Any person who, knowing that another has been discharged by order of a competent judge or tribunal, on a habeas corpus, shall, contrary to the provisions of this act, arrest or detain him against the same cause, which was shown on the return of such writ, shall forfeit five hundred dollars for the first offence, and one thousand dollars for every subsequent offence.

SEC. 17. All the pecuniary forfeitures incurred under this act, shall inure to the use of the party for whose benefit the writ of habeas corpus issued, and shall be sued for and recovered, with costs, by the attorney general, or circuit attorney, in the name of the state, by information; and the amount, when recovered, shall, without any deduction, be paid to the party entitled thereto.

SEC. 18. In any action or suit for any offense against the provisions of this ordinance, the defendant or defendants may plead the general issue, and give the special matter in evidence.

SEC. 19. The recovery of the said penalties shall be no bar to a civil suit for damages.

SEC. 20. The supreme and circuit courts within this state, or the judges thereof, in vacation, shall have power of any court or magistrate, who shall neglect to give such prisoner or prisoners a copy of the process, order, or commitment, by virtue of which he, she, or they are imprisoned, within six hours after demand made by said prisoner or prisoners, or any one on his, her, or their behalf, shall forfeit five hundred dollars.

SEC. 14. Any person who knowing that another has been discharged, by order of the municipal court, on a habeas corpus, shall, contrary to the provisions of this ordinance, arrest or detain him or her again for the same cause which was shown on return of such writ, shall forfeit one thousand dollars for the first offense, and two thousand dollars for every subsequent one.

SEC. 15. All the pecuniary forfeitures incurred under this ordinance shall be and inure to the use of the party for whose benefit the writ of habeas corpus was issued, and shall be sued for and recovered with costs by the city attorney, in the name of the city by information, and the amount when recovered shall, without any deduction, be paid to the parties entitled thereto.

SEC. 16. In any action or suit for any offense against the provisions of this ordinance, the defendant or defendants may plead the general issue, and give the special matter in evidence.

SEC. 17. The recovery of said penalties shall be no bar to a civil suit for damages.

SEC. 18. The municipal court upon issuing a writ of habeas corpus may appoint any suitable person to serve the same, other than the marshal, and shall endorse the appointment on the back of said writ.

SEC. 19. This ordinance to take effect and be in force from and after its passage, any act heretofore to
to issue writs of habeas corpus, for the purpose of bringing the body of any person confined in any jail within the same before them, to testify, or be surrendered, in discharge of bail. When a writ of habeas corpus shall be issued for the purpose of bringing into court any person to testify, or the principal to be surrendered in discharge of bail, and such principal or witness shall be confined in any jail in this state, out of the county, in which such principal or witness is required to be surrendered or to testify, the writ may run into any county in this state, and there be executed and returned by any officer to whom it shall be directed; and the principal, after being surrendered, or his bail discharged, or a person testifying as aforesaid, shall, by the officer executing such writ, be returned to the jail from whence he was taken, by virtue of an order of the court, for the purposes aforesaid; an attested copy of which, lodged with the jailer, shall exonerate such jailer from being liable for an escape. The party praying out such writ of habeas corpus shall pay to the officer executing the same, such reasonable sum for his services as shall be adjudged by the courts respectively. This act to take effect on the first day of June.


Source: Rough Draft Notes of History of the Church, 1842b-015, Church History Library. Capitalization and some punctuation have been modernized.