HABEAS CORPUS: EMPOWERMENT OF THE SUPREME COURT AND
NATIONAL SECURITY IMPLICATIONS

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DEDICATION

This thesis is dedicated to President George Walker Bush, who did what was necessary to defend the United States and Her people in a post-9/11 world. It is also dedicated to those brave men and women who risked all, and sometimes gave all, to keep Americans safe.
I prefer to stay alive and be criticized than be sympathized.

Golda Meir
ABSTRACT OF THE THESIS

Habeas Corpus: Empowerment of the Supreme Court and National Security Implications

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Master of Science in Homeland Security

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The post-9/11 Supreme Court has given alien detainees at Guantanamo the right to file petitions of habeas corpus. This is the result of progressive judging. Progressivism places “idealism” above “realism” and seeks to “reaffirm our nation’s constructive engagement in the United Nations and other multilateral organizations” (Naylor, 2005). This reaffirmation has translated into Supreme Court rulings that ignore or manipulate the Constitution, statutes, and the Court’s own precedents. Through research conducted into the history of the writ of habeas corpus, its use in the United States, the expanding jurisdiction of the Supreme Court, past Supreme Court rulings on the writ and its application to aliens, and current rulings on these same issues, this thesis demonstrates that the writ was never intended to be enjoyed by aliens detained by the U.S. outside its sovereign territory. This thesis will then reveal some of the implications of this Supreme Court expansion, to include how it limits executive and legislative abilities to institute national security policies and procedures.
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CHAPTER 1

HABEAS CORPUS: EMPOWERMENT OF THE SUPREME COURT AND NATIONAL SECURITY IMPLICATIONS

INTRODUCTION

The Supreme Court has the constitutional authority to make policy decisions. Supreme Court justices should use their personal ideologies when making rulings. The Supreme Court should use international laws and opinions in its rulings. These international laws and opinions should be ample justification for finding a law or policy unconstitutional even when it is not unconstitutional according to the Constitution. Do any of these statements sound reasonable? They should not because each of the above mentioned statements are incorrect. This has not stopped progressive justices on the post-9/11 Supreme Court from ruling in ways that suggest the opposite.

PURPOSE

Much debate has surrounded the Supreme Court’s expanded jurisdiction over aliens detained at the Guantanamo detention facility and the provision of the ability to file writs of habeas corpus to those detained there. However, these debates have mainly been relegated to the political arena. This is a disservice. Rather than questioning what a writ of habeas corpus is, where it came from, and how and to whom it has previously been applied, much of society bases their position on the issue on that taken by the political group they are most closely aligned with. This has resulted in a public that is largely uniformed on the issue of habeas corpus and aliens. The purpose of this paper is to provide such persons with insight into habeas corpus, the expansion of the Supreme Court, and national security implications of such expansion.
SITUATIONAL AWARENESS

The post-9/11 Supreme Court has become more empowered, whether through legislation or the Court’s own rulings, than the Founding Fathers had intended when they drafted and ratified the United States Constitution. Some may wonder why this has any relevancy to the field of homeland security. While it may not be blatantly obvious, an empowered Supreme Court has several implications on our country’s national security. First, it allows the judiciary to severely limit what policies the legislature and executive branches can implement to secure the nation. Second, this empowerment has translated into the inclusion of international laws and opinions in Supreme Court decisions. This threatens U.S. sovereignty by beholding the U.S. to the international community rather than its own Constitution. Third, the Supreme Court has guaranteed its continued participation in matters of national security by blatantly ignoring precedent and legislation that disavow it of any involvement. In addition, the Supreme Court’s involvement is a usurpation of legislative and executive authority. This thesis will provide evidence in defense of each of these assertions.

LITERATURE REVIEW AND METHODOLOGY

There is an abundance of literature surrounding the Bush administration’s post-9/11 use of Guantanamo Bay, Cuba to detain aliens captured abroad by the U.S. for terrorist activities. There is also plenty of literature surrounding the administration’s ardent belief that the U.S. was not bound by the Constitution, statutes, or international laws to give said aliens the ability to file writs of habeas corpus in U.S. courts to question their detainment. However, this literature does not delve into why the administration believed that such actions were constitutionally, statutorily, and internationally acceptable. The reason for this lack of insight is largely due to the political nature of the issue. Thus, what literature is available tends to approach the administration’s actions from a progressive standpoint.

The politicization of this issue meant it was absolutely necessary to rely on historical and recent Supreme Court rulings and legislation to fully understand the issue. This is what this thesis attempts to do. In researching habeas corpus and aliens, much time was spent exploring relevant Supreme Court rulings and their corresponding opinions. When the Supreme Court rules on a case, at least one Supreme Court justice will author an opinion justifying the decision. The other justices on the case will either concur with or dissent from
this opinion, in part or its entirety, and will many times author their own opinions justifying why. It is these opinions that were studied to gain insight into how the Supreme Court could justify its reversal of who and where the writ of habeas corpus was applicable.

The opinions themselves could not be taken as absolute truth. This is demonstrated in the lack of unanimity in the Supreme Court decisions. It is for this reason that it was these opinions served as a starting point rather than primary sources. Those justices that author the opinions rely on sources that support their rulings. It was these sources that I further researched to determine their true worth as justifications for the Supreme Court rulings. Throughout this thesis it will become obvious that many of the sources relied upon were misused. This misuse is present in several post-9/11 Supreme Court rulings.

**Terminology**

Post-9/11: the time following the terrorist attacks of September 11, 2001.
CHAPTER 2

BACKGROUND OF HABEAS CORPUS

This paper is premised on the theory that the writ of habeas corpus has historically been enjoyed by a privileged few. It is therefore important gain an understanding as to what exactly the writ is, how and why it came about, and whom it was intended to be applied to. This is what the following chapter will accomplish.

THE HABEAS CORPUS ACT OF 1679

Habeas corpus, Latin for “you have the body” (Naylor, 2005), is a writ, or legal action, in which a detained person can question the lawfulness of their confinement (See Appendix). The notion of habeas corpus predates and is included in the Magna Carta. Despite this longstanding history, it is the Habeas Corpus Act of 1679 that is credited as the most important habeas legislation. Its importance stems from it being the first codification of habeas corpus and the basis for all subsequent United Kingdom habeas legislation (Raithby, 1819).

Passed by English Parliament in response to an abusive government, the act sought to address the frequent detention of the “King’s subjects” for indefinite periods of time and often for arbitrary reasons. So much is stated in the beginning of the Act.

WHEREAS great delays have been used by sheriffs, gaolers and other officers, to whose custody, any of the King’s subjects have been committed for criminal or supposed criminal matters, in making returns of writs of habeas corpus to them directed, by standing out an alias and pluries habeas corpus, and sometimes more, and by other shifts to avoid their yielding obedience to such writs, contrary to their duty and the known laws of the land, whereby many of the King's subjects have been, and hereafter may be long detained in prison, in such cases where by law they are bailable, to their great charges and vexation. (Raithby, 1819)

Through methods such as the institution of timeframes in which a writ was to be addressed to providing repercussions for ignoring these timeframes, the English Parliament sought to limit indefinite and unwarranted detentions (Raithby, 1819).
APPLICATION

The Habeas Corpus Act of 1679 was not intended to be all-encompassing. This is evidenced with the language used in the legislation. The first line of the act states that it was, “An Act for the better secureing the Liberty of the Subject…” (Italics added) (Raithby, 1819). This demonstrates that the right to petition for a writ was intended to apply to those under the King’s jurisdiction. Similar language is used throughout the act, with such phrases as “any person or persons, subjects of this realm” and words like “inhabitant” and “resiant” (Raithby, 1819), this legislation is clear in who it intended to receive habeas privileges.

This intention was nothing new in terms of who could claim habeas privileges, as is evidenced in the Magna Carta. Prior to outlining the various liberties included in this document, the Magna Carta states that, “We have granted to all free men of our realm, for us and our heirs for ever, all the liberties written out below…” (Italics added) (“Magna,” 2007). Like the Habeas Corpus Act of 1679, the language used in the Magna Carta illustrates that habeas privileges were to be applied to those under the sovereign’s rule, “the Subject” and those “of our realm” (“Magna,” 2007). This is important because there is no evidence to suggest that when drafting the Constitution the Founding Fathers intended for any different applicability.

UNITED STATES CONSTITUTION

The Habeas Corpus Act of 1679 was not only the foundation for subsequent habeas legislation in the United Kingdom but it was also the source relied upon by the American Founding Fathers when habeas privileges were included in the United States (U.S.) Constitution (Hamilton, 188; Hazeltine, 1917). Adopted in 1787, the U.S. Constitution states that, “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” (U.S. Constitution). As this is the only mention of habeas corpus, there can be no doubt that the Founding Fathers intended for it to have the same application as that in the Habeas Corpus Act of 1679.

This is supported by H.D. Hazeltine in his essay The Influence of Magna Carta on American Constitutional Development, in which he states that,

…like Magna Carta itself, the great constitutional documents of the seventeenth century, such as the Petition of Right, the Habeas Corpus Act, and the Bill of Rights, have a colonial as well as a purely English history. To these statutes, as to
Magna Carta, the colonists turned as the documentary evidence of the fundamental rights and liberties of all Englishmen, whether they resided in the home-land or in the English communities of America. (Italics added) (1917)

Hazeltine’s supposition regarding the reliance on the Habeas Corpus Act of 1679 is supported by Alexander Hamilton’s Federalist Paper No. 83.

Arbitrary impeachments, arbitrary methods of prosecuting pretended offenses, and arbitrary punishments upon arbitrary convictions, have ever appeared to me to be the great engines of judicial despotism; and these have all relation to criminal proceedings. The trial by jury in criminal cases, aided by the habeas-corpus act, seems therefore to be alone concerned in the question. (Italics added) (Hamilton, 1788)

The habeas corpus act mentioned by both Hazeltine and Hamilton as being the reference for the U.S. Constitution was the Habeas Corpus Act of 1679.

**CONCLUSION**

The Habeas Corpus Act of 1679 is the legislation relied upon by America’s Founding Fathers when the writ of habeas corpus was included in the Constitution. There is no reason to believe the Founders intended for the writ to be applied differently than it had been under the legislation they were referencing. It is important to keep this in mind when reading this thesis as it is the duty of the Supreme Court to interpret the Constitution in the context in which it was ratified. There are those who do not agree with this assertion, many of whom have been and currently are on the post-9/11 Supreme Court. Their claim to the contrary is addressed in a later chapter (Chapter 5).
CHAPTER 3

AUTHORITY TO SUSPEND HABEAS CORPUS

The previous chapter demonstrated the importance of the Habeas Corpus Act of 1679 in gaining an understanding as to whom the Constitution intended the writ to be applied to. In order to further understand the writ in the United States, this chapter will explore which branch of government the Constitution allows to suspend this privilege.

UNITED STATES CONSTITUTION

“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” (U.S Constitution). Known as the suspension clause, this passage limits the government’s ability to suspend the writ of habeas corpus. However, the Constitution does not explicitly mention which governmental branch is authorized to decide when such a suspension is warranted.

The suspension clause’s location in the Constitution provides some insight into this much debated question. Article I of the Constitution is reserved for the legislative branch and this is where the only mention of habeas corpus is made (U.S. Constitution). This location suggests that Congress was intended to have the authority to decide when the suspension of the writ was necessary. In addition, it is important to remember that the American Revolution was fought to escape a tyrannical power (Samaha, 2006). To therefore think the American Founding Fathers would have given such an awesome power to an executive is questionable.

JUDICIAL BRANCH

The judicial branch has historically supported the belief that Congress has the authority to decide when a suspension of habeas corpus was warranted. Shortly after the ratification of the Constitution, Chief Justice Marshall stated that,

If at any time the public safety should require the suspension of the powers vested by this act in the courts of the United States, it is for the legislature to say so. That question depends on political considerations, on which the legislature is to decide.
(Ex parte Bollman, 1807)
Marshall also claimed that the then President Thomas Jefferson was in agreement that it was Congress and not the executive that had such authority.

…in Mr. Jefferson’s opinion, the suspension of the writ, he claimed, on his part, no power to suspend it, but communicated his opinion to Congress, with all the proofs in his possession, in order that Congress might exercise its discretion upon the subject, and determine whether the public safety required it. And in the debate which took place upon the subject, no one suggested that Mr. Jefferson might exercise the power himself, if, in his opinion, the public safety demanded it. (Ex parte Bollman, 1807)

The judicial branch’s recognition that Congress had the power to suspend the writ of habeas corpus was reiterated over fifty-years later following Lincoln’s suspension of habeas privileges in the Civil War. In an opinion authored by Chief Justice Taney, “it was admitted on all hands that the privilege of the writ could not be suspended except by act of Congress” (Ex parte Merryman, 1861).

It may be generally understood that it is Congress that exercises authority over the writ of habeas corpus. However, what would happen if Congress was out of session and could not be activated in a timely manner? This was a question that President Abraham Lincoln was faced with during the Civil War.

**Civil War**

During the Civil War, President Abraham Lincoln suspended habeas corpus on four separate occasions (Dueholm, 2008). The first three suspensions were minimalistic in that they were specifically targeted at areas of strategic importance to the Union war effort (Dueholm, 2008, Richardson, 2004). These suspensions occurred after Lincoln had called for a special session of Congress, but before the session convened (Dueholm, 2008 Richardson, 2004). Once this session occurred, Lincoln defended his suspensions as well as his authority to authorize them (Richardson, 2004). He claimed that the Framers of the Constitution would not have thought “the danger should run its course, until Congress could be called together; the very assembling of which might be prevented, as was intended in this case, by the rebellion” (Richardson, 2004).

Lincoln never sought Congressional approval for his actions and Congress did not give it for almost two years (Richardson, 2004). Congress’s approval for Lincoln’s actions took form in the Habeas Corpus Act of 1863. This legislation retroactively supported Lincoln’s suspensions and approved future suspensions. By the time it was passed, habeas
corpus had been suspended and martial law instituted for the entire country (Richardson, 2004).

Congress’s relative silence was accompanied by similar inaction by the Supreme Court. After the first authorization suspending habeas privileges, Chief Justice Taney issued a writ of habeas corpus in response to the confinement of John Merryman. However, this writ was ignored by its intended recipient, General Cadwalader (Ex Parte Merryman, 1861). Knowing there was nothing he could do to force compliance with the writ Taney wrote an opinion in which he outlined the reasons why Lincoln did not have the authority to suspend habeas privileges without legislative approval (Ex Parte Merryman, 1861). Other than Taney’s opinion, the Supreme Court remained relatively silent for the remainder of the war.

**CONCLUSION**

While the question addressed in this thesis is not who has the authority to suspend the writ of habeas corpus, the inclusion of this chapter was important for two primary reasons. First, it provides further understanding of the writ and its history. Second, subsequent chapters will show that the post-9/11 Supreme Court has usurped this congressional authority. There are national security implications to a Supreme Court that has decided it has the authority to make policy decisions. These will be addressed in additional chapters.
CHAPTER 4

WORLD WAR II

Another infamous suspension of the writ of habeas corpus in the U.S. occurred during World War II (WWII). Like the previous chapter which included background into Civil War suspensions of the writ, this chapter about WWII is relevant for the historical background it provides. It is also important because the suspensions did not only target Americans on American soil, but aliens detained by the U.S. abroad.

HABEAS CORPUS AND NATIONAL SECURITY

The legislative and judicial responses to the suspensions of habeas corpus in World War II (WWII) were more pronounced than those during the Civil War, but had the same effect of validating the executive’s actions. Unlike the slow pace Lincoln’s Congress took to validate his habeas suspensions, the WWII Congress corroborated President Roosevelt’s actions shortly after they were made. Congress passed Public Law 77-503 (1942) (just over a month after FDR had issued Executive Order 9066 (EO 9066, 1942)). EO 9066 provided the framework for the habeas suspensions and mass incarcerations that would occur (Daniels, 2002). Public Law 77-503 criminalized anyone found in violation of the EO and any restrictions that were subsequently emplaced. (1942).

There were several cases during the war when the Supreme Court validated these executive and legislative actions. In the first of these cases, Ex parte Quirin (1942), the Court ruled that unlawful enemy combatants did not get habeas privileges.

Citizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful because in violation of the law of war. Citizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts, are enemy belligerents within the meaning of the Hague Convention and the law of war. (1942)

The Court found that classification as an unlawful enemy combatant nullified any rights associated with American citizenship (Ex parte Quirin, 1942).
In the next two cases, *Yasui v. United States* (1943) and *Hirabayashi v. United States* (1943), the Court ruled that restrictions on liberty were not unconstitutional when emplaced due to threats to national security. Citing *Clark v. Dekeback* (1927), the Court stated that,

> The adoption by Government, in the crisis of war and of threatened invasion, of measures for the public safety, based upon the recognition of facts and circumstances which indicate that a group of one national extraction may menace that safety more than others, is not wholly beyond the limits of the Constitution, and is not to be condemned merely because, in other and in most circumstances, racial distinctions are irrelevant. (1927)

The Court found that the government had the constitutional authority to consider all factors when deciding how best to protect the public, even if one of those factors was race.

These rulings were reaffirmed in the case of *Korematsu v. United States* (1944). The Supreme Court ruled that the authority to make national security decisions had constitutionally been granted to certain military commanders by the executive and legislative branches of government. As to whether such orders were constitutional when targeting American citizens, the Court found that when national security interests were threatened the government could constitutionally balance those interests with civil liberties. This decision was not made lightly. The Court recognized that “all legal restrictions which curtail the civil rights of a single racial group are immediately suspect” and should be judicially scrutinized (*Korematsu v. United States*, 1944). However, it was also understood that “pressing public necessity may sometimes justify the existence of such restrictions” (*Korematsu v. United States*, 1944).

**SUPREME COURT JURISDICTION: WRIT OF HABEAS CORPUS AND ALIENS**

Subsequent WWII cases had the Supreme Court ruling on the jurisdiction of federal courts. In *Ahrens v. Clark* (1948), the Court found that a federal court had no authority to issue writs of habeas corpus to persons detained outside its territorial jurisdiction. The petitioners were 120 Germans detained on Ellis Island who had petitioned the D.C. District Court for writs of habeas corpus. The petitioners claimed that because they were “subject to the custody and control” (*Ahrens v. Clark*, 1948) of the Attorney General (AG) they had the right to petition this court because the AG was in its jurisdiction.
The D.C. District Court and the D.C. Court of Appeals did not agree. In decisions
later upheld by the Supreme Court, the courts ruled that the petitioners were “outside the
territorial confines of the District of Columbia” and therefore could not petition that court for
writs of habeas corpus Ahrens v. Clark (1948). The Supreme Court did not solely rely on
precedent to support its affirmation. It also cited the habeas corpus statute’s own language
that “Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the
district courts and any circuit judge within their respective jurisdictions” (Title 28, 2010).
The Court ruled the statutes phrase “within their respective jurisdictions” constitutionally
limited a court’s reach to its territorial jurisdiction. It was “not sufficient…that the jailer or
custodian alone be found in the jurisdiction” (Ahrens v. Clark, 1948).

Two years after the Ahrens decision, the Supreme Court was faced with yet another
question regarding the jurisdictional reach of U.S. courts. In Johnson v. Eisentrager (1950),
21 Germans petitioned the D.C. District Court for writs of habeas corpus. The petitioners had
been captured in China by the U.S. Army, tried and found guilty by a U.S. military
commission, and were detained in an American-occupied part of Germany under U.S. Army
custody. They sought writs of habeas corpus from the D.C. District Court with the claim that
their “trial, conviction, and imprisonment violated” several constitutional provisions
(Eisentrager v. Forrestal, 1949). The question that these petitions presented the judiciary
with was whether U.S. courts had jurisdiction over enemy aliens held by the U.S. military
overseas.

The D.C. District Court refused to grant writs of habeas corpus to the petitioners. In
accordance with the Ahrens ruling, the court found it had no jurisdiction over the petitioners,
regardless of the fact that they were in U.S. custody. The D.C. Court of Appeals subsequently
reversed this ruling after determining that,

…any person, including an enemy alien deprived of his liberty anywhere under
any purported authority of the United States, was entitled to the writ if he could
show that extension to his case of any constitutional rights or limitations would
show his imprisonment illegal. (Eisentrager v. Forrestal, 1949)

The D.C. Court of Appeals further ruled that aliens detained outside the “territorial
jurisdiction of any District Court of the United States” can petition for a writ of habeas
 corpus (Eisentrager v. Forrestal, 1949). The court determined that in such cases the petition
The Supreme Court found this ruling unconstitutional and reinstated the lower court’s
dismissal of the habeas petitions (Johnson v. Eisentrager, 1950). The Court found no
constitutional or statutory authority that aliens detained abroad were entitled to habeas
privileges. 

We have pointed out that the privilege of litigation has been extended to aliens,
whether friendly or enemy, only because permitting their presence in the country
implied protection. No such basis can be invoked here, for these prisoners at no
relevant time were within any territory over which the United States is sovereign,
and the scenes of their offense, their capture, their trial and their punishment were
all beyond the territorial jurisdiction of any court of the United States. (Johnson v.
Eisentrager, 1950)

The Court agreed with its own precedent that aliens detained outside the territorial
jurisdiction of U.S. courts could not file habeas petitions (Johnson v. Eisentrager, 1950). It
was irrelevant that they were detained by the U.S. and not sufficient that the person
responsible for the detainment was in the territorial jurisdiction of a U.S. court (Johnson v.
Eisentrager, 1950).

CONCLUSION

The Supreme Court’s WWII rulings were consistent with the Court’s position in the
Civil War that the ultimate authority over habeas corpus lay with Congress. Later chapters
will demonstrate that this position was not shared by the post-9/11 Supreme Court. When
reading this thesis it will be important to remember this history and the WWII cases of
Ahrens v. Clark (1948) and Johnson v. Eisentrager (1950) for two primary reasons. First, it
was in these cases that the Supreme Court ruled that aliens only received habeas privileges
when detained in the territory of the United States (Ahrens v. Clark, 1948, Johnson v.
Eisentrager, 1950). Second, the Court found that it was not enough that the person
responsible for the detainment was under U.S. jurisdiction (Johnson v. Eisentrager, 1950).
The significance of these rulings is that they are largely responsible for the Bush
administration’s belief that its use of Guantanamo and the denial of habeas corpus for
detainees was constitutionally sound.
CHAPTER 5

SUPREME COURT PRECEDENT AND
INFLUENCE ON POST-9/11 ACTIONS

The previous chapter demonstrated that it was commonly understood that the ultimate authority over habeas corpus in determining its applicability and under what circumstances it could be suspended belonged to Congress. This chapter will demonstrate how those positions taken by the Supreme Court, primarily in its WWII rulings, established the framework for subsequent actions taken by the executive and legislative branches when dealing with national security threats.

USE OF GUANTANAMO

Many people are unaware and equally unconcerned with Guantanamo’s history as an alien detention facility prior to its use as a detention facility for terrorists. This practice began under the Carter administration and has been used by every executive since (Stabile & Scheina, 2010). When the Supreme Court ignored precedent and conferred habeas privileges to alien detainees at Guantanamo, Boumediene v. Bush (2008), Carter applauded the ruling because it,

…represents a victory for the rule of law and will improve the United States’ image as a champion for human rights and freedom across the world, as well as ensure that individuals in Guantanamo will be afforded an adequate treatment as guaranteed by our nation’s Constitution. (Carter, 2008)

It is ironic that almost twenty years after Carter’s own administration used Guantanamo to detain Cuban refugees he began expressing such concern (Stabile & Scheina, 2010).

The use of Guantanamo for alien detention was supported by WWII Supreme Court rulings that aliens detained outside the U.S. had no constitutional rights (Ahrens v. Clark, 1948, Johnson v. Eisentrager, 1950). It was because of this precedent that President Carter used Guantanamo to detain Cuban refugees in 1980 (Stabile & Scheina, 2010). Referred to as the Mariel Boatlift, this six month exodus resulted in over one-hundred thousand Cuban refugees fleeing to the United States (Stabile & Scheina, 2010). This large influx led the
Carter administration to order Coast Guard interdiction efforts in which many refugees were taken to Guantanamo rather than their Florida destination (Stabile & Scheina, 2010).

Every president since Carter used Guantanamo for this purpose. Notably, President Clinton, another critic of the Bush administration’s use of the detention facility, authorized Operation Sea Signal from 1994 to 1996 (Bentley, 1996). This endeavor was the result of another unmanageable influx of migrants to the U.S., this time Haitians. The Clinton administration responded by authorizing Naval and Coast Guard vessels to interdict refugees and transfer them to Guantanamo. Shortly after the beginning of Operation Sea Signal, Cuban President Castro changed his policy to allow Cubans to leave the country. As was the case with Haitian refugees, interdicted Cubans were transferred to Guantanamo (Bentley, 1996).

The Supreme Court upheld this use of Guantanamo in its 1993 decision in Sale v. Haitian Centers Council (1993). In an opinion delivered by Justice Stevens, the majority held that U.S. statutory protections were only for “aliens who reside in or have arrived at the border of the United States” (Sale v. Haitian Centers Council, 1993). This ruling also addressed the issue of whether aliens qualified for rights under international law, i.e. the Geneva Conventions. According to Justice Stevens,

> Even the United Nations High Commissioner for Refugees has implicitly acknowledged that the Convention has no extraterritorial application…the ‘basic requirements’ his office has established impose an exclusively territorial burden, and announce that any alien protected by the Convention…will be found either ‘at the border or in the territory of a Contracting State.’ (Sale v. Haitian Centers Council, 1993)

Like U.S. statutes, claimed the Court, the Geneva Conventions did not apply to aliens outside the territorial jurisdiction of the “contracting state.”

In this case, the contracting state was the United States, and nowhere was it asserted that Guantanamo qualified as a U.S. territory. In fact, the Court ruled the opposite. The Court found that these aliens were not protected under the U.S. Constitution or the Geneva Conventions because they were not in a U.S. territory (Sale v. Haitian Centers Council, 1993). Yet, many of them were detained at Guantanamo. Had the majority believed Guantanamo was part of U.S. territory, they could not have reached this conclusion.

The significance of this ruling cannot be overstated. First, it reinforced the Supreme Court’s WWII precedent that aliens detained outside U.S. territory did not receive
constitutional or statutory privileges, such as habeas corpus (*Johnson v. Eisentrager*, 1950, *Boumediene v. Bush*, 2008). Second, it set new precedent when it determined that the Geneva Conventions had no extraterritorial applicability. Third, in order to reach the conclusion the Court did, it needed to rule that Guantanamo Bay, Cuba was not a U.S. territory. Finally, this ruling is significant because every progressive justice on this Court who remained a justice to rule on post-9/11 cases would completely ignore the precedent they had just set.

**IGNORING PRECEDENT: RASUL V. BUSH**

We cannot forget Senator John Kerry’s infamous statement during the 2004 presidential election that he “voted for the $87 billion before he voted against it” (Mercurio, 2004). This statement is representative of more than the senator’s personal proclivity of flip-flopping. It is indicative of an overall progressive tradition of changing their minds whenever it suits their own interests (McCarthy, 2011). The Supreme Court’s ruling in *Rasul v. Bush* (2004) is another example of this. Progressive justices in this case ignored the precedent set in the Court’s *Sale* ruling (*Sale v. Haitian Centers Council*, 1993). These justices now claimed that Guantanamo Bay, Cuba was a U.S. territory and as such the U.S. Constitution, U.S. statutes and international laws were applicable. This reversal is particularly peculiar because four of the six justices (Stevens, O’Connor, Kennedy, and Souter) who now concluded that Guantanamo was a U.S. territory were part of that 1993 majority that held it was not (*Sale v. Haitian Centers Council*, 1993, *Rasul v. Bush*, 2004). In keeping with this progressive pattern of changing their minds whenever it suits them, these four justices were against these rights for aliens detained at Guantanamo before they decided they were for them (McCarthy, 2011).

Nothing had changed during the decade between these rulings to support this modification in applicability. In 1903, the United States and Cuba entered into a lease agreement for the U.S. use of Guantanamo Bay, Cuba. *Lease of Coaling or Naval Stations Agreement Between the United States and Cuba* (1903). This lease stated that Cuba retained “ultimate sovereignty” over this leased land, while the U.S. exercised “complete jurisdiction and control” (“Lease,” 1903). In 1934 this lease was extended and the “stipulations of that agreement with regard to the naval stations of Guantanamo shall continue in effect” (*Treaty Defining Relations with Cuba*, 1934).
It was the lease’s “command and control” versus “ultimate sovereignty” stipulations combined with the Court’s WWII precedent (Ahrens v. Clark, 1948, Johnson v. Eisentrager, 1950) that led the Supreme Court to rule aliens detained at Guantanamo did not receive U.S. Constitutional, statutory, or international rights (Sale v. Haitian Centers Council, 1993). As this stipulation remained unchanged between this ruling and the Court’s subsequent rulings to the contrary, there was no support for these justices to now claim aliens detained at Guantanamo did have these rights.

The progressive justices in the Court’s majority defended their decision with statutes and precedents they claimed supported their ruling. This is nonsensical seeing as a majority of what was relied on had been in effect during the Court’s judgment a decade earlier when an opposite conclusion had been reached. In its majority opinion, ironically delivered by the same justice who had delivered the 1993 opinion (Sale v. Haitian Centers Council, 1993), the Court claimed the Habeas Corpus Act of 1867, mandated these aliens receive habeas privileges (Rasul v. Bush, 2004). According to Justice Stevens, “Congress extended the protections of the writ to all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States” (Rasul v. Bush, 2004). This statute had been on the books during the Court’s 1993 ruling, Sale v. Haitian Centers Council (1993), so it is odd that it somehow now had a different applicability.

These progressive justices also supported their ruling by manipulating Supreme Court precedent. For example, it was suggested that the Ahrens v. Clark (1948) decision, which reinforced the practice that courts only had jurisdiction to issue writs of habeas corpus to persons detained within their territorial jurisdiction, had been overruled by a subsequent case. The case this majority relied on to support this assertion was Braden v. 30th Judicial Circuit Court of Kentucky (1973). The petitioner in this case, Braden, was indicted in Kentucky (KY) while in California (CA) custody. He was returned to KY where he escaped and was arrested in Alabama (AL) for separate offenses. It was while serving his sentence in AL that Braden petitioned the District Court for the Western District of KY for a writ of habeas corpus (Braden v. 30th Judicial Circuit, 1973).

The Supreme Court held in Braden (1973) that the petitioner could seek a writ of habeas corpus even though he was detained outside the territorial jurisdiction of the court he petitioned. It was decided that a petition for a writ of habeas corpus could be filed with a
district court as long as “the court issuing the writ have jurisdiction over the custodian of the prisoner” (Braden v. 30th Judicial Circuit, 1973). The Court largely relied on post-Braden (1973) legislation and court decisions to support its ruling. However, while the cited legislation and rulings do support the Court’s ruling in Braden (1973), they do not support the Court’s ruling in Rasul (2004).

The legislation used to support the Braden (1973) ruling only involved persons detained within the territorial jurisdiction of a U.S. court. It is therefore inapplicable to the petitioners in Rasul (2004), as they were detained outside the jurisdiction of any court. This same inapplicability also extends to the court cases used to support this ruling. The cited cases involved American citizens “confined overseas, and thus outside the territory of any district court” (Braden v. 30th Judicial Circuit, 1973). As these petitioners are not American citizens these cases are also irrelevant to their situations. For these reasons, the Court should not have relied on Braden (1973), in its ruling.

The Supreme Court should, however, have relied on Eisentrager. Like the petitioners in Eisentrager those in Rasul (2004) were aliens detained by the U.S. military outside American territory. This is wholly unlike the petitioner in Ahrens and Braden (1973) who were U.S. citizens and were at all times detained within the territorial jurisdiction of a U.S. court. However, the Court chose to ignore the Eisentrager precedent. The Court claimed that because Braden (1973) had overruled Ahrens and Ahrens had been used to support Eisentrager, that Eisentrager was inapplicable (Rasul v. Bush, 2004).

This manipulation of precedent was compounded by the Court’s reliance on precedent that had explicitly been reversed. The majority cited a lower court’s ruling in Eisentrager to support its claim that aliens detained by the military outside U.S. territory had rights (Rasul v. Bush, 2004). It did not matter to these justices that the court they now served on had reversed this ruling. All that seemed to matter was that someone at some time had supported what they wanted to do in the present.

THE “EVOLUTION” OF THE U.S. CONSTITUTION

The Supreme Court’s blatant disregard of its own precedents coincides with the argument that the Constitution must evolve with society (Chemerinsky, 2010). This is a common argument used by proponents of providing aliens detained outside the U.S. with
habeas privileges (Dorf, 2007). Yet, just because it is common does not mean it is valid. The Constitution provides a set of standards that are necessary for the preservation of the democratic government the Founding Fathers envisioned. Had the Constitution been intended to be open to interpretation outside the context in which it was ratified, a legal process for amending it would not have been included (U.S. Constitution). Article V of the Constitution provides the steps for making amendments.

President George Washington demonstrated the importance of this amendment process and the danger of circumventing it in his farewell speech.

If, in the opinion of the people, the distribution or modification of the constitutional powers be in any particular wrong, let it be corrected by an amendment in the way which the Constitution designates. But let there be no change by usurpation; for though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed. (1796)

Washington’s statement demonstrates the error of the open to interpretation argument is not only wrong but dangerous. His statement illustrates that he understood that despite the best intentions, circumventing the process outlined in article V, would threaten the very country the American Revolution had been fought to create.

The theory that the Constitution is a living breathing document increases the likelihood of judicial activism and the usurpation of Congressional authority by the judiciary. Washington understood this when he commented that usurping the congressional authority to amend the Constitution “is the customary weapon by which free governments are destroyed” (Washington, 1796). This is demonstrated by providing aliens detained at Guantanamo with habeas corpus privileges. The idea behind this judicial interpretation may be made in good faith. However, it goes against the Constitutional intention of how and to whom habeas corpus privileges were to be applied. If the American people choose to change the application of habeas corpus, this can be done through a constitutional amendment (U.S. Constitution). It is not the judiciary’s authority to make such a decision on the public’s behalf.

**CONCLUSION**

It was those precedents set by the Supreme Court, primarily those set in its WWII rulings, which were relied upon by every presidential administration since Jimmy Carter’s to
justify the use of Guantanamo to detain aliens. As the naval station at Guantanamo Bay, Cuba was not under the sovereign jurisdiction of the U.S., it was determined that aliens detained there were not protected under the Constitution (Ahrens v. Clark, 1948, Johnson v. Eisentrager, 1950). The Supreme Court agreed with this conclusion in its Sale v. Haitian Centers Council (1993), ruling when it found that the use of Guantanamo and the denial of habeas corpus to aliens detained there was constitutional. In addition, the Court found that aliens detained outside U.S. territory, which included Guantanamo, were not protected by international laws. These precedents show that the Court’s post-9/11 rulings were groundless and indicative of progressive justices who make rulings on the theory that the Constitution should “evolve” with society. It is dangerous to have a Supreme Court that blatantly ignores and manipulates precedent that is consistent with the Constitution in order to justify rulings representative of their personal ideologies. Yet, this is what the post-9/11 Court has done.
The previous chapter demonstrated that the Supreme Court has ignored and manipulated precedent in order to advance the personal ideologies of its member justices. How is it that the Supreme Court is able to rule based on personal ideologies than precedent and the Constitution? This is possible because Supreme Court is more powerful than it should be and Congress is largely responsible. Almost since the Constitution’s ratification Congress has passed legislation expanding the Court’s jurisdiction. When not authoring such legislation, Congress implicitly supported this ever-expanding authority by doing nothing as the Supreme Court expanded its own jurisdiction. Giving credit where credit is due, there are those justices and members of Congress who have made some attempt to thwart this jurisdictional expansion. However, other than offering dissenting opinions or authoring legislation that the Supreme Court subsequently declared unconstitutional, these attempts have not amounted to much.

**LEGISLATION EXPANDING SUPREME COURT’S JURISDICTION**

Shortly after the ratification of the Constitution, Congress passed the Judiciary Act of 1789, to expand the Supreme Court’s jurisdiction. It was in this legislation that federal courts, to include the Supreme Court, were given the “power to issue writs of... *habeas corpus*” to federal prisoners within “their respective jurisdictions”(Judiciary Act, 1789). It is commonsensical that the federal courts would have the ability to issue writs of habeas corpus to federal prisoners held in their jurisdictions.

Congress next expanded the jurisdiction of federal courts with the Act of March 2, 1833. According to this statute,

…the justices of the Supreme Court, or a judge of any district court of the United States…shall have power to grant writs of habeas corpus in all cases of a prisoner
or prisoners, in jail or confinement, where he or they shall be committed or confined on, or by any authority or law, for any act done, or omitted to be done, in pursuance of a law of the United States, or any order, process, or decree, of any judge or court thereof, any thing in any act of Congress to the contrary notwithstanding. (Brightly, 1865)

In accordance with its constitutional authority to determine the jurisdictional reach or limits of federal courts, Congress gave federal courts jurisdiction over anyone detained by a state for performing federal duties (Brightly, 1865).

Less than a decade later, Congress again extended the jurisdictional reach of federal courts into state affairs with the Act of August 29, 1842. The statute stated,

That either of the justices of the Supreme Court of the United States, or judge of any district court of the United States, in which a prisoner is confined…shall have power to grant writs of habeas corpus in all cases of any prisoner or prisoners in jail or confinement, where he, she, or they, being subjects or citizens of a foreign state, and domiciled therein… (Doyle, 2007)

Federal courts now had jurisdiction over aliens detained by state governments (Doyle, 2007).

The biggest blow to the Constitution’s intention of limiting the size and influence of the federal government came in the form of the Act of February 5, 1867. This piece of legislation gave federal courts the authority “to grant writs of habeas corpus in all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States” (Wieck, 1970). Federal courts now had some jurisdiction over state prisoners who had exhausted all state remedies (Wieck, 1970).

Less than a century after the U.S. had gained its independence from a tyrannical and oppressive regime, Congress was well on its way to doing what the Constitution sought to avoid. The Founding Fathers had wanted a federal government with limited power (Carey, 2004). It is apparent that Congress did not see the wisdom in this as it continued to expand federal authority far beyond what the Constitution had intended.

**SELF-EXPANSION: SUPREME COURT USURPS CONGRESSIONAL AUTHORITY**

The ever-expanding jurisdiction of the Supreme Court cannot exclusively be blamed on legislation. However, it can still be attributed to Congress for remaining complicit as the Court continued to expand its jurisdiction without legislative approval. The most notorious of these expansions occurred in *Marbury v. Madison* (1803), which set the precedent for
judicial review. In a ruling that gave the Supreme Court oversight over the other branches of
government, the Court found it had the constitutional authority to rule legislation
unconstitutional.

This system of checks and balances is an indispensible aspect of our democracy. It has allowed for the continued existence of our country and the Constitution it was founded on. However, the premise that Supreme Court justices could remain true to the Constitution and not interpret it according to their personal ideologies was too much to hope for. Nowhere has this been more evident than with progressive justices in the first decade of the 21st century.

Progressives on the post-9/11 Supreme Court have continued to expand the Court’s authority. The first example of this occurred in the Court’s 2004 decision in *Rasul v. Bush* (2004). It was in this ruling that progressive justices determined that their jurisdictional authority extended to aliens detained at the Guantanamo detention facility. The reason for this unprecedented ruling can be summed up in two phrases: progressive activism and international appeasement. Only a decade before, the Court had almost unanimously ruled that U.S. Constitutional, statutory and international rights were not conferred upon aliens detained by the U.S. abroad, to include those held at Guantanamo (*Sale v. Haitian Centers Council*, 1993). Four of these same justices now ruled the opposite.

*Hamdan v. Rumsfeld* (2006) ruling provides another example of the Court’s usurpation of congressional authority. Congress had passed the Detainee Treatment Act of 2005 (DTA) to limit court jurisdiction over aliens detained at Guantanamo. Therefore, the Supreme Court should never have heard this case or any future ones from aliens at Guantanamo. Article III Section 2 of the U.S. Constitution gives Congress the authority to limit the appellate jurisdiction of the Supreme Court (U.S. Constitution). This is exactly what Congress did in the DTA. By arguing semantics, such as that the legislation was not retroactive and therefore did not limit the Court’s jurisdiction over cases already in progress, these justices were infringing on Congressional authority to limit judicial jurisdiction.

**PROGRESSIVE JUSTICES AND INTERNATIONAL APPEASEMENT**

A prominent way in which Supreme Court justices are able to use the Court’s expanded power to rule in ways favorable to their personal ideologies, without losing all
sense of legitimacy, is by using international laws and opinions in their decisions. While such consideration of the international community is necessary to avoid being the Qaddafi’s and Saddam’s of the world, putting more emphasis on doing what other countries want us to do rather than doing what is best for U.S. national security is peculiar. Other countries are constantly acting in ways that are in their best interests, but progressives in the U.S. would rather our country not do this. They would rather the U.S. do things such as give habeas privileges to terrorists who help murder Americans as long as this is such actions would appease the international community (O’Connor, 2003). It does not seem to matter that providing alien fighters with the right to file habeas petitions in U.S. courts goes against the historical use of the writ and the Supreme Court’s own precedents. The new mantra seems to be that the U.S. will do what other countries want it to, regardless of what is in the country’s best interests.

The Bush administration was often criticized for defending U.S. national security without the support of its allies and international organizations, i.e. the United Nations (“George Bush,” 2002). Whether one does or does not agree with the actions taken, the administration was doing what every other country does by acting in its best interests. An example of this occurred in 1986 when France and Spain refused U.S. fighter jets access to use their airspaces (Boyne, 2007). Reagan believed this action was justified after Libyan state sponsored terrorists had bombed a TWA airliner in Greece, killing four Americans, and attacked a West Berlin discotheque frequented by American military, killing one U.S. serviceman (Bureau of Near Eastern Affairs, 2010; Martin, 2009). Regardless of our country’s belief that our actions were justified, and despite our alliances with France and Spain, these countries did not want to involve themselves because they had not been targeted by the terrorist attacks.

The 2009 release of the Lockerbie bomber by Scotland, with purported insistence of the UK, is another example of countries acting in their best interests at the expense of their allies. Al-Megrahi was the only person convicted in the Pan Am Flight 103 bombing that killed 270 people, over half of whom were American (Menendez, Lautenberg, Schumer, & Gillibrand, 2010). One would think that the deaths of these Americans in combination with the fact that the U.S. led the investigation that resulted in al-Megrahi’s conviction would have warranted their being made aware of these ongoing negotiations between their allies.
and Libya regarding the terrorist. This was not the case. Scotland released the bomber from his life-sentence without consulting with the U.S. claiming he had terminal cancer and only months to live. Two years later, al-Megrahi is still alive and a recent report by U.S. senators shows his release was less about compassion and more about protecting UK trade and business relations with Libya (Menendez, et al., 2010). Like the previous example of Spain and France, this is just another case of countries putting their own interests before those of their allies.

It has been historically recognized that sovereign nations have the right to act in their best interests (Bateman, 2011). The previous examples are a few of many where U.S. allies have shown a willingness to do so, often at our expense. This is what makes the progressive policy of letting the international community dictate what the U.S. can or cannot do to defend itself so questionable. Such a policy demonstrates that while the U.S. accepts the right of other countries to act in their own interests, it will not do the same in the face of international objections.

In addition to the criticism of individual countries, progressives like to cite UN disapproval to justify implementing or terminating certain policies. This is a dangerous practice because the UN lacks any moral authority to tell the U.S. what it can do to protect its national security. This international organization has continually shown it serves as a conduit for countries to exert power over the U.S., which they otherwise would not have. In 1998, the UN Human Rights Council investigated purported violations by the U.S. government against the Navajo people (Earth Island Journal, 1998). In 2009, this same council investigated the “housing crisis” in California and throughout the U.S. (Coalition for Economic Survival, 2009). In 2011, a UN representative investigated unsafe drinking water in Seville, California (“UN Investigates Water”). It is comical that this is how the UN chooses to exert its energy rather than focusing on the persecution and genocide of religious and ethnic minorities in Africa and the Middle East.

The United Nations continues to show its lack of moral authority by allowing countries to serve on committees responsible for investigating violations that they are currently committing. On April 28, 2010, the UN announced Iran would serve on the Commission on the Status of Women (United Nations, 2010). This is a country where women have few rights and can be stoned to death for such things as committing adultery.
Until March 2011, Libya served on the UN human rights council (United Nations, 2011). Libya’s Colonel Gaddafi is an admitted terrorist responsible for atrocities committed against citizens of several countries, to include the U.S., and even his own countrymen. While these countries could have been chosen on the premise that ‘it takes one to know one,’ this hardly provides them with the authority to judge other countries. These are only two of the many examples when the UN has shown a lack of moral authority that would give it the legitimacy necessary to judge how the U.S. chooses to secure itself.

Whether on an individual basis or in the community forum of the United Nations, the international community has repeatedly shown itself to be self-serving. There is nothing inherently wrong or right with this; however, there is definitely something questionable when the U.S. chooses to appease the international community rather than take all necessary measures to ensure its national security. Yet, this is exactly what progressive justices on the Supreme Court have done.

**U.S. MORAL AUTHORITY**

The argument that the Constitution should be adhered to over international laws and the citation of examples in which other countries have repeatedly demonstrated a willingness to put their own interests before those of the U.S. is not an argument of ‘they are doing it so why shouldn’t we’. Rather, it is an argument of self-preservation. Some would suggest that the use of international laws and opinions is in the best interests of the U.S. because it shows our country’s moral authority (Babington, 2005). Supporters of this opinion may be correct. But this would not be the first time, or the last, that U.S. policies were said to be in opposition to the international community. The U.S. support of Israel, its military bases throughout the world, and its support for undemocratic Arab regimes are often said to inspire anti-American sentiment (Abdallah, 2003). Yet, the U.S. maintains these policies. The United Nations and the European Union view capital punishment as a human rights violation (European Union, 2011, United Nations, 1948). Nevertheless, the death penalty remains legal in the majority of American states (“States,” 2011).

Perhaps it was one, several, or all of these policies that can be blamed for the 1983 bombings against the U.S. Marine barracks in Beirut, Lebanon; the 1993 attack on the World Trade Center; the 2000 bombing of the U.S.S. Cole; or the September 11, 2001 attacks
against the Pentagon and World Trade Center (U.S. Army, 2003). Supporters of this opinion would agree with that. However, it is more likely that American policies are being used as scapegoats for those who do not like the U.S. This does not mean that such policies should be terminated.

The problem with citing the degradation of moral authority as reason for terminating U.S. policies is that it is subjective. Moral authority is the “quality or characteristic of being respected for having good character or knowledge, especially as a source of guidance or an exemplar of proper conduct” (“Moral Authority,” 2011). Who determines what qualities or characteristics are representative of moral authority? Is it Saudi Arabia where sharia law is the law of the land (“The Basic,” 1992)? Is it England where handguns are banned (“Firearms,” 2011)? Maybe it is the United Nations which is allowing Syria admittance on the human rights committee despite a recent government crackdown that resulted in hundreds of deaths of anti-government protesters (Evansky, 2011).

The U.S. is a representative democracy, and as such, the Constitution and the American people should determine the subjective and fluid moral authority of the country. A representative democracy “is a form of democracy founded on the principle of elected individuals representing the people (italics added)” (“Representative,” 2011). There is therefore no better way to demonstrate U.S. moral authority than instituting policies according to current American public opinion. A March 2011 Rasmussen Poll found that fifty-eight percent of likely voters favor the use of Guantanamo and sixty-percent of likely voters favor military tribunals rather than U.S. courts (Barone, 2011). Thus, if the U.S. wanted to live up to its status as a representative democracy, which would demonstrate its moral authority, it would continue using Guantanamo to detain alien terrorists and try them by military tribunal. Government adherence to the will of its public is the truest test of its moral authority. After all, how could the U.S. espouse the ideals of a representative democracy if it is not adhering to them itself?

**CONCLUSION**

The post-9/11 Supreme Court’s blatant disregard of precedent, even when set by some of the same justices, is dangerous to national security. It shows that these justices are not basing their rulings on the Constitution like their position mandates they do. Instead, it is
their progressive ideologies, to include the belief that international laws and opinions are relevant to their rulings in place of the Constitution, which they are basing their rulings on. The use of international laws and opinions is necessary for these justices to give their unprecedented rulings any semblance of reasonability. If their rulings were constitutionally or statutorily sound, such inclusions of the international variety would be unnecessary.

The use of international laws and opinions in Supreme Court rulings is not the purpose of the Court. This is also not the only example of the Court’s disregard of its constitutional purpose. The Supreme Court is charged with ensuring constitutional standards are followed. Placing international laws and opinions above the Constitution hardly serves this purpose. Another example of the Court’s disinterest in carrying out its constitutional mandate occurred with the DTA. The Constitution gives Congress the authority to limit the Court’s appellate jurisdiction, which Congress did with the DTA. The Constitution also gives Congress the authority to create laws, which again, is what it did with the DTA. Thus, the fact that the Supreme Court chose to ignore the DTA’s limit on its jurisdiction over aliens detained at Guantanamo and grant certiorari in the case of *Hamdan v. Rumsfeld* (2006) is also indicative of a Court that no longer feels bound by the Constitution it is sworn to uphold.

If the Constitution had sought to create such a powerful Supreme Court, one that decides international laws and opinions come before the Constitution and one that ignores legislation that constitutionally limits its jurisdiction, it would not have outlined which cases the Court was to have appellate and original jurisdiction. It also would not have been necessary to for subsequent legislation to passed granting the Supreme Court with additional situations in which it would exercise jurisdiction. Thus, the Supreme Court has lost legitimacy as it is not what the Founding Fathers had envisioned for this country.
The previous chapter demonstrated how Supreme Court justices have used international laws and opinions to justify their manipulation and blatant ignorance of the Court’s precedents. To think that the Founding Fathers intended for international laws to override the Constitution is insupportable. Yet this is exactly what progressives on the Supreme Court have suggested. Post-9/11 rulings have continuously made the U.S. Constitution and statutes subservient to international laws. This is a dangerous endeavor. Allowing international laws to override the U.S. Constitution and statutes not only infringes upon the country’s sovereignty, but also with its ability to successfully defend itself (Scruton, 2002).

The methods available to the executive and legislative branches to deal with national security threats are already constitutionally and statutorily limited. These limitations have been amplified by post-9/11 Supreme Court rulings. In addition to the restrictions already in place, progressive justices on the Court have mandated that the government not use any methods internationally unacceptable, even when they are constitutionally and statutorily sound. While it is not the Court’s responsibility to hold the U.S. accountable to the international community, this is exactly what these justices have done.

**Hamdan v. Rumsfeld**

The Court’s ruling in *Hamdan* (2006) provides a clear example of progressive justices placing the international community before the U.S. The majority of justices in this case, who were all progressives, found that Hamdan could not be tried by military commission because “its structure and procedures violate both the UCMJ and the Geneva Conventions” (Emphasis added.) (*Hamdan v. Rumsfeld*, 2006). Four of these five justices also found that conspiracy, the charge against the petitioner, was not an “offense that by…the law of war may be tried by military commissions” (Emphasis added.) (*Hamdan v. Rumsfeld*, 2006). (It
will be interesting to hear what these justices will say now that the Obama administration has decided to use military tribunals to try 9/11 conspirators.) (Garamone, 2011).

The majority of justices took issue with the fact that these military commissions prohibited defendants from accessing classified materials, even when used against them at trial (Administration of George W. Bush, 2001). This procedure makes perfect sense because as with all fair trials, such as those offered by military commissions, there is the possibility a defendant will not be convicted. In light of this possibility, it would be nonsensical to provide suspected terrorists with information pertinent to U.S. national security. What happens if they are found not guilty and let go? The U.S. then has an alien with some sort of tie to terrorism, as they would not have been held at Guantanamo otherwise, with information that could certainly be used against us. Prohibiting these persons from accessing this information is therefore a sound national security policy.

There are no Constitutional or statutory reasons why this policy cannot be used. However, because progressive justices do not like the policy and the international community spoke out against it, they have chosen to cite international laws that support their progressive ideologies. The majority claims that these commissions must “incorporate at least the barest of those trial protections that have been recognized by customary international law” (Hamdan v. Rumsfeld, 2006). This should not be the test. The test should be constitutional and statutory, not international.

Not only is it not the Supreme Court’s job to apply international laws to their cases, but it is especially not their job to apply international laws that the U.S. has never ratified. These progressive justices do not seem to see this lack of ratification as a limitation. In defending this particular ruling, the justices stated that the U.S. should use Article 75, Protocol I of the Geneva Conventions of 1949 to determine what “customary international,” protections should be applied (Hamdan v. Rumsfeld, 2006). The U.S. never ratified this particular protocol. So, not only have these justices expanded their duty by using international laws in their rulings, but they are using international laws that the U.S. is not a party to. Even if the United States had been party to this protocol, it would still be inapplicable to terrorists such as Hamdan. The Geneva Conventions apply during armed conflict or declared war “between two or more of the High Contracting Parties” (“Geneva Convention Relative to the Protection…”, 1949). As these are terrorists and not soldiers of a
contracting party, they would not be protected by the Geneva Conventions. This treaty further supports its inapplicability to terrorists by outlining who can claim the protected prisoner of war (POW) status. Nothing in these various POW descriptions justify giving terrorists detained at Guantanamo this protected status (“Geneva,” 1949b).

Another thing that would not change if the U.S. was party to this protocol is the Supreme Court’s authority to apply it to its rulings. The Constitution gives the Supreme Court appellate jurisdiction over cases “arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority” (U.S. Constitution). This jurisdiction is not absolute. The same section of the Constitution that gives the Court this jurisdiction also invests Congress with the authority to make “Exceptions” and “Regulations” to the Court’s appellate jurisdiction (U.S. Constitution).

**INAPPLICABILITY OF THE GENEVA CONVENTIONS**

The Geneva Conventions are frequently employed by the post-9/11 Supreme Court to justify rulings contrary to the Court’s own precedents. Firstly, it is not the duty of the Supreme Court to apply international laws to U.S. cases. However, when these laws are applied, they are not even being applied correctly. The Geneva Conventions state that it “shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties” (Emphasis added.) (“Geneva”, 1949a). The United States is such a “Contracting Party,” but members of non-state terrorist groups, such as al-Qaeda, are not. Thus, as the protections outlined in the Geneva Conventions are premised on such individuals belonging to a contracting party, those who do not cannot claim any of its protections.

This lack of application is supported by U.S. case law that continually reiterates that treaties are between nations (Trans World Airlines, Inc. v. Franklin Mint Corp, 1984, United States ex. Rel Saroop v. Garcia, 1997). Non-state terrorist groups, such as al-Qaeda, are not nations, let alone contracting parties to the Geneva Conventions. To therefore claim that the treaty should be expanded to include non-state actors, such as Guantanamo detainees, is to change the parameters of the treaty without authorization from those contracting states.

If the international community chooses to extend the protections of the Geneva Conventions to such non-state actors, it should amend the current treaty or ratify another one.
Those countries that choose to become a contracting party to this more expansive agreement would be subject to its provisions. As the treaty now stands, it is only between nations and non-state actors and non-contracting nations cannot claim its protections. Followers of the belief that international laws should be used to make judicial rulings believe that just as the Constitution must “evolve” with changing society these treaties should “evolve” with the changing dynamics of warfare (Murphy, 2007). Such evolution includes applying the treaty to non-state actors as it is applied to its contracting parties (Murphy, 2007).

**DETAINEE TREATMENT ACT OF 2005 AND JUDICIAL JURISDICTION**

Congress exercised its authority to make “Exceptions” and “Regulations” to the judiciary’s appellate jurisdiction when it passed the Detainee Treatment Act of 2005 (DTA). This act sought to minimize judicial jurisdiction over aliens detained at Guantanamo. Section 2241 of Title 28 (2010) was amended to restrict any “court, justice, or judge…to hear or consider…an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba.”

This legislation did not completely eliminate all forms of judicial oversight. The DTA (2005) gave the D.C. Court of Appeals “exclusive jurisdiction to determine the validity of any final decision of a Combatant Status Review Tribunal that an alien is properly detained as an enemy combatant.” In addition, alien defendants in capital cases and those sentenced to at least 10 years confinement were guaranteed review by this court. Review of sentences less than 10 years was not prohibited but could be granted at the court’s discretion (2005).

**INTERNATIONAL LAW: DETAINEE TREATMENT ACT OF 2005 AND MILITARY COMMISSIONS ACT OF 2006**

The DTA provides insight into the lack judicial authority to use international laws in rulings. The act explicitly states that when exercising jurisdiction over aliens at Guantanamo, the D.C. Court of Appeals is to ensure that the standards and procedures used to determine the detainee’s status and final determination are “consistent with the Constitution and laws of the United States” (Detainee Treatment Act, 2005). It cannot be assumed that Congress also intended for the D.C. Court of Appeals to consider if these standards and procedures were consistent with international laws.
The Military Commissions Act of 2006 (MCA) further supports the lack of judicial authority to use international laws in rulings. In this act, Congress outlines “grave breaches” of common Article 3 of Geneva Conventions that the U.S. is prohibited from engaging in (Military Commissions Act, 2006). Such “war crimes” include, but are not limited to, torture, murder, rape, sexual assault or abuse, and mutilation or maiming (Military Commissions Act, 2006). The inclusion of these crimes in this legislation should not be surprising to Americans because they are constitutional and statutory violations in the U.S. This shows that American laws and policies are relatively consistent with international laws.

The purpose of this inclusion in the MCA is to show this consistency. It is not to apply international laws to U.S. policies or judicial rulings. This is demonstrated in Section 5 which states that, “No person may invoke the Geneva Conventions to any protocols thereto in any habeas corpus…action or proceeding…as a source of rights in any court of the United States or its States or territories” (Military Commissions Act, 2006). More succinctly put, “No foreign or international source of law shall supply a basis for a rule of decision in the courts of the United States in interpreting the prohibitions enumerated” (Military Commissions Act, 2006). As international laws cannot be used by the detainees, they most certainly cannot be used by the D.C. Court of Appeals in their rulings.

**CONCLUSION**

It is the duty of the Supreme Court to ensure compliance with the Constitution and not to apply international laws. However, the post-9/11 Supreme Court has taken it upon itself to ensure that international laws are followed, even at the expense of the Constitution. The Court’s *Hamdan* (2006) ruling is one example of this occurrence. There was no constitutional or statutory reason why the Court should have found military commissions lacking. However, the Court did just that because it believed the commissions were inconsistent with international laws. The Court also changed the applicability of these international laws by ruling they protected non-state actors. This ruling not only defied precedent (*Sale v. Haitian Centers Council*, 1993), but it also went against Congress who had passed legislation that the Geneva Conventions were not applicable to those detained at Guantanamo (Military Commissions Act, 2006). This was just one of several examples of the Court’s usurpation of Congress’s constitutional authority to make laws.
This shows several examples of U.S. “allies” implementing policies that were not beneficial to the national security of the U.S. (Chapter 6). Those examples are few of many that demonstrate the U.S. should not constrain itself from implementing national security policies that are consistent with its Constitution but not necessarily consistent with international laws. That being said, this is exactly what the Supreme Court has repeatedly voted be done. When the Court rules that policies, such as the use of military commissions, should not be pursued because of their inconsistencies with international law, they are placing the international community ahead of the Constitution. This is not what the Founding Fathers would have wanted and it places U.S. national security in jeopardy.
CHAPTER 8

A THIRST FOR POWER

The previous chapter showed how the Supreme Court has allowed international laws to subvert the Constitution as a way to advance the personal agendas of the Court’s member justices. This chapter will demonstrate how in addition to the progressive ideologies that are advanced by such subversion, these rulings are demonstrative of justices seeking to increase their own power by increasing that of the Court.

The Detainee Treatment Act of 2005

The Supreme Court ruled in Boumediene v. Bush (2008) that the procedures outlined in the Detainee Treatment Act (DTA) were an “inadequate substitute for habeas corpus” (Boumediene v. Bush, 2008). This was a surprising ruling because the DTA was specifically tailored in response to the Court’s 2004 ruling in Hamdi v. Rumsfeld (2004). Hamdi was an American citizen detained at the Guantanamo detention facility as an enemy combatant. His father petitioned for a writ of habeas corpus on his behalf stating that as an American citizen his son was entitled to Constitutional protections (Hamdi v. Rumsfeld, 2004). The Supreme Court agreed, to a point.

The Court held that “a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government’s factual assertions before a neutral decisionmaker” (Hamdi v. Rumsfeld, 2004). Other than these two requirements, the Court ruled that military tribunals could be altered, such as by accepting hearsay as “the most reliable available evidence from the Government” (Hamdi v. Rumsfeld, 2004). The majority appeared to understand that normal procedures would not be conducive to dealing with post-9/11 terrorist threats when it opined that it would be constitutional to tailor these “enemy combatant proceedings…to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict” (Hamdi v. Rumsfeld, 2004).
With this ruling in mind, Congress passed the Detainee Treatment Act of 2005. This act implemented procedures to ensure Guantanamo detainees were “properly classified as enemy combatants and to permit each detainee the opportunity to contest such designation” (England, 2004). The *Hamdi* ruling had mandated that each detainee “receive notice of the factual basis for his classification” (*Hamdi v. Rumsfeld*, 2004). This was accomplished by providing each detainee with a personal representative and giving them access to relevant unclassified information used to classify them as an enemy combatant (Wolfowitz, 2004).

*Hamdi* also dictated that each detainee receive “a fair opportunity to rebut the Government’s factual assertions before a neutral decisionmaker” (*Hamdi v. Rumsfeld*, 2004). This was accomplished this by instituting Combatant Status Review Tribunals (CSRT) that consisted of “three neutral commissioned officers of the U.S. Armed Forces” (Wolfowitz, 2004) who had no previous connection with the detainee. The DTA (2005) went a step further when it provided that if determined to be an enemy combatant by the CSRT Guantanamo detainees could appeal this classification to the D.C. Court of Appeals.

In addition to these provisions, detainees were allowed to be present during their tribunals, except in matters that compromised national security, present evidence, testify in their defense, and question any witnesses (England, 2004). These provisions demonstrate that Congress not only met those requirements outlined in *Hamdi* (2004), but surpassed them.

**SUPREME COURT JURISDICTION OVER GUANTANAMO DETAINEES: *BOUMEDIENE V. BUSH***

The DTA’s surpassing of the *Hamdi* (2004) requirements makes the Court’s ruling in *Boumediene v. Bush* (2008) extremely curious. Congress had done more than what the Supreme Court had required and yet the Court was now ruling that it was not enough. If not the provisions, then what did the Supreme Court really have an issue with? The true issue the Court had with the DTA was that it limited its jurisdiction over aliens detained at Guantanamo.

Had the Supreme Court’s ruling truly been about the so-called inadequacies of the DTA provisions, the Court would have explained why such provisions did not “protect whatever due process or statutory rights petitioners may have” (*Boumediene v. Bush*, 2008). Instead, the Court omitted this information. This meant that no matter what action Congress took the Supreme Court could rule it unconstitutional without providing insight on how to
make it constitutional. This omission ensured the Supreme Court’s continued jurisdiction over these detainees.

The Supreme Court also ensured its continued jurisdiction by ruling that Guantanamo detainees “need not exhaust the review procedures in the Court of Appeals before proceeding with their habeas actions in the District Court” (*Boumediene v. Bush*, 2008). This is yet another intriguing ruling by the Court considering that American citizens in state custody must exhaust all remedies before petitioning for a writ of habeas corpus in federal courts (Title 28, 2010). Even then, Americans are limited to the district court whose jurisdiction they are in, whereas the Court now held that detainees may petition *any* district court (*Boumediene v. Bush*, 2008).

Perhaps the most telling aspect of this ruling was that the Supreme Court never gave the D.C. Court of Appeals the opportunity to hear a case under the DTA (*Boumediene v. Bush*, 2008). The DTA (2005) had given the Court of Appeals the authority not only to determine if the CSRT ruling was “consistent with the standards and procedures specified by the Secretary of Defense for Combatant Status Review Tribunals,” but also the authority to determine if the procedures that resulted in the ruling were “consistent with the Constitution and laws of the United States.” The Supreme Court did not let this happen. Had the D.C. Court of Appeals been allowed to hear a case under the DTA, there was the possibility it would rule the DTA’s provisions were adequate substitutes for habeas corpus. This would have gone against what the Court was now ruling and reinforced the DTA’s limitation on judicial jurisdiction over Guantanamo detainees.

**CONCLUSION**

Congress surpassed the requirements set forth by the Supreme Court in its *Hamdi* (2004) ruling when it passed the DTA. It then emplaced limitations on federal court authority over aliens detained at Guantanamo with the MCA. The Court chose to ignore this limitation when it granted certiorari to hear cases by such detainees. It was when ruling in the consolidated cases that comprised *Boumediene* (2008) that the Court ruled that the provisions outlined in the DTA were insufficient substitutions for habeas corpus. What were the additional requirements the Court ruled were necessary? Nobody knows. The majority of justices in this decision left this open thereby ensuring the Court’s continued jurisdiction over
aliens at Guantanamo. This guarantees that the Supreme Court can keep its hand in the policy-making arena which means it can dictate what national security policies the U.S. can pursue.
CHAPTER 9

CONCLUSION

PROPOSED CONGRESSIONAL ACTION

With a focus on international appeasement, rather than constitutional interpretation, justices have given alien fighters the right to petition for writs of habeas corpus in U.S. courts. These rulings go against precedent and are the result of a power-hungry Supreme Court with a progressive majority set on international appeasement. In light of this, Congress needs to recognize that it is not powerless to combat these rulings. It cannot allow the Supreme Court to continue to ignore and manipulate precedent to expand its authority and advance the majority’s progressive agendas.

The Senate can do its part by not confirming politically polar nominees to the Supreme Court. While the executive has the authority to nominate someone to the Supreme Court, it is only through the Senate that the nominee is confirmed (U.S. Constitution). It is therefore the responsibility of the Senate to only confirm nominees who will function “as guardian and interpreter of the Constitution” (“Supreme,” 2011), and not interpret the Constitution according to their own ideologies.

In the intermediate, when there are no nominees to confirm, Congress needs to exercise its Constitutional authority to “make all Laws which shall be necessary and proper,” (U.S. Constitution) and limit judicial authority over aliens detained at Guantanamo. Congress has already shown its willingness to do so, with the DTA and MCA, and it needs to maintain this vigilance. As progressives on the Supreme Court will likely find fault with such legislation, Congress must also find other ways to limit the Court’s jurisdiction. The National Defense Authorization Act of 2011, provides such an example.

This legislation did not address the Supreme Court’s rulings that aliens detained at Guantanamo got habeas privileges. It did, however, deal with Guantanamo detainees and where and how they are tried. This legislation prohibited funds from being used for the “transfer or release of individuals detained” at Guantanamo, and from being used to “modify or construct facilities in the United States to house detainees transferred” from Guantanamo.
(National Defense Authorization Act, 2011). It also placed more stringent requirements for the transfer of Guantanamo detainees to “foreign countries and other foreign entities” (National Defense Authorization Act, 2011). This legislation is proof that Congress is not powerless against a Supreme Court with more authority than was constitutionally intended.

**IMPLICATIONS**

In the Supreme Court case of *Rasul v. Bush* (2004), the Supreme Court held that the judicial branch had jurisdiction over aliens “held in a territory over which the United States exercises plenary and exclusive jurisdiction, but not ultimate sovereignty” (*Hamdi v. Rumsfeld*, 2004). The Court also asserted that the case of *Braden* (1973) meant that as long as the court had “jurisdiction over the custodian of the prisoner,” it could issue a writ of habeas corpus (*Rasul v. Bush*, 2004). Based on these “requirements,” it can be argued that these courts have jurisdiction over U.S. installations in combat zones, such as Iraq and Afghanistan. This would allow the judicial branch to insert itself into combat operations which would hinder the war effort. This fear and recognition is nothing new as it was addressed in the Court’s *Eisentrager* decision as a reason for not providing habeas privileges to combatants.

Such trials would hamper the war effort, and bring aid and comfort to the enemy. They would diminish the prestige of our commanders not only with enemies, but with wavering neutrals. It would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home. Nor is it unlikely that the result of such enemy litigiousness would be a conflict between judicial and military opinion highly comforting to enemies of the United States. Moreover, we could expect no reciprocity for placing the litigation weapon in unrestrained enemy hands. The right of judicial refuge from military action, which it is proposed to bestow on the enemy, can purchase no equivalent for benefit of our citizen soldiers. (*Johnson v. Eisentrager*, 1950)

This excerpt clearly shows that the *Eisentrager* Court understood the negative implications of making the writ of habeas corpus available to combatants. Such implications remain relevant and only time will tell how profound their impact will be on U.S. national security.
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APPENDIX

HABEAS CORPUS ACT OF 1679
31 Charles 2, c. 2 (England)

An act for the better securing the liberty of the subject, and for prevention of imprisonments beyond the seas.

[Assented to 27th May, 1679.]

WHEREAS great delays have been used by sheriffs, gaolers and other officers, to whose custody, any of the King's subjects have been committed for criminal or supposed criminal matters, in making returns of writs of habeas corpus to them directed, by standing out an alias and pluries habeas corpus, and sometimes more, and by other shifts to avoid their yielding obedience to such writs, contrary to their duty and the known laws of the land, whereby many of the King's subjects have been, and hereafter may be long detained in prison, in such cases where by law they are bailable, to their great charges and vexation.

II. For the prevention whereof, and the more speedy relief of all persons imprisoned for any such criminal or supposed criminal matters; be it enacted by the King's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority thereof. That whensoever any person or persons shall bring any habeas corpus directed unto any sheriff or sheriffs, gaoler, minister or other person whatsoever, for any person in his or their custody, and the said writ shall be served upon the said officer, or left at the gaol or prison with any of the under-officers, under-keepers, or deputy of the said officers or keepers, that the said officer or officers, his or their under-officers, under-keepers or deputies, shall, within three days after the service thereof as aforesaid, (unless the commitment aforesaid were for treason or felony, plainly and specially expressed in the warrant of commitment), upon payment or tender of the charges of bringing the said prisoner, to be ascertained by the Judge or Court that awarded the same, and endorsed upon the said writ, not exceeding twelve pence per mile, and upon security given by his own bond to pay the charges of carrying back the prisoner, if he shall be remanded by the Court or Judge to which he shall be brought according to the true intent of this present act, and that he will not make any escape by the way, make return of such writ; and bring, or cause to be brought, the body of the party so committed or restrained, unto or before the Lord Chancellor, or Lord Keeper of the great seal of England for the time being, or the Judges or Barons of the said Court from which the said writ shall issue, or unto and before such other person or persons before whom the said writ is made returnable, according to the command thereof; and shall then likewise certify the true causes of his detainer or imprisonment, unless the commitment of the said party be in any place beyond the distance of twenty miles from the place or places where such Court or person is or shall be residing; and if beyond the distance of twenty miles, and not above one hundred miles, then within the space of ten days, and if beyond the distance of one hundred miles, then within the space of twenty days, after such delivery aforesaid, and no longer.
III. And to the intent that no sheriff, gaoler or other officer, may pretend ignorance of the import of any such writ; be it enacted by the authority aforesaid, That all such writs shall be marked in this manner, *Per statutum tricesimo primo Caroli secundi Regis*, and shall be signed by the person that awards the same; and if any person or persons shall be or stand committed or detained as aforesaid, for any crime, unless for felony or treason plainly expressed in the warrant of commitment, in the vacation-time, and out of term, it shall and may be lawful to and for the person or persons so committed or detained (other than persons convict or in execution of legal process) or any one on his or their behalf, to appeal or complain to the Lord Chancellor or Lord Keeper, or any one of his Majesty's Justices, either of the one bench or of the other, or the Barons of the Exchequer of the degree of the coif; and the said Lord Chancellor, Lord Keeper, Justices or Barons or any of them, upon view of the copy or copies of the warrant or warrants of commitment and detainer, or otherwise upon oath made that such copy or copies were denied to be given by such person or persons in whose custody the prisoner or prisoners is or are detained, are hereby authorized and required, upon request made in writing by such person or persons, or any on his, her, or their behalf, attested and subscribed by two witnesses who were present at the delivery of the same, to award and grant an *habeas corpus* under the seal of such Court whereof he shall then be one of the Judges, to be directed to the officer or officers in whose custody the party so committed or detained shall be, returnable *immediate* before the said Lord Chancellor or Lord Keeper or such Justice, Baron or any other Justice or Baron of the degree of the coif of any of the said Courts; and upon service thereof as aforesaid, the officer or officers, his or their under-officer or under-officers, under-keeper or under-keepers, or their deputy, in whose custody the party is so committed or detained, shall, within the times respectively before limited, bring such prisoner or prisoners before the said Lord Chancellor or Lord Keeper, or such Justices, Barons or one of them, before whom the said writ is made returnable, and in case of his absence before any other of them, with the return of such writ, and the true causes of the commitment and detainer; and thereupon, within two days after the party shall be brought before them, the said Lord Chancellor or Lord Keeper, or such Justice or Baron before whom the prisoner shall be brought as aforesaid, shall discharge the said prisoner from his imprisonment, taking his or their recognizance, with one or more surety or sureties, in any sum according to their discretions, having regard to the quality of the prisoner and nature of the offense, for his or their appearance in the Court of the King's bench the term following, or at the next assizes, sessions or general gaol-delivery of and for such county, city, or place where the commitment was, or where the offense was committed, or in such other court where the said offense is properly cognizable, as the case shall require, and then shall certify the said writ with the return thereof, and the said recognizance or recognizances unto the said Court where such appearance is to be made; unless it shall appear unto the said Lord Chancellor or Lord Keeper or Justice or Justices, or Baron or Barons, that the party so committed is detained upon a legal process, order or warrant, out of some court that hath jurisdiction of criminal matters, or by some warrant signed and sealed with the hand and seal of any of the said Justices or Barons, or some Justice or Justices of the Peace, for such matters or offenses for the which by the law the prisoner is not bailable.

IV. Provided always, and be it enacted, that if any person shall have willfully neglected by the space of two whole terms after his imprisonment, to pray a *Habeas Corpus* for his enlargement, such person so willfully neglecting shall not have any *Habeas Corpus* to be granted in vacation time, in pursuance of this act.
V. And be it further enacted by the authority aforesaid, that if any officer or officers, his or their under-officer or under-officers, under-keeper or under-keepers, or deputy, shall neglect or refuse to make the returning aforesaid, or to bring the body or bodies of the prisoner or prisoners according to the command of the said writ, within the respective times aforesaid, or upon demand made by the prison or person in his behalf, shall refuse to deliver, or within the space of six hours after demand shall not deliver to said person so demanding, a true copy of the warrant or warrants of commitment and detainer of such prisoner, which he and they are hereby required to deliver accordingly; all and every the head gaolers and keepers of such prisoner, and such other person in whose custody the prisoner shall be detained, shall for the first offense forfeit to the prisoner or party grieved the sum of one hundred pounds; and for the second offense the sum of two hundred pounds, and shall and is hereby made incapable to hold or execute his said office; the said penalties to be recovered by the prisoner or party grieved, his executors or administrators, against such offender, his executors, or administrators, by any action of debt, suit, bill, plaint or information, in any of the King’s Courts at Westminster, wherein no essoin, protection, privilege, injunction, wager of law, or stay of prosecution by non vult uterius prosequi or otherwise, shall be admitted or allowed, or any more than on one imparlance; and any recovery or judgment at the suit of any party grieved, shall be a sufficient conviction for the first offense; and any after recovery or judgment at the suit of a party grieved for any offense after the first judgment, shall be a sufficient conviction to bring the officers or person within the said penalty for the second offense.

VI. And for the prevention of unjust vexation by reiterated commitments for the same offense; be it enacted by the authority aforesaid, that no person or persons which shall be delivered or sit at large upon any Habeas Corpus shall at any time hereafter be again imprisoned or committed for the same offense by any person or persons whatsoever, other than by the legal order and process of such Court wherein he or they shall be bound by recognizance to appear, or other Court having jurisdiction of the cause; and if any other person or persons shall knowingly, contrary to this act, recommit or imprison, or knowingly procure or cause to be recommitted or imprisoned, for the same offense or pretended offense, any person or persons delivered or set at large as aforesaid, or be knowingly aiding or assisting therein, then he or they shall forfeit to the prisoner or party grieved the sum of five hundred pounds; any colourable pretense or variation in the warrant or warrants of commitment notwithstanding, to be recovered as aforesaid.

VII. Provided always, and be it further enacted, that if any person or persons shall be committed for high treason or felony, plainly and specially expressed in the warrant of commitment, upon his prayer or petition in open Court the first week of the term, or first day of the Sessions of Oyer and Terminer, or general gaol delivery to be brought to his trial, shall not be indicted some time in the next term, Session of Oyer and Terminer, or general gaol delivery, after such commitment; it shall and may be lawful to and for the Judges of the Court of King’s Bench and Justices of Oyer and Terminer or general gaol delivery, and they are hereby required upon motion to them made in open Court the last day of the term, Session or gaol delivery, either by the prisoner or any one in his behalf, to set at liberty the prisoner upon bail, unless it appear to the Judges and Justices upon oath made that the witnesses for the King could not be produced the same term, Session or general gaol delivery; and if any person or persons committed as aforesaid, upon his prayer or petition in open Court the first week of the term or first day of the Session of Oyer and Terminer and general gaol delivery, to be brought to his trial, shall not be indicted and tried the
second term, Session of *Oyer* and *Terminer* or general gaol delivery, after his commitment, or upon his trial shall be acquitted, he shall be discharged from his imprisonment.

**VIII.** Provided always, that nothing in this act shall extend to discharge out of prison any person charged in debt, or other action, or with process in any civil cause, but that after he shall be discharged of his imprisonment for such his criminal offense, he shall be kept in custody according to the law, for such other suit.

**IX.** Provided always, and be it enacted by the authority aforesaid, that if any person or persons, subjects of this realm, shall be committed to any prison, or in custody of any officer or officers whatsoever, for any criminal or supposed criminal matter, that the said person shall not be removed from the said prison and custody into the custody of any other officer or officers; unless it be by *Habeas Corpus* or some other legal writ; or where the prisoner is delivered to the constable or other inferior officer to carry such prisoner to some common gaol; or where any person so sent by order of any Judge or Assize or Justice of the Peace, to any common workhouse or house of correction; or where the prisoner is removed from one prison or place to another within the same county, in order to his or her trial or discharge in due course of law; or in case of sudden fire or infection, or other necessity; and if any person or persons shall, after such commitment aforesaid, make out and sign, or countersign any warrant or warrants for such removal aforesaid, contrary to this act; as well he that makes or signs or countersigns such warrant or warrants to as the officer or officers that obey or execute the same, shall suffer and incur the pains and forfeitures in this act before mentioned, both for the first and second offenses respectively, to be recovered in manner aforesaid by the party grieved.

**X.** Provided also, and be it further enacted by the authority aforesaid, that it shall and may be lawful to and for any prisoner and prisoners as aforesaid, to move and obtain his or their *Habeas Corpus*, as well out of the High Court of Chancery or Court of Exchequer, as out of the Courts of King’s Bench or Common Pleas, or either of them; and if the said Lord Chancellor or Lord Keeper, or any Judge or Judges, Baron or Barons for the time being of the degree of the coif, of any of the Courts aforesaid, in the vacation time, upon such of the copy or copies of the warrant or warrants of commitment or detainer, or upon oath made that such copy or copies were denied as aforesaid, shall deny any writ of *Habeas Corpus* by this act required to be granted, being moved for as aforesaid, they shall severally forfeit to the prisoner or party grieved the sum of five hundred pounds, to be recovered in manner aforesaid.

**XI.** And be it declared and enacted by the authority aforesaid, that an *Habeas Corpus*, according to the true intent and meaning of this act, may be directed and seen in any county Palatine, the Cinque Ports, or other privileged places within the Kingdom of *England*, dominion of *Wales*, or town of *Berwick upon Tweed*, and the islands of *Jersey* and *Guernsey*; any law or usage to the contrary notwithstanding.

**XII.** And, for preventing illegal imprisonments in prisons beyond the seas, be it further enacted by the authorities aforesaid that no subject of this realm that now is, or hereafter shall be an inhabitant or resiant Of this Kingdom of *England*, dominion of *Wales*, or town of *Berwick upon Tweed*, shall or may be sent prisoner into *Scotland*, *Ireland*, *Jersey*, *Guernsey*, *Tangier*, or into forts, garrisons, islands, or places beyond the seas, which are or at any time hereafter shall be
within or without the dominions of His Majesty, his heirs, or successors; and that every such imprisonment is hereby enacted and adjudged to be illegal; and that if any of the said subjects now is or hereafter shall be so imprisoned, every such person and persons so imprisoned, shall and may, for every such imprisonment, maintain, by virtue of this act, an action or actions of false imprisonment, in any of His Majesty’s Courts of record, against the person or persons by whom he or she shall be so committed, detained, imprisoned, sent prisoner, or transported, contrary to the true meaning of this act, and against all or any person or persons that shall frame, contrive, write, seal, or countersign any warrant or writing for such commitment, detainer, imprisonment, or transportation, or shall be advising, aiding, or assisting in the same, or any of them; and the plaintiff in every such action shall have judgment to recover his treble costs, besides damages, which damages so to be given shall not be less than five hundred pounds; in which action no delay, stay, or stop of proceeding by rule, order, or command, nor no injunction, protection, or privilege whatsoever, nor any more than one imparlance, shall be allowed, excepting such rule of the Court wherein the action shall depend, made in open Court, as shall be thought in justice necessary, for special cause to be expressed in the said rule; and the person or persons who shall knowingly frame, contrive, write, seal or countersign any warrant for such commitment, detainer, or transportation, or shall so commit, detain, imprison, or transport any person or persons contrary to this act, or be any way advising, aiding, or assisting therein, being lawfully convicted thereof, shall be disabled from thenceforth to bear any office of trust or profit within the said realm of England, dominion of Wales, or town of Berwick upon Tweed, or any of the islands, territories, or dominions thereunto belonging, and shall incur and sustain the pains, penalties and forfeitures limited, or denied, and provided, in and by the statute of Provision and Praemunire made in the sixteenth year of King Richard the Second; and be incapable of any pardon from the King, his heirs or successors, of the said forfeitures, losses or disabilities or any of them.

XIII. Provided always, that nothing in this act shall extend to give benefit to any person who shall by contract in writing agree with any merchant or owner of any plantation, or other person whatsoever, to be transported to any parts beyond the seas, and receive earnest upon such agreement, although that afterwards such person shall renounce such contract.

XIV. Provided always, and be it enacted, that if any person or persons, lawfully convicted of any felony, shall in open Court, pray to be transported beyond the seas, and the Court shall think fit to leave him or them in prison for that purpose, such person or persons may be transported into any parts beyond the seas; this act, or anything therein contained to the contrary notwithstanding.

XV. Provided also, and be it enacted, that nothing herein contained shall be deemed, construed, or taken, to extend to the imprisonment of any person before the first day of June, one thousand six hundred seventy and nine, or to any thing advised, procured or otherwise done, relating to such imprisonment; any thing herein contained to the contrary notwithstanding.

XVI. Provided also, that if any person or persons at any time resiant in this realm, shall have committed any capital offense in Scotland or Ireland, or any of the islands, or foreign plantation of the King, his heirs or successors, where he or she ought to be tried for such offense, such person or persons may be sent to such place, there to receive such trial, in such manner as the
same might have been used before the making of this act; any thing herein contained to the contrary notwithstanding.

XVII. Provided also, and be it enacted, that no person or persons shall be sued, impleaded, molested, or troubled for any offense against this act, unless the party offending be sued or impleaded for the same within two years at the most after such time wherein the offense shall be committed, in case the party grieved shall not be then in prison; and if he shall be in prison, then within the space of two years after the decease of the person imprisoned, or his or her delivery out of prison, which shall first happen.

XVIII. And, to the intent no person may avoid his trial— or general gaol delivery by procuring his removal before the Assizes, at such time as he cannot be brought back to receive his trial there, be it enacted, that after the Assizes proclaimed for that county where the prisoner is detained, no person shall be removed from the common gaol under any Habeas Corpus granted in pursuance of this act, but upon any such Habeas Corpus shall be brought before the Judge of Assizes in open Court, who is thereupon to do what to justices shall appertain.

XIX. Provided nevertheless, that after the Assizes are ended, any person or persons detained, may have his or her Habeas Corpus according to the direction and intention of this act.

XX. And be it also enacted by the authority aforesaid, that if any information, suit, or action shall be brought or exhibited against any person or persons for any offense committed or to be committed against the form of this law, it shall be lawful for such defendant to plead the general issue, that they are not guilty, or that they owe nothing, and to give such special matter in evidence to the jury that shall by the same, which matter being pleaded had been good and sufficient matter in law to have discharged the said defendant or defendants against the said information, suit, or action, and the said matter shall be then as available to him or them, to all intents and purposes, as if he or they had efficiently pleaded, set forth, or alleged, the same matter in bar or discharge of such information, suit, or action.

XXI. And because many times persons charged with petty treason or felony, or as acceptances thereunto, are committed upon suspicion only, whereupon they are bailable, or not, according as the circumstances making out that suspicions are more or less weighty, which are best known to the Justices of Peace that committed the persons, and have the examinations before them, or to other Justices of the Peace in the county; be it therefore enacted that when any person shall appear to be committed by any Judge or Justice of the Peace, and charged as accessory before the fact, to any petty treason or felony, or upon suspicion thereof, or with suspicion of petty treason or felony, which petty treason or felony shall be plainly and specially expressed in the warrant of commitment, that such person shall not be removed or bailed by virtue of this act, or in any other manner than they might have been before the making of this act.