



Written by [Thomas R. Eddlem](#) on January 21, 2011

Obama to Pursue Unconstitutional Military Commissions

The Obama administration is planning to renew the Bush administration's idea of "military commissions" trials for Guantanamo detainees and other suspects long imprisoned in the so-called "war on terrorism."



The decision comes just days after the U.S. Supreme Court [let die](#) a U.S. district court ruling that Guantanamo detainee Mohammed al-Adahi be set free. Yemeni citizen al-Adahi, who has been detained in Guantanamo Bay prison since January 2002 without charges, was ordered set free by a district court, but an appeals court reversed the order. When the Supreme Court refused to hear the case, it allowed the appeals court decision to continue the detention without trial to stand. So al-Adahi will continue to be detained without charges "legally."

President Obama — who [pledged](#) during his first week as President to close the Guantanamo Bay prison within one year — has yet to do so. Moreover, the same candidate who [criticized President Bush for indefinitely detaining terror suspects without charges or trial](#) now more or less openly admits he'll be doing precisely the same thing.

A military commission is a special court system outside the ordinary civil court and the Uniform Code of Military Justice that is set up to try individuals accused of war crimes. Nowhere is it mentioned in the U.S. Constitution, except where the [Sixth Amendment](#) prohibits the creation of these courts after the fact by requiring that a court's "district shall have been previously ascertained by law." But military commissions have been created by the executive branch from time to time throughout history, usually with the inability of defendants to prove their case. Under the Bush administration's military commissions established by the [Military Commissions Act of 2006](#), many U.S. military attorneys [resigned in protest](#) after they were unable to see evidence against their clients, "confessions" obtained using torture were employed in the courts, or the prosecutors thought the process was blatantly unfair to the defendants. The Bush military commissions were later declared unconstitutional by the U.S. Supreme Court in the case [Boumediene v. Bush](#).

As one might expect, the ACLU is furious at the Obama decision. "Trying Guantánamo detainees in a system that is designed to ensure convictions, not fair trials, strikes a major blow to any efforts to restore the rule of law," the American Civil Liberties Union wrote in [a press release](#) January 20.

On the presumably opposite side of the political spectrum, neo-conservatives are sure to begin gloating at the Obama administration's 180-degree about-face. The [neo-conservative gospel](#) during the Bush administration was that the President has the power to set up whatever courts it wants in order to convict "war criminals." Exhibit A in their case (and now, presumably, Obama's case) was the U.S.



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Supreme Court's [Johnson v. Eisentrager](#) case, where the New Deal-packed Supreme Court allowed a military commission to convict several Nazi spies and saboteurs shortly after World War Two. The court ruled that "a nonresident enemy alien has no access to our courts in wartime."

Justice Scalia's [dissent](#) in the [Boumediene](#) case (also highly regarded by neo-cons) stressed the precedent of the Supreme Court's *Eisentrager* case. One would think that a so-called "conservative" would look askance at a Roosevelt-influenced Supreme Court that strays from the text of the Constitution. After all, if all you need to do is to get a Supreme Court precedent to agree that an action is constitutional, you don't have much of a Constitution at all. Remember, this is the same Supreme Court that [declared that innocent Japanese-Americans could be removed from their homes and put into concentration camps](#) for the duration of the war.

Scalia [concluded](#) — like *Eisentrager* — that "habeas corpus was not available to aliens abroad, as Judge Randolph's thorough opinion for the court below detailed. It is entirely clear that, at English common law, the writ of habeas corpus did not extend beyond the sovereign territory of the Crown." But, of course, despite the precedents, you will find no such territorial limitation on the right of habeas corpus in the actual text of the U.S. Constitution. Only with "interpretation" by the courts that undoes the plain language of the Constitution and the Bill of Rights can one twist the U.S. Constitution to say that the federal government may lock a man up without trial for life (or create a [kangaroo court](#) trial for him) legally.

As background, it's important to stress that the right of someone not to be imprisoned forever without a trial does not spring from the Constitution; it comes from God, which the Declaration of Independence notes when it declares that we are "endowed by our Creator" with "inalienable rights." The Constitution simply protects those rights that God has already granted every human being. In the case of the right of *habeas corpus* (the right not to be imprisoned without trial or charges), the [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." And while the original Constitution allows Congress to suspend *habeas corpus* by passing a law during rebellion or invasion, the [Bill of Rights](#) reasserts the right of *habeas corpus* in a more unequivocal way. The Fifth Amendment [asserts](#), "No person shall be held to answer for a capital, or otherwise infamous crime... nor be deprived of life, liberty, or property, without due process of law." And perhaps most importantly, the Sixth Amendment [requires](#) that:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Nobody would contest that Presidents can create these military commission kangaroo courts under Supreme Court precedents. But those precedents don't change the words of the Constitution and the Bill of Rights, nor do they make the creation of a class of [Dredd Scott-style non-persons](#) any less contemptible to subsequent generations who will look upon the decision by the Bush and Obama administrations with disdain.



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