

# Can the Constitution be saved?

Written by

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The horrors of Sept. 11, 2001, created many American widows. Among them is Kristen Breitweiser, a lawyer who also mourns "The Sad Defeat of our Constitution" (Huffington Post, April 4) after President Obama decided not to prosecute the alleged leading killers "in an open court of law." She added, "I wonder whether it wasn't just the steel towers that were brought down and incinerated on 9/11 but the yellowed pages of our U.S. Constitution as well."

Those of us acquainted with the Constitution also are aware of how much we continue to lose from our founding self-government document that gave us a choice to be a free people. For example, far from Guantanamo Bay's military commissions, here at home our constitutional guarantee of personal privacy is hanging by a thread.

During the Bush-Cheney escalation of unbridled executive power, certain Supreme Court justices tried actively to guard the Constitution, as when President Bush unilaterally took over national security because, he said: "You need to have a

president who understands you can't win this war with legal papers." (ABC's "Nightline" May 13, 2004)

President Obama, also having shelved more of the Constitution, agrees with his predecessor.

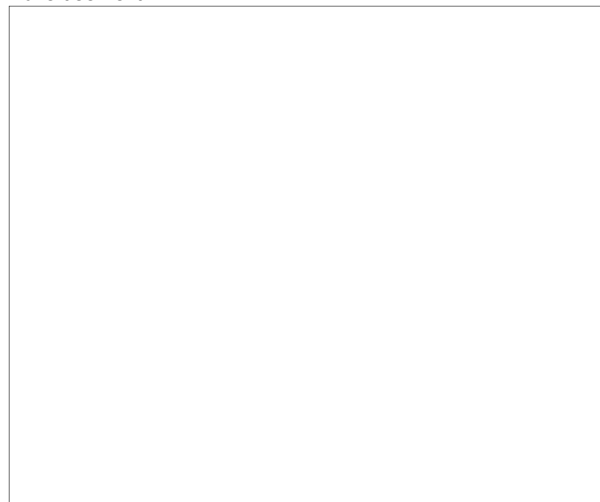
But in *Hamdi v. Rumsfeld*, the 2004 Supreme Court ruled that Yaser Hamdi -- an American citizen held without charges or access to a lawyer in a Navy brig here -- had a constitutional right to appear before an American judge.

Writing for an 8-to-1 court, Sandra Day O'Connor famously (for a time) said: "A state of war is not a blank check for the president when it comes to the rights of the nation's citizens."

But what about the noncitizens we imprison as suspected terrorists?

An answer came in June 2008 from a deeply divided Supreme Court in *Boumediene v. Bush*, ruling that suspected

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terrorist noncitizen prisoners at Guantanamo Bay had the right under "the Great Writ," habeas corpus, to make our government show that they were lawfully held in their cells.

Justice Anthony Kennedy, writing for the majority, wanted not only Americans but also the world to know: "The laws and the Constitution are designed to survive, and remain in force, in extraordinary times."

When our Constitution was taking form, Thomas Jefferson insisted to James Madison that habeas corpus be in the very body of the Constitution. And in a 1798 letter to A.H. Rowan, Jefferson declared: "The Habeas Corpus secures every man here, alien or citizen, against everything which is not law. ... Freedom of the person under the protection of habeas corpus I deem (one of the) essential principles of our government."

This applies to anyone, citizen or not, in custody under American law, no matter what President Bush and President Obama decree.

But despite Jefferson and the Boumediene Supreme Court victory for habeas corpus, the Great Writ steadily has been shriveled by the D.C. Circuit appellate court in Washington and then the Supreme Court -- with the support of President Obama and his so-called Justice Department. As Jane Mayer of the New Yorker says hard and plain, this administration is "incapable of standing up to the political passions still stirred by the threat of terrorism." ("The KSM Trial Decision," April 4, 2011)

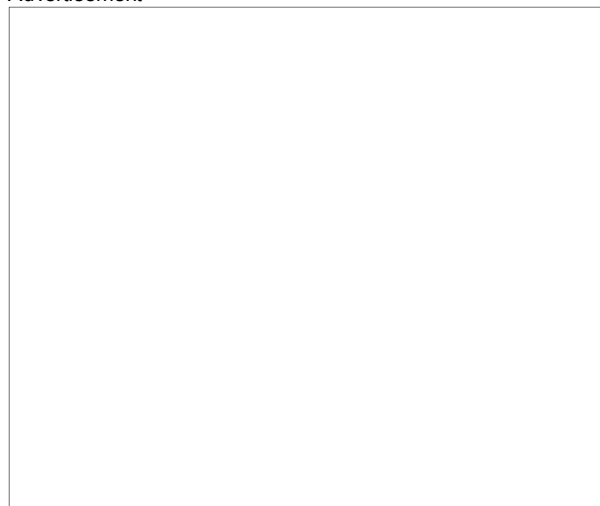
In Andy Worthington's "How The Supreme Court Gave Up On Guantanamo" (pubrecord.org, April 14), he first notes the D.C. District Court (a level below the D.C. Circuit Court) had generally decided that a habeas corpus petition from a Gitmo inmate could be denied if he were part of "the command structure" of al-Qaida and/or the Taliban.

This happened because in Boumediene, the Supreme Court had not clearly defined those prisoners eligible for habeas. In any case, the ever-vigilant Worthington documents that since January 2010, "D.C. Circuit judges... have attacked the 'command structure' argument insisting that (only) being 'part of' al-Qaida and/or the Taliban is sufficient to justify ongoing detention for life."

Habeas corpus denied.

What these D.C. Circuit Court appellate judges will settle for to deny habeas is just "some evidence" that the petitioner was part of these terrorist organizations.

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Jefferson would have strongly dissented against such unconstitutional vagueness.

Worthington quoted an angry New York Times editorial reminding the Supreme Court that "Alexander Hamilton called 'arbitrary imprisonments' by the executive 'the favorite and most formidable instruments of tyranny.'" Worthington sternly added the Supreme Court should remind the D.C. Circuit Courts "which one leads the federal judicial system and which has a solemn duty to follow."

If this "contemptuous approach" to the Supreme Court's historic decision in Boumediene by the lower appellate courts continues, Worthington predicts that "having gutted habeas corpus of all meaning in rulings over the last 15 months, the D.C. Circuit Court will be allowed to continue deciding that every prisoner still held at Guantanamo should -- and very possibly will -- be held forever, regardless of whether they were (previously) cleared for release by other judges, or by the President's own interagency Guantanamo Review Task Force."

President Obama is so busy running for re-election that I doubt that he cares about speaking up for the Boumediene decision because, after all, how many voters know about Boumediene -- or "the Great Writ."

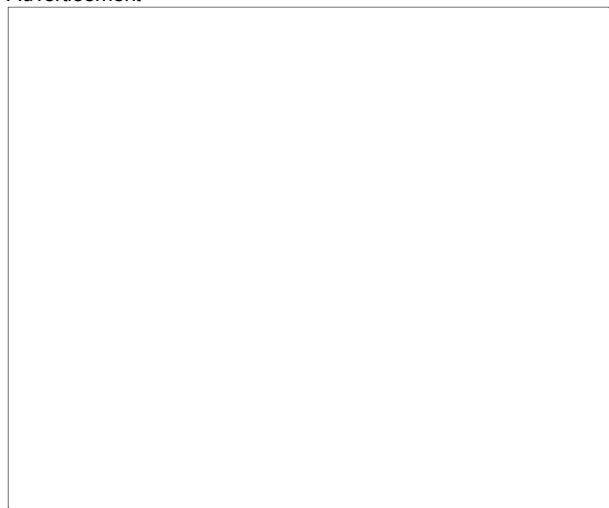
On April 4, the protesting Sept. 11 widow Kristen Breitweiser wrote, "I recognize that there are many, many other things for Americans to be upset with today, but I hope everyone can take a second to contemplate this decision about trying the

9/11 conspirators at Guantanamo and recognize what it says about President Obama, the Department of Justice and the United States" -- and the effect on the Constitution.

Jefferson told us of "the eternal and unremitting force of habeas corpus laws." Little did he know.

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