



11350 Random Hills Road, Suite 800, Fairfax, Virginia 22030 Phone (703) 934-6101 Fax (703) 352-3678

[fff@fff.org](mailto:fff@fff.org) [www.fff.org](http://www.fff.org)

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## **A New Year Message to Barack Obama: Free the Guantánamo Uighurs** **by Andy Worthington**

The omens have never been good for the 17 Uighurs in Guantánamo, even though they have justice on their side. Refugees from Chinese oppression who had sought shelter in Afghanistan, only to be captured and sold to U.S. forces as “terror suspects”, the 17 men were the first Guantánamo prisoners to be cleared of being “enemy combatants,” after an appeals court [demolished](#) the supposed evidence against one of the men in June, and the government abandoned its claims against the other 16.

The Uighurs then secured a [resounding victory](#) at the start of October, when District Court Judge Ricardo Urbina ruled that their continued detention in Guantánamo was unconstitutional, and ordered their release into the United States, as they cannot be returned to China because of fears that they will be tortured, and no other country had been found that was prepared to accept them. When the government appealed Judge Urbina’s ruling, however, only one of the three appeal court judges dealing with the case — Judge Judith W. Rogers, a Bill Clinton nominee — understood the lies and distortions that the government had put together to prevent their release.

Judicial nominees do not always ape the opinions of those who appoint them, of course. Their independence — and their desire to follow legal precedents rather than political whims — often infuriates those who appointed them, but it would be fair to say, I think, that judges’ conservative or liberal tendencies often match those of the Presidents who appointed them.

In November, when Judge Richard Leon, a Bush appointee, ordered five Bosnian Algerians to be [released from Guantánamo](#) because the government had failed to substantiate its allegations against them, there was genuine surprise, but the decision in the case of these 17 other innocent men at Guantánamo was all too predictable, as two other Bush nominees, Karen LeCraft Henderson and A. Raymond Randolph, proved themselves unable to notice the government’s dissembling, and endorsed whatever nonsense was pushed their way.

And nonsense it was, as Judge Rogers explained, on October 20, in a dissenting opinion ([PDF](#)), when her colleagues first approved the government’s request for a stay on the Uighurs’ release pending an appeal. Although the appeal took place on November 24, the verdict has not

yet been announced, but is expected to endorse the administration's self-proclaimed right to extend the Uighurs' imprisonment in Guantánamo indefinitely.

In her dissenting opinion, Judge Rogers drew on [\*Boumediene v. Bush\*](#), the Supreme Court case last June that revived the prisoners' habeas corpus rights (first granted in June 2004), after Congress had attempted to remove them in two flawed pieces of legislation (the Detainee Treatment Act of 2005, and the Military Commissions Act of 2006). She noted that the Supreme Court not only granted Guantánamo prisoners "the privilege of habeas corpus to challenge the legality of their detention," but also held that "a court's power under the writ must include 'authority to ... issue ... an order directing the prisoner's release.'"

Noting that this was "exactly" what Judge Urbina had done, "subject to conditions to be determined by the district court in light of the views of the Department of Homeland Security and proffers regarding housing and supervision made by their counsel," Judge Rogers pointed out, unambiguously, that "The court's release order was based on findings that are either uncontested by the government or clearly supported by the record." She noted that the government "had filed no returns to the writs filed by ten of the petitioners, and the returns in response to the remainder consisted only of the hearing records from the Combatant Status Review Tribunals" that had been "found wanting" in *Parhat v. Gates*, the case in June in which an appeals court had derided the government's supposed evidence against one of the men, Huzaifa Parhat, for being akin to a nonsense poem by Lewis Carroll, the author of *Alice's Adventures in Wonderland*.

Dealing a final blow to the government's unprincipled and two-faced claims that, although cleared of being "enemy combatants," the men remained a threat to national security because they had received weapons training, Judge Rogers added, "Although expressly offered the opportunity by the district court, the government presented no evidence that the petitioners pose a threat to the national security of the United States or the safety of the community or any person."

Moving on to the government's attempts to claim that "under the separation of powers the decision on whether to admit the petitioners into the United States 'rests solely with the political branches,'" and that "immigration laws preclude a habeas court from ordering the release of an inadmissible alien into the United States," Judge Rogers stated that the first argument "misstates the law," because "the Supreme Court has made clear that, in at least some instances, a habeas court can order an alien released with conditions into the country despite the wish of the Executive to detain him indefinitely," and "It is thus both inadequate and untrue to assert that the political branches have 'plenary powers over immigration.'"

Dealing with the second argument — that the Uighurs were "inadmissible aliens" either because they had been "engaged in 'terrorist activity'" or were "members of, or received weapons training from, a terrorist group" — Judge Rogers reiterated that the government was attempting to defy reality, because it "did not proffer evidentiary support for this argument in the district court," and also explained that, even if this were not the case, the government's argument was

“problematic,” because the Supreme Court “had held that even inadmissible aliens cannot be held indefinitely under the normal immigration detention status,” whereas the Uighurs “have been imprisoned for over six years.”

Judge Rogers also noted that the government had “made no showing” that the Attorney General had “certified” the Uighurs for “special alien-terrorist provision, as required by that statute,” and pointed out that it had, instead, attempted to rely on the same discredited CSRTs that the *Parhat* judges had found to “lack sufficient indicia of ... reliability.”

She also explained that “interpreting the immigration statutes to bar release from Guantánamo robs the petitioners’ habeas right [as granted in *Boumediene*] of meaning,” and chided the government for misinterpreting a 1953 case, *Shaughnessy v. US ex rel. Mezei*, in which the Supreme Court ruled that “inadmissible aliens have no constitutional rights because they are outside the territory of the United States,” by explaining that, in *Boumediene*, the Supreme Court “explicitly recognized that Guantánamo detainees have a constitutional right to habeas,” and adding that “*Mezei* sought admission to the United States of his own will while these petitioners require admission because they were abducted by bounty hunters, brought by force to Guantánamo, and imprisoned as enemy combatants, which the government has conceded the petitioners were not.”

In a final salvo, Judge Rogers tackled the government’s attempts to claim that allowing the Uighurs to enter the United States would cause “irreparable harm,” by returning to the lack of any evidence against them. Noting that, “Having failed to file returns for many of the petitioners or to proffer evidence to the district court, the government can point to no evidence of dangerousness,” she added that “such record as exists suggests the opposite,” pointed out that the court “found there is no evidence petitioners harbor hostility toward the United States,” and highlighted a significant passage from *Boumediene* to wrap up her dissent:

[T]he writ of habeas corpus is itself an indispensable mechanism for monitoring the separation of powers. The test for determining the scope of this provision must not be subject to manipulation by those whose power it is designed to restrain.

Judge Rogers’ dissent clearly highlights the government’s shameful attempts to disguise a catalog of grievous errors through tortuous legal maneuvering, to shirk all responsibility for depriving 17 innocent men of their liberty for seven years, and to dream up justifications for continuing to hold them indefinitely. However, the most distressing result of the craven capitulation of Judges Henderson and Randolph to the government’s last-ditch demonstration of executive arrogance was highlighted by Erin Louise Palmer, a member of the International Human Rights Committee of the American Bar Association’s Section of International Law, [on a blog](#) maintained by members of the Committee.

Noting that Judge Randolph had written the Court of Appeal's decisions in *Al Odah v. United States*, *Hamdan v. Rumsfeld*, and *Boumediene v. Bush*, in which the Court of Appeals had deprived Guantánamo prisoners of their habeas rights and had upheld the validity of the Military Commissions as a suitable trial system, Palmer pointed out that the Supreme Court "disagreed with each of these decisions." From this a clear inference can be drawn that the Uighurs' case will not only be taken up by the Supreme Court, but will result in another bloody nose for Judges Henderson and Randolph.

The only problem with this scenario, of course, is that it leaves the Uighurs stranded in Guantánamo with no notion of when they will ever be released. As I explained in a [recent article](#), the only other solution is for Barack Obama to step in and order the men's release. Given the disgraceful propaganda peddled by the outgoing administration, this may not be a popular move, but it is required not only to emphasize that the new government is committed to upholding the U.S. Constitution, but also as an important gesture to America's allies, to encourage them to accept other prisoners, cleared for release for many years, who, like the Uighurs, cannot be repatriated because of international treaties preventing the return of foreign nationals to countries where they face the risk of torture.

By freeing the Uighurs to the care of the communities in Washington D.C. and Tallahassee, Florida, who have already prepared [detailed plans](#) for their welcome, President Obama can show the leadership, respect for the law and moral courage that is demanded by the plight of Uighurs and that is, moreover, necessary for him to fulfill his promise to [close Guantánamo](#), and to begin the long process of addressing the many human rights abuses perpetrated by the Bush administration.

*Andy Worthington is the author of [The Guantánamo Files: The Stories of the 774 Detainees in America's Illegal Prison](#) (published by Pluto Press). Visit his website at: [www.andyworthington.co.uk](http://www.andyworthington.co.uk).*

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