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Court Allows Return of Guantánamo Prisoners to Torture **by Andy Worthington**

As [rumors swirl](#), suggesting that a number of the remaining 13 Uighur (Muslims from China's Xinjiang province) prisoners in Guantánamo may soon be [relocating](#) to the tiny Pacific island state of Palau, a court case relating to nine of these men threatens to hurl a number of other prisoners in Guantánamo, who have also been cleared for release, into a new maelstrom of uncertainty regarding their future, by removing long-standing injunctions preventing their return to countries where they face the risk of torture, or removing other requirements that, in anticipation of a transfer, the government provides their lawyers with 30 days' warning.

The trigger for this sudden shifting of legal protections for [some of the most vulnerable prisoners in Guantánamo](#) (from countries with notoriously poor human rights records, including [Algeria](#), [Libya](#), [Tunisia](#), and Uzbekistan) was the response to [a ruling last October](#), by District Court Judge Ricardo Urbina, after the government (reeling from [a shocking court defeat](#) in June) conceded that it could no longer claim that the Uighurs were "enemy combatants." Judge Urbina ruled that they should be relocated to the U.S. mainland, because the government conceded that it was unsafe to return them to China, because no other country had been found that would accept them, and because continuing to hold them in Guantánamo was unconstitutional.

The government disagreed, and appealed Judge Urbina's ruling, and when the Court of Appeals came to review the case, a panel of three judges — including Judge A. Raymond Randolph, a man noted for endorsing every Bush administration policy regarding the "war on terror" that was subsequently overturned by the Supreme Court — [reversed Judge Urbina's ruling](#), deciding that the courts had no business interfering in immigration policies that were the preserve of the Executive.

The judges were seemingly unmoved that this would leave the Uighurs (and, very possibly, others in Guantánamo) with no means of leaving the prison, and that it stripped [the Supreme Court's ruling](#) in June 2008, recognizing the prisoners habeas corpus rights, of all practical meaning, if it was not possible for judges to order their release. In the judges' words,

however, “the political branches have the exclusive power ... to decide which aliens may, and which aliens may not, enter the United States, and on what terms.”

In response to the ruling, the Uighurs’ lawyers filed a petition for a writ of certiorari with the Supreme Court. A date in June was set for a hearing, amid fears from the lawyers that the government would find other countries to take the Uighurs before that date, so that the Supreme Court could be persuaded not to review the Circuit Court’s ruling, and to rule on whether it was indeed acceptable that the Executive should be able to gut the lower courts’ habeas rulings of all meaning by refusing to allow judges to order the prisoners’ release.

In the end, the government managed only to dispose of four of the Uighurs before the deadline ([sending them to Bermuda](#)), but the Supreme Court then decided to refrain from hearing the case until October, perhaps to give the government time to resolve the issue itself.

This case, *Kiyemba v. Bush* (which became *Kiyemba v. Obama*) is now known as “Kiyemba I,” because, in response to the ruling by the Court of Appeals, the Uighurs’ lawyers submitted an appeal on their clients’ behalf, also filed as *Kiyemba v. Obama*, and now known as “Kiyemba II.” In the brief, they asked the Court of Appeals to reconsider its opinion *en banc* (in other words, with all the judges ruling, instead of just a panel of three), and also sought assurances that the courts would be able to act if the government proposed sending their clients to countries where they faced the risk of torture.

However, not only did the court refuse to reconsider its ruling, but the judges also refused the Uighurs’ request for the court’s assistance “to prevent their transfer to a country where they are likely to be subjected to further detention or to torture” ([PDF](#)), drawing on *Munaf v. Geren*, a case from 2008 in which “two American citizens held in the custody of the United States military in Iraq petitioned for writs of habeas corpus, seeking to enjoin the Government from transferring them to Iraqi custody for criminal prosecution in the Iraqi courts.”

In *Munaf*, although “the Court held the district court had jurisdiction over the petitions,” it also ruled that “it could not enjoin the Government from transferring the petitioners to Iraqi custody” because “that concern is to be addressed by the political branches, not the judiciary.”

The court added that strenuous efforts had been made by the U.S. government not to transfer prisoners to countries where they might face torture, and “the upshot is that the detainees are not liable to be cast around willy-nilly without regard to their likely treatment in any country that will take them,” but in any case, as the judges also explained, “The district court may not question the Government’s determination that a potential recipient country is not likely to torture a detainee” because “the judiciary is not suited to second-guess such determinations.”

With that decision, effectively, the case was lost. The Uighurs’ lawyers announced their intention to appeal this second ruling to the Supreme Court, and it is currently anticipated that the Supreme Court will address both “Kiyemba I” and “Kiyemba II” sometime next month.

However, the fallout from the Court of Appeals' insistence that no court is empowered to prevent the government from sending prisoners wherever it wishes has had a disturbing knock-on effect on other cases (as many as 150 of the remaining 225 prisoners, according to [SCOTUSblog](#)), in which lawyers have, since 2005, persuaded the courts to order the government to provide 30 days' notice in advance of any proposed transfer, and, in some cases, including that of [Ahmed Belbacha](#), an Algerian who had lived in the UK, have secured injunctions preventing any attempt to repatriate their clients.

Belbacha's case is, in many ways, emblematic of the issues at stake. Although he was cleared for release from Guantánamo by a military review board in February 2007, he is terrified of returning to Algeria, where he fears persecution both by the government and by the Islamists whose threats forced him to flee his homeland in the first place. His case has attracted widespread support from human rights organizations and has also received international media coverage.

Since the Court of Appeals made its ruling in "Kiyemba II," lawyers have been aware that the 30-day notices and injunctions were under threat, but it was not until September 8, when the court issued its mandate regarding "Kiyemba II", which formally implements its ruling, that the way was paved for the government, if it wishes, to lawfully repatriate prisoners who, like Belbacha, would rather remain in Guantánamo than return home.

As a result, Belbacha's lawyers have filed a motion with the Court of Appeals asking the judges "to hold this case in abeyance pending the Supreme Court's disposition of a petition for certiorari that the petitioners in *Kiyemba* intend to file." The judges may well respond by reiterating that they are secure in assurances from the government that "the detainees are not liable to be cast around willy-nilly without regard to their likely treatment in any country that will take them," but with just four months to go until the deadline is reached for [Obama's promised closure of Guantánamo](#), it is, I believe, legitimate to entertain fears that the administration may wish to repatriate cleared prisoners to countries it regards as safe (following "intense diplomatic negotiations," or some such explanation), but which the prisoners and their lawyers still regard as a profound threat.

Andy Worthington is the author of [The Guantánamo Files: The Stories of the 774 Detainees in America's Illegal Prison](#) (published by Pluto Press) and serves as policy advisor to the Future of Freedom Foundation. Visit his website at: www.andyworthington.co.uk.

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