



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

fff@fff.org www.fff.org

Continued Incarceration of the Innocent **by Andy Worthington**

After railing against Senators and Representatives for their cowardly, uninformed, and unacceptable attempts to prevent President Obama from bringing any Guantánamo prisoner to the U.S. mainland for any reason — even for trials — which I wrote about most recently in an article entitled “[Dick Cheney’s Pawns On Guantánamo](#),” I’m delighted to report that, last Tuesday, the Senate finally saw sense, voting, 79 to 19, as part of a \$42.8 billion bill for Homeland Security, to accept that the administration can bring prisoners to the U.S. mainland to face trials.

The vote follows [a similar climb-down](#) two week ago by the House of Representatives, which had recently allowed itself to be mesmerized by a paranoid motion proposed by Rep. Hal Rogers (R-Ken.), and the bill will now be signed into law by President Obama.

However, Congress is still interfering to an unacceptable degree in the administration’s plans, insisting, as [AFP described it](#), that the president provide lawmakers with “a detailed assessment of the possible security risk 45 days before” prisoners are brought to trial in the United States,” including “details of the dangers involved, steps to diminish the possible threat, the legal rationale for the transfer, and assurances to the governor of the receiving state that the individual poses little or no security risk.”

In addition, the bill as it was finally passed still allows lawmakers to meddle with plans to transfer prisoners to other countries, requiring as AFP put it, that prisoners “cannot be transferred to another country unless the president gives Congress the name of the detainee, the destination, a risk assessment, and the terms of a transfer.” As Lt. Col. David Frakt, the former military defense attorney for released prisoner Mohamed Jawad, [explained to me recently](#), this is actually an example of Congress reinforcing the powers it granted itself in the summer, when lawmakers insisted on being given two weeks’ notice before any prisoner — even those cleared by the courts after successful habeas corpus petitions — can be released.

In Lt. Col. Frakt’s words, what this meant was that Congress had decided that, for this two-week period, prisoners cleared by U.S. courts can actually be held “in the status of ‘Congressional

prisoner,' a status for which there is no Constitutional authority," and this unconstitutional power grab has not been removed in the final discussions regarding the bill.

Even so, the saddest part of the bill — which still casts the gloomiest of light on the lawmakers — is the lawmakers' insistence that no prisoner can be released onto U.S. soil, either on the mainland or on overseas territories like Guam or Puerto Rico. This has done nothing but alienate European countries, who are being asked to take cleared prisoners who cannot be repatriated because they face the risk of torture in their home countries, and, moreover, threatens to bring Congress into conflict with the Supreme Court.

Last Tuesday, as the Senate voted to allow prisoners to be brought to the U.S. to face trial, the Supreme Court agreed to review the case of the Uighurs (Muslims from China's Xinjiang province), who remain in Guantánamo, even though a District Court judge [ordered their release](#) into the United States over a year ago, after the Bush administration conceded that they had no connection with either al-Qaeda or the Taliban. The judge, Ricardo Urbina, ruled that they be brought to the United States, because no other country had been found that would accept them, and because their continued detention in Guantánamo was unconstitutional.

As [I explained in an article](#) last week, the Justice Department, under both George W. Bush and Barack Obama, disagreed, as did the Court of Appeals, which ruled that issues involving the immigration of aliens were matters for the Executive and not the courts to decide, even though the men's lawyers pointed out that this effectively gutted habeas corpus of all meaning.

President Obama, of course, failed to rise to this challenge by bringing these men to the United States, and, ever since, his administration has scabbled around, in a generally undignified manner, trying to find new homes for them, [sending four to Bermuda](#) in June, and hoping that the rest would be [relocated to the remote Pacific island of Palau](#).

However, as the [Washington Post](#) noted in a principled editorial last Wednesday, the stumbling block to this otherwise workable plan to pretend that the United States has no obligations towards men it wrongly imprisoned for nearly eight years is that Palau has refused to take one of the men, Arkin Mahmud, who "suffers from serious mental health issues because of his detention and lengthy periods of solitary confinement." As a result, his brother, Bahtiyar Mahnut, has decided to turn down Palau's offer of a new home for himself, in order to stay with his brother. As the *Post* noted, "Unless another country accepts the brothers, they could remain in custody indefinitely — a prospect that is unconscionable and that no doubt informed the justices' decision to hear the matter."

The *Post* proceeded to explain that the Supreme Court was faced with a tricky legal decision, because the justices will be considering whether, in defense of habeas corpus, and in reference to the unique position in which the Guantánamo prisoners are held, they are being asked to decide whether a judge has the power to order the release of prisoners into the U.S.,

when all the precedents, as the Court of Appeals made clear, establish that the admission of foreigners in to the U.S. is a matter for the executive and legislative branches of government.

However, as the *Post* also noted:

[T]he moral and ethical imperatives are clear and compelling. The Uighurs find themselves subject to detention not because they tried to enter the country illegally but because they were snatched in Pakistan and Afghanistan after the United States' 2001 invasion of Afghanistan and forcibly taken to Guantánamo. The United States has complete control over the fate of these men and should take full responsibility in righting the situation. That should include narrowly crafted legislation that would allow Mr. Mahmud and Mr. Mahnut into the United States, where they could remain together and Mr. Mahmud could get the medical help he needs.

This is a bold move for one of the nation's leading newspapers to take, but I unreservedly commend the *Post's* editors for it, as it addresses a seemingly insoluble quandary, which, it seems to me, cannot otherwise be resolved. Whilst it is probable that a number of the remaining Uighurs will soon start a new life in Palau, the administration may want to think long and hard about what to do with Arkin Mahmud and Bahtiyar Mahnut and to be grateful that only the *Washington Post* has chosen to shine a spotlight on the continued imprisonment of an innocent man whose detention has not only been regarded as unconstitutional for over a year but who also "suffers from serious mental health issues because of his detention and lengthy periods of solitary confinement."

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.

This article was originally published in October 2009.