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Guantánamo Uighurs Back in Legal Limbo **by Andy Worthington**

Last Monday, the Supreme Court declined to review a case brought on behalf of seven men in Guantánamo whose [release into the United States](#) ordered by a U.S. judge 17 months ago. The men in question are Uighurs, Muslims from China's Xinjiang province, and the ruling ordering them to be re-housed in the United States was made in October 2008 by Judge Ricardo Urbina.

In light of the Supreme Court's June 2008 ruling in [Boumediene v. Bush](#), granting the Guantánamo prisoners habeas-corpus rights, the government had suffered [a humiliating court defeat](#), and had then abandoned all pretense that the Uighurs — sold to U.S. forces after fleeing a settlement in which they had been living in Afghanistan — were “enemy combatants.” It had long been apparent to the Bush administration that the men had only one enemy — the Chinese government — and the government had also accepted that it could not repatriate them because they would face torture or other ill-treatment, and so, for many years, the State Department had been obliged to try to find new homes for them in other countries.

This was a difficult task, and although [Albania accepted](#) five of Guantánamo's 22 Uighurs in May 2006, no other country would help out, and it took another two years and four months — and the *Boumediene* ruling — until a judge was able to examine their case, and to order that, because no other country had been found that would accept the remaining 17 men, and because the government had conceded that they were not “enemy combatants,” their continued detention was illegal, and the government should offer them new homes on the U.S. mainland.

The government, predictably, appealed, and in February 2009 the Court of Appeals for the D.C. Circuit [ruled against the men](#), and against Judge Urbina's heroic ruling, casting the men back into legal limbo by ruling that matters relating to immigration were not for the courts to decide, but were, instead, the exclusive preserve of the Executive branch.

In light of the Uighurs' particular circumstances, this was a callous ruling, but it was unsurprising given that one of the judges in this notoriously conservative court was Judge A. Raymond Randolph, who had the dubious distinction of writing the three major Guantánamo

decisions issued by the D.C. Circuit — in *Al Odah v. Bush*, *Hamdan v. Rumsfeld* and *Boumediene v. Bush* — which were all reversed by the Supreme Court.

More surprising was the fact that the Justice Department, under Obama, chose to maintain the Bush administration's position, but this was a harbinger of further cowardice to come, and although Greg Craig, the White House counsel, then established a plan to bring two of the Uighurs to the United States in April and secured the agreement of Secretary of State Hillary Clinton, and Defense Secretary Robert Gates, Obama [quashed the plan](#) when he started taking flak from Republican critics, and the Uighurs were once more abandoned.

Through extraordinary diplomatic maneuvering, [Special Envoy Daniel Fried](#) managed to secure new homes for ten of the men in the months that followed. Four [went to Bermuda](#) in June, and another six [to the island of Palau](#), in the Pacific, at the end of October. In the meantime, [the Supreme Court agreed](#) to take the men's case, to decide whether Judge Urbina — and the men's lawyers — had been right, and that habeas was meaningless if a judge was unable to order the release into the United States of innocent men, seized by mistake, for whom no other country could be found.

However, before the March 23 deadline arrived for the Supreme Court to review the case, Switzerland threw the government a lifeline, [offering new homes](#) to two of the men. This still left five others, but they had all been offered new homes in Palau and another country, which they had refused. As a result, the government asked the Supreme Court to dismiss the case as “improvidently granted,” because of the Swiss offer, and because the other five men “had received offers of resettlement, which were later withdrawn, from the Republic of Palau and a second unidentified country.”

Despite the offers, this remains a complicated situation. Switzerland has made its offer, but has not yet brought the men to their new homes, and the Palau deal is less straightforward than it may at first appear. Although some critics have argued that the men are angling for new homes in the United States and have consigned themselves to life imprisonment in Guantánamo by refusing the offer, their lawyers have stated that they had genuine doubts about the terms of resettlement, and fears that they would still not be safe from the Chinese government, which were perfectly legitimate.

Quite how these problems will be resolved is at present unclear. The Supreme Court ruled that, because offers of resettlement had been made, “This change in the underlying facts may affect the legal issues presented,” adding, “No court has yet ruled in this case in light of the new facts, and we decline to be the first.” As a result, the Supreme Court referred the case back to the D.C. Circuit, noting that the court “should determine, in the first instance, what further proceedings in that court or in the District Court are necessary and appropriate for the full and prompt disposition of the case in light of the new developments.

At first glance, this appears to be bad news, and it is, of course, in the sense that the Uighurs are still stuck at Guantánamo, and the Supreme Court refused to fulfill the dreams of Guantánamo's fiercest opponents — myself included — who had hoped that the highest court in the land would finally order the Executive to take responsibility for the Bush administration's horrendous mistakes by giving new homes to wrongly detained men. From my point of view, this would not only encourage other countries to continue taking cleared prisoners who cannot be repatriated, but would also demonstrate to the American people, in the clearest manner possible, that not everyone held at Guantánamo was a terrorist, and that terrible mistakes were made.

However, despite this disappointment, the Supreme Court did not merely bounce the case — *Kiyemba v. Obama* — back to the lower courts. Clearly and deliberately, the justices actually vacated the Court of Appeals ruling, which they need not have done, banishing the judges' contentious ruling about immigration and the reach of habeas corpus, and allowing the Uighurs' lawyers to file a petition requesting that the case be remanded back to the District Court to look at anew, with a full exploration of all the issues surrounding habeas rights and the resettlement proposals.

Vacating the Court of Appeals ruling was not only a positive step in terms of reviving the issues outlined above; it also removed some of the other baleful effects of that particular ruling that had impacted negatively on other detainee issues.

In an email exchange, Michel Paradis, a civilian defense lawyer with the Pentagon, assigned to the military commissions, explained that “the biggest problem with Judge Randolph's now vacated decision was that it went far beyond what the facts and issues in the case required,” and that Randolph “strained to reach the most sweeping ground on which to decide the case.”

Paradis continued:

I would not be surprised if there were some debatable issues over the application of immigration laws, but Judge Randolph went far beyond that, and, as he did in *Al Odah*, *Boumediene* and *Hamdan*, threw in a gratuitous paragraph that said GTMO detainees simply do not qualify as persons protected by the Due Process Clause of the Constitution.

The practical effect of this paragraph has been pernicious. In [Rasul v Myers](#) [a torture case brought against senior U.S. officials by several British ex-prisoners], Judge Randolph relied on this paragraph to rule that former British detainees are not “persons” and therefore were not protected from religious harassment by federal law. And since the D.C. Circuit's rulings control the district courts, the district judges have ruled, in the Obaidullah case for example [an Afghan recently put forward for [a trial by military commission](#)], that forced confessions can be admitted even into a civilian federal court if they happen to have been made by a GTMO detainee. So this paragraph

did not simply create second-class persons, it created a class of non-persons. And it did so in a way that was not only dubious legally, but wholly unnecessary.

Moreover, although Judge Randolph papered over *Boumediene*, Judge Rogers, who concurred with the result in *Kiyemba*, strongly objected to Judge Randolph's apparent effort to overrule the Supreme Court. Likewise, in *Rasul*, Judge Brown, who was one of the Bush administration's more contentious appointments to the D.C. Circuit, called Judge Randolph's reasoning "constricted" and "untenable" (strong words for a federal court opinion) and insisted that "'persons' are individual human beings, of whom the American people are just one class."

From this, it is clear that the Supreme Court had more in mind than just the Uighurs, and that it was extremely important to dismiss, for the fourth time, an unacceptable ruling made by Judge Randolph. Admittedly, this hurls the Uighurs back into a legal limbo, but my hope is that the case will be returned to the District Court, and that a judge with the decency and respect for the law demonstrated by Judge Urbina in October 2008 will once more be able to address these issues in a responsible manner, and may, for the second time, set in motion a process that, this time, might lead to the resettlement of innocent men from Guantánamo on the U.S. mainland.

Not only would this be the right thing to do, but nothing — and I mean nothing — would do more to silence the opportunistic fear-mongers who delight in stirring up hysteria about Guantánamo at every opportunity than for one of these men to be brought to live in America, where ordinary, decent people would soon realize that the hysteria is nothing more than a cynical attempt to preserve the Bush administration's lies about the wretched experiment undertaken at Guantánamo.

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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