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USA: Indefinite detention by litigation 'Monstrous absurdity' continues as Uighurs remain in Guantánamo

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Petitioners are free to go to any country that will take them, and indeed they would not still be at Guantánamo if they were willing to return to their home country. Understandably, they do not wish to do so, and it is United States policy not to force their transfer to China. But the Government's willingness to accede to petitioners' request does not disable the Government from the exercise of its sovereign power under the Constitution and Acts of Congress to decline to bring petitioners to the United States and release them into this country.

US government, 24 October 2008¹

Chosen by the US administration as a location to detain alien "enemy combatants" in the "war on terror" because it thought that by so doing it could keep them away from judicial oversight, the detention facility at Guantánamo has over the past seven years become synonymous with the pursuit of unfettered executive power. Each time a court ruling threatened its strategy, the administration exploited litigation to delay judicial review or manipulated individual cases to bypass judicial scrutiny altogether.²

Despite the US Supreme Court's ruling in *Boumediene v. Bush* in June 2008 that the Guantánamo detainees have the right to challenge the lawfulness of their detention in the US courts, and that "the costs of delay can no longer be borne by those who are held in custody", the administration continues to adopt an approach that delays justice and remedy. This is currently on display in the case of 17 Uighurs who are still in indefinite military custody at Guantánamo more than a month after a federal judge ordered their release into the USA. The US administration has violated international law in keeping the Uighurs in indefinite detention without charge in Guantánamo for more than six years. Now it is exploiting domestic law in its bid to keep them there.

The administration has conceded that the Uighurs are not "enemy combatants", and a majority of them have been cleared for release since 2003 (see box overleaf). The USA has accepted that they cannot be returned to their native China because they would face a serious risk of torture or execution there. However, it has been unable to find a country willing to accept them in more than four years of trying. It says it has approached and re-approached nearly 100 countries. Clearly, then, the only current way to end the indefinite detention of the Uighurs is for them to be released into the USA. The administration is refusing to countenance such an outcome, however. Instead it is arguing that, even in such a case, and "even if the detention is indefinite, it is still lawful".³

One hundred and seventy years ago, the US Supreme Court referred to the “monstrous absurdity” of a situation in which it was claimed there was no remedy “although a clear and undeniable right should be shown to exist”.⁴ The plight of the Uighurs is a monstrous absurdity, and another example of why the Guantánamo detention facility has come to be known as an “abomination”, among other things.⁵

On 7 October 2008, Judge Ricardo Urbina of the District Court for the District of Columbia (DC) ruled that the detention of the Uighurs was unlawful as “the Constitution prohibits indefinite detention without just cause”.⁶ Noting that the USA’s “extensive diplomatic efforts” to find a third country solution had come to nothing, he ordered that the detainees be released into the USA. The government appealed, however, and obtained an emergency stay of his order from the US Court of Appeals for the DC Circuit. The Court of Appeals then agreed to hear arguments in the case and has since received the written briefs from the two parties.

In its briefs to the Court of Appeals, the US administration argues that Judge Urbina’s order should be reversed because “the power to admit an alien into the United States is a sovereign function exercised solely by the political branches. Unless otherwise authorized by law, no court has the power to review the Executive’s decision to exclude an alien from this country”.⁷ Judge Urbina had recognized the sensitivity of judicial intervention in “a field normally dominated by the political branches”. However, he pointed out that it was the government that had taken the Uighurs into its custody and transported them to Guantánamo; it was the government that had not charged them with any crime and “has presented no reliable evidence that they would pose a threat to US interests”. Moreover, he said, the government had “stymied” its own efforts to find a third country solution “by insisting (until recently) that they were enemy combatants, the same designation given to terrorists willing to detonate themselves among crowds of civilians”. Judge Urbina also took account of the fact that there were individuals and organizations ready and willing to support the Uighurs upon resettlement in the USA “by providing housing, employment, money, education and other spiritual and social services”.⁸

The US authorities cleared 10 of the 17 Uighur detainees for release as long ago as 2003. Another five were cleared for release from Guantánamo in 2005, and the remaining two in 2006 and 2008. Judge Urbina noted that while the government now recognized that the Uighurs were not “enemy combatants”, it was “unclear whether they ever were enemy combatants”. Three years earlier, in his ruling on Uighur detainees subsequently transported to Albania, another District Court judge had said something similar: “The government’s use of the Kafkaesque term ‘no longer enemy combatants’ deliberately begs the question of whether these petitioners ever were enemy combatants”. In any event, the label “enemy combatant”, at least with the legal consequences ascribed to it by the USA, is unknown in international law. Moreover, the executive bodies used to review the “enemy combatant” label – the Combatant Status Review Tribunals (CSRTs) set up by the US administration in 2004 – are fundamentally flawed – among other things they are authorized to rely on secret information that the detainee cannot see and information obtained under torture or other ill-treatment in making their decisions on detainees who have no access to legal counsel for this process. In the case of the Uighurs there is substantial evidence of political interference in the CSRT decisions. See *USA: Justice Years Overdue: Federal court hearing for Uighur detainees in Guantánamo*, 7 October 2008, <http://www.amnesty.org/en/library/info/AMR51/110/2008/en>.

In its bid to have Judge Urbina's order overturned, the government has deployed tactics amounting to little more than euphemism, innuendo and threat. The euphemism is that the Uighurs are "housed" at Guantánamo, suggesting that this is somehow not detention; the innuendo is that the Uighurs pose a security risk even if the government is unable to provide any evidence to this effect; and the threat is that, even if the Uighurs were to be allowed into the USA, they would be subject to immediate and indefinite detention under immigration law.

Firstly, then, there is the euphemism. The Uighurs, the government has taken to repeatedly stating, are being "housed" at Guantánamo, and has said that this is "for their own protection pending their departure for another country that will accept them".⁹ This is not "housing" in the sense of "adequate housing" that is the right of everyone under the International Covenant on Economic, Social and Cultural Rights, or the "right to the continuous improvement in living conditions" under that treaty.¹⁰ Yet it seems the administration would like to paint such a benign picture. For example, it stresses in its brief to the Court of Appeals that the Uighurs are "in special communal housing with access to all areas of the camp, including an outdoor recreation space and picnic area". They "sleep in an air conditioned bunk house, and have the use of an activity room equipped with various recreational items, including a television with VCR and DVD players". They also "have access to special food items, shower facilities, and library materials".¹¹

One might be reminded here of official remarks made shortly after the first detainees were brought to Guantánamo in January 2002. The detainees were "lucky to be in the custody of our military", said the White House, "because they're receiving three square meals a day, they're receiving health care that they never received before. Their sleeping conditions are probably better than anything they've had in Afghanistan".¹² The detainees were being treated "very well", said the Secretary of Defense. "Just for the sake of the listening world", he added, "Guantánamo Bay's climate is different than Afghanistan. To be in an eight-by-eight [foot] cell in beautiful, sunny Guantánamo Bay, Cuba, is not a – inhumane treatment. And it has a roof."¹³

As has since been documented, the administration's assurances of the humane treatment of "enemy combatants" in US custody have proved to be empty. Neither is the Guantánamo detention facility a holiday camp. It is a prison camp. The Uighurs are currently held in Camp Iguana, where conditions are less harsh than those they have endured previously, particularly in Camp 6, but they are incarcerated nonetheless, as a US lawyer's description illustrates:

"At Camp Iguana, the men appear to remain completely isolated from anyone except their jailors and their lawyers, and perhaps an occasional visit from a representative of the International Committee of the Red Cross. I am informed and believe that they have no telephone or other direct access to the outside world. The men are not permitted to leave Camp Iguana. They are not granted even supervised excursions outside of Camp Iguana. The Uighurs do not have meaningful access to news or information about their families¹⁴.... Although the Uighurs are free to move about inside Camp Iguana, they are still detained in a high security prison controlled by Joint Task Force Guantánamo (JTF-GTMO), the command that operates all areas of the Guantánamo prison. The Uighurs are surrounded by fences and razor wire... Military

guards with rifles patrol the prison, and the men are monitored by cameras 24 hours a day. Three huts make up much of the physical space at Camp Iguana, leaving a small area as the only space for physical recreation. I observed that the guards do not refer to the Uighurs by name, but rather by ISN (Internment Serial Number). The guards keep their own name tags covered by tape."¹⁵

This, according to the US administration, is how individuals it does not consider to be "enemy combatants" should be subjected indefinitely – never to be released if no third country solution is found. Moreover, it has asserted the right to transfer them back to isolation in the punitively harsh regime of Camp 6 in the event of any perceived rule infractions by the detainees.¹⁶ Despite the government's depiction of the men as "housed" in comfortable conditions, the authorities have refused to let the men's lawyers meet with them without the Uighurs being chained to the floor.

Prior to a visit to Guantánamo scheduled for late October 2008, counsel for the Uighurs filed an emergency motion in District Court seeking "reasonable conditions" for the visit, including that the Uighurs be allowed to meet their counsel without being chained, or, if meeting as a group with the lawyer, that they not be forced to do so through a chain-link fence. This is what had occurred on a previous visit which was "degrading", and made it "impossible to shake the client's hand, exchange documents, and otherwise conduct an appropriate meeting".¹⁷ The government opposed the motion, arguing that under the Military Commissions Act of 2006 (MCA) the court had no jurisdiction to consider the request "to micro-manage the conditions of their confinement".¹⁸ Even if it did have jurisdiction, the government continued, "it is well settled that courts accord substantial deference to the judgment of prison administrators and generally refrain from interfering in the day-to-day operations of prison facilities, including the interaction between prisoners and counsel". This deference "is particularly appropriate under the unique circumstances here, where non-enemy combatants are held in the same facility with enemy combatants detained by the military in a time of war".¹⁹ The District Court, the government said, "should not second guess the considered judgment of the professional guard staff at Guantánamo Bay regarding the security arrangements for a counsel visit with multiple detainees at the same time". The Guantánamo authorities provided the lawyers with a choice to meet with the Uighurs in groups of six at a time in a room in Camp 4 with the detainees shackled, or as a single group at Camp Iguana through the chain-link fence as occurred before. The District Court judge denied the Uighurs' counsel's motion, although he noted that the government had "failed to articulate a cogent rationale as to why the prison authority could not permit counsel to meet individually with [the Uighurs], who are not designated as enemy combatants, in a confined and secured area without shackles."²⁰

In addition to painting a falsely rosy picture of the plight of the detainees, and litigating to prevent remedies, the government has also resorted to innuendo. Since it was ordered by Judge Urbina to release the Uighurs into the USA, the administration has portrayed them as dangerous individuals.²¹ This is despite the fact that it clearly considers there to be no security considerations that should prevent other countries from accepting them. And it is despite the fact that when specifically asked by Judge Urbina what threat the Uighurs would pose if released into the USA, the government had nothing to say. As Judge Judith Rogers of the US Court of Appeals for the DC Circuit has since noted, "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". She added that the fact that one or more of the Uighurs received training in firearms (as the government has repeatedly stressed to the Court of Appeals) "cannot alone show they are dangerous, unless millions of United States resident citizens who had received firearms training are deemed to be dangerous".²² The US lawyers for the detainees have noted that five other Uighurs released from Guantánamo to Albania in 2006 had received the same firearms training that the US government now considers should be a reason for the exclusion of the other 17 from the USA. "We understand", the lawyers say, "that the Executive advertised [the five] to Albania as suitable for release into the civilian population of its capital. They have lived peaceably every since".²³

Remarkably, the administration is arguing that allowing the Uighurs into the USA "poses a risk *distinct to this Nation*" (emphasis added). These "aliens", the government argues to the Court of Appeals, "ask to be brought to the country that has detained them for six years".²⁴ It does not elaborate on this apparent suggestion that detaining the men has made them dangerous, and has provided not a scintilla of evidence for such an assertion. To turn its own unlawful detention of these men against them in this way, in order to seek to continue their detention, is nothing short of shameful.

Thirteen of the 17 Uighurs still in Guantánamo had been taken into custody in Pakistan in late 2001 having fled there from Afghanistan after the Uighur settlement to which they had fled from China was bombed by US forces.²⁵ The US administration has alleged that this settlement was run by the East Turkistan Islamic Movement (ETIM), and that the Uighurs' alleged association with ETIM precludes their entry into the USA under immigration laws. No court, however, has ever determined that the settlement in question was run by ETIM, or that the Uighur detainees were linked to the organization. In fact, the only court to consider the issue – the Court of Appeals for the DC Circuit in Huzaiifa Parhat's case (see below) – explicitly declined to make any finding that Parhat was a member of ETIM after noting that even the Combatant Status Review Tribunal (see box above) had acknowledged that the US authorities had provided "no source document evidence" to support the connection.

The government argues that even if the Uighurs "were standing at the Nation's borders", they would likely not be allowed in on security grounds, pursuant to the broadly worded Section 1182 of the Immigration and Nationality Act (INA) which renders inadmissible into the USA any foreign national who has engaged in "terrorist activity" or is linked to a "terrorist organization". In the context of the government litigation on the Uighur cases, this is apparently a reference to the ETIM, which the US State Department designated as a "terrorist organization" in September 2002. The US lawyers for the Uighurs have said in their brief to the US Court of Appeals that "it appears that the designation was a political concession to induce Chinese cooperation with Iraq invasion plans".²⁶ Whether or not this is true, in 2002 the Chinese government was using "the international war on terror as a justification for cracking down harshly on suspected Uighur separatists", according to the US State Department in its criticism of China's human rights record.²⁷ Moreover, 2002 was also the year that Chinese agents were granted access to Guantánamo and participated in the ill-treatment of the Uighur detainees.²⁸

In its June 2008 ruling on Huzaifa Parhat, one of the 17 Uighur detainees still in Guantánamo, the Court of Appeals found that the allegations about association with ETIM were insufficient to support the finding that the detainee was an “enemy combatant” under the Pentagon’s definition. Moreover the Court found “credible” Parhat’s argument that the government was relying on a number of classified assertions the original source of which was the Chinese government, less than an objective source.²⁹ In any event, the Court of Appeals wrote that it is “undisputed that [Parhat] is not a member of al Qaida or the Taliban, and that he has never participated in any hostile action against the United States or its allies”. Judge Urbina noted that the US government has conceded that the June Court of Appeals ruling applies to all 17 of the Uighurs equally, and that “there are no material factual differences” between their cases.

The government is now arguing, however, that under the INA, “it is irrelevant that the terrorist organization the alien is linked to does not appear to harbour any hostile designs against the United States; the statute does not require that the terrorist organization be a threat to us”.³⁰ In other words, having failed to persuade the Court of Appeals that vague and unsubstantiated allegations about the Uighur detainees’ association with ETIM were enough to justify the “enemy combatant” label, the administration is now using the same allegations to suggest that because “notably, Section 1182 [of the INA] is not limited in scope to individuals who are combatants against the United States or its allied forces in an armed conflict”, the Uighurs would not be allowed into the USA under the immigration statute.³¹

The US government pushes its case even further, however. It argues that even if the Uighurs were “somehow entitled to be brought into and released in the United States, it is clear that the INA also permits the Government to immediately take petitioners into custody and detain them pending removal to another country upon their arrival.” It adds that, although the US Supreme Court ruled in 2001 (*Zadvydas v. Davis*) that six months marked a cut-off point for such detention, the Court “explicitly recognizes that Congress might authorize a longer period of detention for particularly dangerous individuals, say, suspected terrorists – and that, for detention under those circumstances, special arguments might be made for forms of preventive detention and for heightened deference to the judgments of the political branches with respect to matters of national security.” Referring to Section 1226a of the INA, the government brief continues: “In response to that decision, Congress made a legislative judgment that individuals who seek to engage in terrorist acts, defined broadly, should be detained for a lengthier period”.

Meanwhile, the government has filed a letter with the US Court of Appeals asserting that the State Department “is actively continuing its efforts to resettle the 17 Uighurs currently held at Guantánamo, and that negotiations are ongoing regarding the possibility of their resettlement in third countries”.³² The government argues that a decision requiring the government to release the Uighurs into the USA could complicate negotiations with third countries over resettlement. If the 17 Uighurs were brought to the USA, it suggests, “even our friends and allies might be less likely to participate in resettlement efforts for petitioners (or, indeed, for any other detainee)”.³³ The fact is, however, that any such efforts by the State Department – unsuccessful for years – have already been undermined by the government’s own conduct – its prior labelling of the detainees as “enemy combatants” and its more recent campaign of

innuendo labelling them as dangerous. Indeed the Justice Department's branding of the Uighurs as dangerous in its recent litigation has apparently led to an interagency dispute that the State Department's ability to negotiate a third country solution has been jeopardized.³⁴

Article 9.4 of the International Covenant on Civil and Political Rights (ICCPR) states that "anyone deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide *without delay* on the lawfulness of his detention and *order his release* if the detention is not lawful" (emphasis added). The Human Rights Committee, the expert body established by the ICCPR to monitor compliance with this treaty, has made it clear that there are "no circumstances" that states may invoke "as justification for acting in violation of humanitarian law or peremptory norms of international law, for instance... through arbitrary deprivations of liberty".³⁵ The Committee has also stressed that "a State party may not depart from the requirement of *effective* judicial review of detention" (emphasis added).³⁶ It is now more than two years since the Human Rights Committee called directly on the USA to ensure, in accordance with article 9(4) of the ICCPR, that: "persons detained in Guantánamo are entitled to proceedings before a court to decide without delay on the lawfulness of their detention or order their release if the detention is not lawful."³⁷

The ICCPR, according to the USA, is "the most important human rights instrument adopted since the UN Charter and the Universal Declaration of Human Rights".³⁸ Not so important, it seems, that the principle articulated in article 9 could not be cast aside by the USA for six years and five months until the US Supreme Court ruled that the Guantánamo detainees had the constitutional right to challenge the lawfulness of their detention in the federal courts. The Court also held "that when the judicial power to issue habeas corpus properly is invoked the judicial officer must have adequate authority to make a determination in light of the relevant law and facts and to formulate and issue appropriate orders for relief, including, if necessary, an order directing the prisoner's release." The cost of any further delay must not fall on the detainees, the Court added. It is now more than five months since the Supreme Court's ruling.

In his October 2008 release order, Judge Urbina recognized the urgency of the situation facing the Uighurs and the need for the judiciary to act where the political branches had not:

"Although the judicial branch should give deference to the Executive's role in administering justice and enforcing the law, this deference does not mean that the third branch is frozen in place. When that deference awaits action contemplated by the Constitution and that action does not materialize, fidelity to the Constitution may require judicial intervention, especially when an individual's liberty is at stake".³⁹

The administration has called Judge Urbina's order that the Uighurs be released into the USA an "extravagant remedy" and accuses him of adopting "an expansive view of judicial authority".⁴⁰ It has turned to litigation which, by design or effect, can serve only to delay justice for the detainees. The government is now interpreting immigration laws to prevent their release from Guantánamo, a strategy which Judge Rogers of the US Court of Appeals has said "robs... of meaning" the Uighurs' right to habeas corpus."⁴¹ The administration argues that "at

most, habeas provides a right of release from custody on the *basis of their status as asserted enemy combatants*" (emphasis in original), but it continues to seek the right to detain them indefinitely on the ground that to be released into the USA would confer on the detainees a "further and fundamentally different right".⁴² This position "overworks legal fiction", Judge Rogers suggests, by saying that a person "is free when by the commonest of common sense he is bound".⁴³

Oral arguments for and against Judge Urbina's order are scheduled in the US Court of Appeals for 24 November 2008. It is not known when a decision will be issued, but it is thought unlikely to be before January 2009. As the Uighurs' lawyers have pointed out, "procedural imprisonment may last much longer". Unless the government changes its approach, even if it loses before the three-judge panel of the Court of Appeals, it is likely to seek a rehearing in front of the full court. Whether or not the court agrees to this, the Uighurs' detention would continue during the litigation, as it would for even longer if the government then sought to take the issue to the Supreme Court.

The government should immediately drop its opposition to Judge Urbina's order, bring the Uighur detainees into the USA, and work to find lawful, fair, safe and lasting solutions in all their cases. If the current administration fails to do this, the next one should do so immediately upon taking office on 20 January 2009.

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See also:

USA: Justice Years Overdue: Federal court hearing for Uighur detainees in Guantánamo, 7 October 2008, <http://www.amnesty.org/en/library/info/AMR51/110/2008/en>.

USA: Federal judge orders release of Uighurs held at Guantánamo, government appeals, 8 October 2008, <http://www.amnesty.org/en/library/info/AMR51/111/2008/en>.

USA: US Court of Appeals blocks release of Guantánamo Uighurs as government resorts to 'scare tactics', 10 October 2008, <http://www.amnesty.org/en/library/info/AMR51/113/2008/en>.

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<sup>1</sup> *Kiyemba v. Bush*, Brief for appellants, US Court of Appeals for the DC Circuit, October 2008

<sup>2</sup> For example, see pages 44-66 of USA: Guantánamo and beyond: The continuing pursuit of unchecked executive power, May 2005, <http://www.amnesty.org/en/library/info/AMR51/063/2005>; and pages 31-44 of USA: No substitute for habeas corpus: six years without judicial review in Guantánamo, November 2007 <http://www.amnesty.org/en/report/info/AMR51/163/2007>.

<sup>3</sup> *Kiyemba v. Bush*. Reply brief for appellants. US Court of Appeals for the DC Circuit, 7 November 2008.

<sup>4</sup> *Kendall v. United States*, 37 U.S. 524 (1838).

<sup>5</sup> The man of tomorrow, by Archbishop Desmond Tutu. Washington Post, 9 November 2008.

<sup>6</sup> In re: Guantanamo Bay detainee litigation, Memorandum Opinion. US District Court for the District of Columbia, 8 October 2008 (the ruling from the bench was on 7 October, the written ruling on 8 October).

<sup>7</sup> *Kiyemba v. Bush*, Brief for appellants, US Court of Appeals for the DC Circuit, October 2008.



<sup>8</sup> See also *Kiyemba v. Bush*, Amended brief of *Amicus Curiae* Uyghur American Association in support of appellees and in support of affirmance of the District Court. In the US court of Appeals for the DC Circuit, 1 November 2008.

<sup>9</sup> *Kiyemba v. Bush*, Brief for appellants, US Court of Appeals for the DC Circuit, October 2008.

<sup>10</sup> International Covenant on Economic, Social and Cultural Rights, Article 11. The USA has signed but not ratified the Covenant.

<sup>11</sup> *Kiyemba v. Bush*, Brief for appellants, US Court of Appeals for the DC Circuit, October 2008

<sup>12</sup> White House Press briefing, 28 January 2002,

<http://www.whitehouse.gov/news/releases/2002/01/20020128-11.html>.

<sup>13</sup> Secretary of Defense Donald Rumsfeld, Department of Defense news briefing, 22 January 2002,

<http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=2254>.

<sup>14</sup> An example given in this Declaration is that a letter to one of the Uighurs from his family, with photographs of his children, had still not been cleared to give to the detainee three weeks after it was submitted to the authorities in September 2008.

<sup>15</sup> *Parhat v. Gates*, Declaration of J. Wells Dixon, US Court of Appeals for the DC Circuit, 15 October 2008.

<sup>16</sup> See USA: Cruel and inhuman: conditions of isolation for detainees at Guantánamo Bay, April 2007,

<http://www.amnesty.org/en/library/info/AMR51/051/2007>.

<sup>17</sup> In Re: Guantanamo Bay Detainee Litigation. Emergency motion for order related to counsel visit of October 27, 2008, In the US District Court for DC, 22 October 2008.

<sup>18</sup> Under Section 7 of the MCA, "no court, justice or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination".

<sup>19</sup> In Re: Guantanamo Bay Detainee Litigation. Respondents opposition to emergency motion for order related to counsel visit of October 27, 2008, In the US District Court for DC, 23 October 2008.

<sup>20</sup> In re: Guantanamo Bay Detainee Litigation. Memorandum Order. US District Court for DC, 24 October 2008, Judge Alan Kay.

<sup>21</sup> On 7 October 2008, the administration filed an emergency motion seeking a stay of Judge Urbina's order. Its petition to the US Court of Appeals for the DC Circuit asserted that failure to stay the order "threatens to cause significant and irreparable harm to the United States and the general public", and compliance with the order would "pose a serious security risk". The 13-page petition variously characterized the 17 Uighurs as individuals who "engaged in weapons training at a military camp sponsored by the Taliban as part of an organized attempt to attack a sovereign government"; "sought to wage terror on a sovereign government"; "trained for armed insurrection against their home country"; "sought to wage organized and armed warfare against the Chinese Government and continue to harbour hostile views toward China"; and who "received weapons training at a camp in Taliban-controlled Afghanistan where they prepared to attack Chinese interests". The US lawyers for the Uighurs accused the government of resorting "to scare tactics in the form of innuendo and unsubstantiated, exaggerated, and false rhetoric aimed at painting [the Uighur detainees] as dangerous men, including the astonishing assertion, never before made in three years of litigation through all levels of the federal system, that these men were preparing to 'wage terror on a sovereign government'. Nothing in the record justifies that statement." See also, *US Court of Appeals blocks release of Guantánamo Uighurs as government resorts to 'scare tactics'*, 10 October 2008, <http://www.amnesty.org/en/library/info/AMR51/113/2008/en>.

<sup>22</sup> *Kiyemba v. Bush*, Order. US Court of Appeals for the DC Circuit, 20 October 2008, Judge Rogers, dissenting.

<sup>23</sup> *Bush v. Kiyemba*, Corrected brief of petitioners-appellees, US Court of Appeals for the DC Circuit, 3 November 2008.

<sup>24</sup> *Kiyemba v. Bush*. Reply in support of motion for stay pending appeal and for expedited appeal. US Court of Appeals for the DC Circuit, October 2008.

<sup>25</sup> Another fled from Kabul to Pakistan. These 14 are alleged to have been sold by Pakistani forces to the USA for US\$5,000 a head. The three others were arrested by the Northern Alliance in Afghanistan and handed over to the USA.

<sup>26</sup> *Ibid.*

<sup>27</sup> See Country Reports on Human Rights Practices – 2002, entry on China, available at <http://www.state.gov/g/drl/rls/hrrpt/2002/18239.htm>.

<sup>28</sup> See USA: Justice Years Overdue: Federal court hearing for Uighur detainees in Guantánamo, 7 October 2008, <http://www.amnesty.org/en/library/info/AMR51/110/2008/en>.

<sup>29</sup> "The [Combatant Status Review] Tribunal's determination that Parhat is an enemy combatant is based on its finding that he is "affiliated" with a Uighur independence group [ETIM], and the further finding that the group was "associated" with al Qaida and the Taliban. The Tribunal's findings regarding the Uighur group rest, in key respects, on statements in classified State and Defense Department documents that provide no information regarding the sources of the reporting upon which the statements are based, and otherwise lack sufficient indicia of the statements' reliability. Parhat contends, with support of his own, that the Chinese government is the source of several of the key statements." *Parhat v. Gates*, US Court of Appeals for the DC Circuit, 20 June 2008.

<sup>30</sup> *Kiyemba v. Bush*, Brief for appellants, US Court of Appeals for the DC Circuit, October 2008 (quoting *Hussain v. Mukasey*, US Court of Appeals for the Seventh Circuit (2008), internal quote marks omitted).

<sup>31</sup> *Ibid.*

<sup>32</sup> Letter from John Bellinger, Legal Advisor, State Department, to Assistant Attorney General Gregory Katsas, US Department of Justice, 21 October 2008.

<sup>33</sup> *Kiyemba v. Bush*. Reply brief for appellants. US Court of Appeals for the DC Circuit, 7 November 2008.

<sup>34</sup> See Release of 17 Guantánamo detainees sputters as officials debate the risk. *New York Times*, 16 October 2008.

<sup>35</sup> Human Rights Committee, General Comment 29, States of emergency (Article 4). UN Doc: CCPR/C/21/Rev.1/Add. 11, 31 August 2001, para. 11.

<sup>36</sup> *Ibid.* note 9.

<sup>37</sup> Human Rights Committee. Conclusions on the USA, 28 July 2006.

<sup>38</sup> Opening statement to the UN Human Rights Committee by Matthew Waxman, Principal Deputy Director of the Policy Planning Staff at the Department of State, Head of the US Delegation, Geneva, Switzerland, 17 July 2006, <http://www.state.gov/s/p/rem/69126.htm>

<sup>39</sup> In re: Guantanamo Bay detainee litigation, Memorandum Opinion. US District Court for the District of Columbia, 8 October 2008.

<sup>40</sup> *Kiyemba v. Bush*. Motion for stay pending appeal and for expedited appeal. US Court of Appeals for the DC Circuit, October 2008.

<sup>41</sup> *Kiyemba v. Bush*, Order. US Court of Appeals for the DC Circuit, 20 October 2008, Judge Rogers, dissenting.

<sup>42</sup> *Kiyemba v. Bush*. Reply in support of motion for stay pending appeal and for expedited appeal. US Court of Appeals for the DC Circuit, October 2008.

<sup>43</sup> *Kiyemba v. Bush*, Order. US Court of Appeals for the DC Circuit, 20 October 2008, Judge Rogers, dissenting. (Judge Rogers was quoting Justice Jackson's dissent in the US Supreme Courts's 1953 ruling, *Shaughnessy v. U.S. ex rel. Mezei*).