By Andy Worthington

From Andy Worthington | Original Article

President Obaam's hopes of closing Guantánamo, which were already gravely wounded by his inability to meet his self-imposed deadline of a year for the prison's closure, now appear to have been killed off by lawmakers in Congress.

Although the House Armed Services Committee was happy to authorize, by 59 votes to 0, a budget of over $700 billion for war ($567 billion for "defense spending" and $159 billion for the wars in Afghanistan and Iraq) for the fiscal year beginning in October, lawmakers unanimously saw through — and turned down — a fraction of this budget for what the administration had labeled a "transfer fund" — money intended to close Guantánamo and buy a new prison in Illinois for prisoners designated for trials or for indefinite detention without charge or trial.

The administration had attempted to hide its intentions behind this vague wording, because senior officials were acutely aware of ferocious opposition in Congress to the closure of Guantánamo. Fueled by opportunistic Republicans and backed by cowardly Democrats, Congress had only been prevented at the last minute from passing an insane law last year, which would have prevented the administration from bringing any prisoner to the US mainland for any reason (even to face a trial) and had only relented in October, allowing prisoners to be brought to the US mainland for trials, but not for any other purpose.

Despite this, the House Armed Services Committee is now trying to withdraw from even this concession to the administration's aims, including, in a summary of the bill, a prohibition on using even the tiniest fraction of the war budget (around $350 million) to buy a new detention facility. As Spencer Ackerman explained in the Washington Independent :

According to the bill summary, the bill now requires Defense Secretary Robert Gates to give Congress a report that "adequately justifies any proposal to build or modify such a facility" if it wants to move forward with any post-Guantánamo detention plan. "The Committee firmly believes that the construction or modification of any facility in the US to detain or imprison individuals currently being held at Guantánamo must be accompanied by a thorough and comprehensive plan that outlines the merits, costs, and risks associated with utilizing such a facility," the summary text read. "No such plan has been presented to date. The bill prohibits the use of any funds for this purpose."

This is a depressing example of how even a morally and ethically flawed attempt to close Guantánamo is unacceptable to both Republican and Democrat lawmakers, who have retreated to a position that the Bush administration, at its most extreme, would have been proud of.

For those of us who don't mind prisoners being brought to the US mainland to face trials (35 in total, according to Obama's Guantánamo Task Force), but who are implacably opposed to the administration's contention that it can hold some prisoners indefinitely (48 of the remaining 181 prisoners), it is by no means a tragedy that the plan to replicate some of Guantánamo's most unpalatable innovations on American soil has been prevented.

In my more optimistic moments, it strikes me that, with the option of transferring prisoners to the US mainland denied, the administration will — if it remains committed to the closure of Guantánamo — have to rethink its plans, and that one way of doing this would be to give up on its intention to hold 48 men indefinitely, which, to put it bluntly, is unconstitutional.

In truth, the claim that 48 men should be held indefinitely has always been something of a deception, because these men have outstanding habeas corpus petitions in the District Court in Washington D.C., where judges, rather than an unaccountable Task Force, are making their own decisions about whether they are, as President Obama explained in a major national security speech last May , a special category of prisoner who "cannot be prosecuted yet who pose a clear danger to the American people."

So far, the judges have ruled that just 14 men can continue to be held indefinitely, although it's noticeable that, in denying their habeas petitions, they have generally not concluded that they "pose a clear danger to the American people," but have, instead, found that they were minor players

in the Taliban, or in al-Qaeda forces supporting the Taliban. However, according to the detention policies they are required to follow, the judges are not allowed to distinguish between the terrorists of al-Qaeda and the foot soldiers of the Taliban when it comes to consigning men, on an apparently sound legal basis, to endless incarceration.

This problem relates to the Authorization for Use of Military Force, passed by Congress the week after the 9/11 attacks, which authorizes the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001" (or those who harbored them). Combined with a Supreme Court ruling (in *Hamdi v. Rumsfeld*, in 2004) that "Congress has clearly and unmistakably authorized detention" of individuals covered by the AUMF, this is the rationale used by the administration to justify the prisoners' detention, and, although different judges have expressed different opinions about who these individuals are, they have broadly agreed that, to qualify as an "enemy combatant" — or, in Obama's new world, an "alien unprivileged enemy belligerent" — the government is required to prove, by a preponderance of the evidence, that these individuals supported al-Qaeda and/or the Taliban.

This lack of distinction between al-Qaeda and the Taliban is clearly ridiculous, as was noted last year by two judges, Judge James Robertson and Judge Thomas Hogan, who made a point of stating, when refusing to grant the habeas petitions of two Yemenis, Adham Mohammed Ali Awad and Musa'ab al-Madhwani, that they did not regard either man as an ongoing threat. Regarding Ali Awad, Judge Robertson noted, "It seems ludicrous to believe that he poses a security threat now," and in al-Madhwani's case, Judge Hogan stated that he "did not think Madhwani was dangerous," noted that he has been a "model prisoner" since his arrival at Guantánamo in October 2002, and added, "There is nothing in the record now that he poses any greater threat than those detainees who have already been released."

Moreover, this inability to make a distinction between al-Qaeda and the Taliban — or al-Qaeda forces supporting the Taliban in military operations in Afghanistan, rather than in activities related to terrorism — is one that I have been railing against for some time now, for the simple reason that the former should be put forward for trials, whereas the latter — if they should continue to be held at all — should be held as prisoners of war according to the Geneva Conventions.

I don't see this happening anytime soon, of course, because no one even wants to talk about it, but when the House Armed Services Committee moves so decisively to prevent the closure of Guantánamo — and every sign is that the House will approve their amendment this week, and the Senate Armed Services Committee will follow suit at the end of the month — the closure of Guantánamo now requires a new kind of thinking.

To my mind, this should involve, first of all, more respect for the District Court's habeas rulings than has been shown to date. Over the last 20 months, judges have granted the habeas petitions of 35 prisoners, and along the way have done more to demolish claims that Guantánamo holds "the worst of the worst" than any other forum, exposing how much of the government's supposed evidence consists of unreliable statements made by the prisoners themselves or by their fellow prisoners, and also exposing how torture, coercion and the bribery of prisoners with better living conditions have played a major role in making these statements unreliable. Despite this, the administration has failed to take advantage of these rulings in its dealings with Congress, and has preferred to either appeal them, or to release those who have won their petitions with extreme reluctance.

In addition, rethinking the closure of Guantánamo should involve highlighting the fact that 96 of the 181 men still held have been cleared for release, reviving plans for returning dozens of cleared men to Yemen (which were shelved in the most cowardly manner after it was revealed that the would-be Christmas Day plane bomber, Umar Farouk Abdulmutallab, had trained in Yemen), and — although I expect hell to freeze over before this comes to pass — renewing calls for cleared prisoners who cannot be repatriated because they face the risk of torture to be allowed to settle in the US, as was planned last year by White House Counsel Greg Craig, supported by Robert Gates and Hillary Clinton, until Obama got cold feet.

This could best be achieved by allowing US citizens access to the stories of cleared prisoners released in other countries who are living peaceful lives, and, if it's of any use, I'm happy to help on this front, as I've spent much of the last three months traveling around the UK with a former

prisoner, Omar Deghayes, showing "Outside the Law: Stories from Guantánamo" (a film I co-directed, in which Omar plays a major part), and can guarantee that giving people the opportunity to meet Omar (after they have seen his pained and eloquent testimony about his ordeal) is a perfect way to demonstrate that colossal mistakes were made — and continue to be made — at Guantánamo, that many innocent men were seized, and that many of these innocent men are still held.

And finally, to return to the confusion between al-Qaeda and the Taliban that is at the heart of Guantánamo's detention problem, rethinking the closure of Guantánamo should involve a recognition that the failure to distinguish between al-Qaeda terrorists and Taliban foot soldiers is unfairly consigning men to indefinite detention as terrorists when they should be held as prisoners of war. In addition, it should also provide an opportunity to reflect on the more fundamental question of whether, over eight years after most of the men who are still held at Guantánamo were first seized, the Authorization for Use of Military Force is a valid reason for detention at all, when the Geneva Conventions and the criminal justice system should suffice.