

Court rules detainees in Afghanistan can challenge imprisonment

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In another rebuke to the arrogation of power by both the Bush and the Obama administrations to imprison so-called enemy combatants indefinitely without charges or trials, a federal judge in Washington ruled that three detainees held at a US prison at the Bagram air base in Afghanistan have the right to challenge their detention in a US court.

The case is one of a number in which the Obama administration has continued the defense begun by the Bush administration of extra-constitutional policies and practices introduced over the past eight years on issues ranging from "extraordinary rendition" to torture and domestic spying.

This case involves four individuals who were seized by US security forces and transported against their will to Afghanistan for imprisonment in the Bagram detention facility. Some of them report first being held and tortured in secret CIA prisons, so-called "black sites." None of them had any involvement in the ongoing war being waged by the US military against Afghan forces resisting foreign occupation.

The four include: Fadi al Maqaleh, a Yemeni citizen who was captured by US forces outside of Afghanistan in 2003; Haji Wazir, an Afghan citizen who was seized in Dubai in 2002; Amin al Bakri, a Yemeni citizen, grabbed by US operatives in Thailand in 2002; and Redha al-Najar, a citizen of Tunisia who was captured in Pakistan in 2002. All of them have been held under brutal conditions for more than six years without ever being tried or even allowed to hear the supposed evidence against them.

The Bush administration declared all those held at Bagram "enemy combatants," claiming that they had no right to judicial review in the US, nor any protection under the Geneva Conventions governing treatment of prisoners of war. The practical effect of this classification was to turn Bagram into a center of torture, where at least two detainees have died under interrogation.

The Bagram facility has received far less public attention than the Guantánamo Bay detention camp, with its 600 detainees denied any contact with lawyers, family members or indeed anyone outside of their American jailers and the International Committee of the Red Cross, which is bound by its agreement not to make public statements about conditions in specific

prisons. Every bit as much as Guantánamo or Abu Ghraib, the Bagram facility embodies the lawlessness and brutality that led much of the world to see the US as a pariah state under the Bush administration.

After the change in administrations, Judge John D. Bates of the US District Court for the District of Columbia scheduled a hearing to allow the new president and his Justice Department to change the position taken under Bush.

But on February 20, Obama's lawyers went into court to announce that "the government adheres to its previously articulated position"—i.e., the Bush administration's position, of seeking the dismissal of the appeal by the detainees for the right to file habeas corpus petitions in US district courts.

In a 55-page ruling issued Wednesday, Judge Bates rejected the government's move to have three of the detainees' petitions dismissed. In the case of the fourth, the Afghan citizen Haji Wazir, he reserved judgment pending the filing of further briefs by the government and his lawyers. All four of the detainees have been represented by the International Justice Network.

Bates based his ruling largely on the June 2008 US Supreme Court decision in the case of *Boumediene et al v. Bush*, in which the high court ruled that the "enemy combatants" held at Guantánamo had the right to file habeas corpus petitions in US courts challenging the legality of their imprisonment.

The 5-4 decision held that the 2006 Military Commissions Act setting up military commissions to try the detainees represented an unconstitutional usurpation of power in categorically denying them habeas corpus rights. It found the legislation in violation of the so-called Suspension Clause in the US Constitution, which states: "The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it."

Bates, a conservative judge appointed by George W. Bush, stressed that his ruling was "quite narrow" and applied only to the four detainees. Nonetheless, he stressed, as did the Supreme Court majority in *Boumediene*, the fundamental character of the right of habeas corpus.

The judge quoted Alexander Hamilton's observation that habeas corpus constituted an essential bulwark against tyranny: "[C]onfinement of the person, by secretly hurrying him to jail, where his sufferings are unknown or forgotten, is a less public,

a less striking, and therefore a more dangerous engine of arbitrary government."

The government—under both Bush and Obama—essentially argued that, because the individuals detained at Bagram were not US citizens and were not abducted on US soil, the writ of habeas corpus had no bearing, and they had no right to challenge their imprisonment in a US court. Moreover, they insisted that because the detainees were being held outside of the United States, the courts had no jurisdiction.

However, the Supreme Court majority in its *Boumediene* ruling on Guantánamo rejected these arguments, finding that these issues of nationality did not automatically settle the question, particularly given that the "enemy combatants" were being imprisoned for the open-ended duration of the "global war on terrorism" and were being held on a military base where the US exercised full effective control.

The government has since argued that Bagram is fundamentally different from Guantánamo because of the "sovereignty" of the Afghan puppet regime, formally recognized in the Status of Forces Agreement it signed with Washington. Moreover, they insist that as Bagram is in a "theater of war," there are insurmountable barriers to extending habeas rights to the detainees held there. "The military's mission clearly would be compromised if the civilian courts of the United States can review the military's detention of enemy combatants it captures," stated the government's brief.

Judge Bates rejected these arguments, holding that the status of the detainees at Bagram was "virtually identical" to that of those held at Guantánamo.

"They are non-citizens who were (as alleged here) apprehended in foreign lands far from the United States and brought to yet another country for detention," the judge wrote.

Moreover, he stated that under the procedures established by the military at Bagram, detainees had "significantly less" ability to challenge their designation as enemy combatants than even those imprisoned at Guantánamo.

As for Bagram itself, Bates stated that the "effective degree of control" exercised by the US military was no different than at Guantánamo.

Finally, in relation to the "practical difficulties" posed by Bagram's location in a "theater of war," Bates stressed that this was a problem of the government's own making, given that the four detainees "were all apprehended elsewhere and then brought (i.e., rendered) to Bagram for detention now exceeding six years."

He stressed that such an act of rendition "resurrects the same specter of limitless Executive power the Supreme Court sought to guard against in *Boumediene*—the concern that the Executive could move detainees physically beyond the reach of the Constitution and detain them indefinitely.

In the case of the fourth detainee, the Afghan citizen Haji Wazir, Bates employed the case-by-case, "multi-factor" basis established by the Supreme Court for determining the

applicability of habeas rights to those held in the US detention centers. He found that the government's argument that granting him such rights could provoke "friction" with the Afghan government "possible—if not likely"—and employing the "balance of factors" scheme elaborated in *Boumediene*, ruled that he could not invoke habeas rights under that decision.

Bates deferred ruling on the dismissal of Wazir's appeal, however, ordering both sides to submit briefs on an alternative separation of powers argument made by the detainee's lawyers. They argued that the executive branch's determination of enemy combatant status combined with the congressional legislation stripping the federal courts of jurisdiction to hear enemy combatants' habeas petitions represented an unconstitutional abridgement of the power of the judiciary.

The Bagram case represents a damning indictment of the Obama administration. In an attempt to improve Washington's dismal image on the world stage, it has pledged to close the Guantánamo detention center and has released some of those held there—while continuing to hold others indefinitely without trials. At the same time, however, it is fighting in court to maintain the same conditions of imprisonment, rendition and torture—or worse—at Bagram. While dropping the "enemy combatant" designation at Guantánamo, it has gone into federal court to clarify that it reserves the right to continue using it whenever it sees fit.

Meanwhile, under conditions in which the administration is escalating the war in Afghanistan, doubling the number of US troops deployed there, it is also carrying out a major expansion of the Bagram detention center, spending \$60 million so that the facility can hold more than 1,100 prisoners.

Also significant in the decision issued by Bates on Wednesday, sections of the ruling were redacted at the demand of the government—in particular, information on how many of those now detained at Bagram were captured outside of Afghanistan and "rendered" there for interrogation and torture. The attempt by the Obama administration to keep this information from the American and world public can only mean that these practices are continuing.



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