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Judge Rules that Afghan “Rendered” to Bagram in 2002 Has No Rights by Andy Worthington

In a depressing if predictable decision last Monday, U.S. District Court Judge John D. Bates ruled that Haji Wazir, an Afghan businessman seized in the United Arab Emirates in 2002 and rendered to the U.S. prison at Bagram airbase, can continue to be held as a prisoner without rights, even though he has never had an adequate opportunity to test whatever allegations the U.S. military is using to justify his detention and even though he has been given no sign of when, if ever, his detention will come to an end.

In [a heroic ruling](#) three months ago, Judge Bates demolished the position taken by the Bush administration — and slavishly followed by the Justice Department under President Obama — which maintained that all prisoners held at Bagram were beyond the reach of the U.S. courts, and, specifically, beyond the reach of [Boumediene v. Bush](#), the Supreme Court ruling in June 2008 that recognized habeas corpus rights for the Guantánamo prisoners.

Discerning that there were, in fact, significant differences between Afghans held in Bagram — in an active war zone — and foreigners seized outside Afghanistan and rendered to the prison, Judge Bates ruled that *Boumediene* extended to the foreign prisoners, because, as he explained, “the detainees themselves as well as the rationale for detention are essentially the same,” and because, without it, it was impossible to review the legality of executive detention.

For three of the four men whose cases were heard by Judge Bates —Redha al-Najar, a Tunisian seized in Karachi, Pakistan, Amin al-Bakri, a Yemeni gemstone dealer seized in Bangkok, Thailand, and Fadi al-Maqaleh, a Yemeni, who have all been held for at least five years — it was clear that some kind of justice had finally been delivered to them, because, as I explained at the time, “only an administrative accident — or some as yet unknown decision that involved keeping a handful of foreign prisoners in Bagram, instead of sending them all to Guantánamo — prevented them from joining the 779 men in the offshore prison in Cuba.”

In theory, Judge Bates’ decision also applies to the other foreign prisoners seized outside Afghanistan and rendered to Bagram, who are thought to number around 30 of the roughly 650 prisoners held, but it is difficult to see how they will be able to file habeas corpus challenges, as

the government has refused to reveal their identities. Uncovering their identities and filing habeas claims on their behalf will presumably be the next step for lawyers representing the Bagram prisoners, but only if the government is unsuccessful in the appeal that, shockingly, was [lodged immediately](#) after Judge Bates' ruling in April.

For Haji Wazir, however, no such lifeline now exists. As I mentioned above, Judge Bates' latest ruling was unsurprising, because, in his first ruling three months ago, he refused to extend habeas rights to the Afghans who make up the majority of the prisoners held in Bagram, agreeing with the government's claim that to do so would cause "friction" with the Afghan government, because of ongoing negotiations regarding the transfer of Afghan prisoners to the custody of their own government. In the intervening months, Judge Bates reviewed other possible avenues for habeas relief in Haji Wazir's case, but concluded that they were not applicable (see the [PDF](#) of the ruling for further explanation).

Speaking to the [Associated Press](#), Tina Foster of the [International Justice Network](#), which represents Haji Wazir, said the government had given "no indication" of why her client, who, she explained, "owned a money exchange business with an office in Dubai, and split his time between Afghanistan and the UAE," was being held, and "objected to the idea that his rights should be different based solely on where he was born," as the AP described it.

"All we know is that he's being held in U.S. custody and according to this administration there's no court in which he has an ability to challenge his detention," she said by phone. "No matter what this administration says about torture ending and abusive practices ending, the fact that it won't even allow transparency into what it's doing is extremely troubling."

This is undoubtedly true, as everything about the Obama administration's approach to Bagram is "extremely troubling." The decision to appeal Judge Bates' ruling regarding the foreign prisoners defies logic, as Bates not only made clear that "the detainees themselves as well as the rationale for detention are essentially the same," but also spelled out that the review process at Bagram was both "inadequate" and "more error-prone" than the [discredited tribunal process](#) used at Guantánamo.

In his ruling, Judge Bates quoted from a government declaration which stated that the Unlawful Enemy Combatant Review Board (UECRB) at Bagram does not even allow the prisoners to have a "personal representative" from the military in place of a lawyer (as at Guantánamo) and that "Bagram detainees represent themselves." In addition, he stated,

Detainees cannot even speak for themselves; they are only permitted to submit a written statement. But in submitting that statement, detainees do not know what evidence the United States relies upon to justify an "enemy combatant" designation — so they lack a meaningful opportunity to rebut that evidence. [The government's] far-reaching and ever-changing definition of enemy combatant, coupled with the

uncertain evidentiary standards, further undercut the reliability of the UECRB review. And, unlike the CSRT process [the Combatant Status Review Tribunals at Guantánamo], Bagram detainees receive no review beyond the UECRB itself.

This Court need not determine how extensive the process must be to stave off the reach of the Suspension Clause to Bagram. It suffices to recognize that the UECRB process at Bagram falls well short of what the Supreme Court found inadequate at Guantánamo.

While it remains abundantly clear that habeas rights must extend to foreign prisoners held in Bagram and that the Obama administration must be constantly criticized for refusing to accept Judge Bates' ruling, the worry for Haji Wazir — and, to be honest, for all the other Afghans held in the prison, who were presumably seized in their own country — is that the review process mentioned by Judge Bates, and the prison authorities' uncertain relationship with the Afghan government, do not inspire confidence that Bagram is being run as it should be following Obama's inauguration.

In one of his first acts as president, Obama signed [a number of executive orders](#), in which he promised to close Guantánamo within a year and to ban torture and which established that the questioning of prisoners by any U.S. government agency must follow the interrogation guidelines laid down in the Army Field Manual, which guarantees humane treatment under the Geneva Conventions. The order relating to interrogations also specifically revoked President Bush's [Executive Order 13440](#) of July 20, 2007, which “reaffirm[ed]” his “determination,” on February 7, 2002, that “members of al-Qaeda, the Taliban, and associated forces are unlawful enemy combatants who are not entitled to the protections that the Third Geneva Convention provides to prisoners of war.”

As a result, it was my belief that Bagram — and all other prisons in a U.S. war zone — would be run as prisoner-of-war camps according to the Geneva Conventions, which make no mention of “Unlawful Enemy Combatant Review Boards” and which are not complicated by trying to work out what exactly is the relationship between the government of Afghanistan and the occupying force that is the U.S. military. If this was the case, we would now be able to have a discussion that has not taken place in the last eight years, but which is clearly long overdue: whether it is acceptable to hold prisoners of war until the end of hostilities when the “war” in question — the “war on terror,” [rebranded](#) as “Overseas Contingency Operations” by the Obama administration — has already lasted longer than the Second World War, and may, according to senior officials in the Bush administration (whose opinions have not been publicly repudiated by Obama) last for generations.

Moreover, this is not my only concern. Allied to the above was an expectation that competent tribunals — as prescribed in [Article 5 of the Geneva Conventions](#) for suspected “irregular” combatants (as opposed to regular soldiers, who, for example, wear uniforms and have a recognizable hierarchy of command) — would be reintroduced. Held close to the time and place of capture, to separate soldiers from civilians caught up in the fog of war, these were convened in every U.S. war from Vietnam until the invasion of Afghanistan in October 2001 (and led to around three-quarters of around 1,200 disputed prisoners being released during the first Gulf War), and the Bush administration’s refusal to implement them was a major factor in populating Guantánamo with [the “Mickey Mouse” prisoners](#) derided by Maj. Gen. Michael Dunlavey, one of Guantánamo’s earliest commanders, in 2002.

It was also my belief, following the issuing of Obama’s executive orders, that the president would call an immediate halt to what I can only describe as the “Rumsfeldization” of the U.S. military, in which, following the directives of former Defense Secretary Donald Rumsfeld (and echoing what was happening with the intelligence agencies, where the FBI was sidelined by the CIA), the detention of prisoners was no longer a matter of holding them humanely until the end of hostilities, but became, instead, an ongoing process of interrogation, dedicated to securing “actionable intelligence,” which, of course, degenerated into the use of torture when the presumed “actionable intelligence” was not forthcoming.

It may be that the policies at Bagram changed overnight after Obama issued his executive orders in January, but the suspicion — which is only reinforced by [a BBC report](#) two weeks ago, in which 25 out of 27 prisoners, held at Bagram between 2002 to 2008, stated that they had been subjected to abuse during their detention — is that, as far as the administration is concerned, certain key innovations in the “war on terror — in particular, holding prisoners for their intelligence value, rather than to keep them “off the battlefield” — has become the post-9/11 norm, as a kind of unilateral reworking of the Geneva Conventions.

On this basis, therefore, it seems likely that the administration is still trying to avoid any kind of outside scrutiny of Bagram because its general battlefield detention policies are still as arbitrary as they were in January 2008, when the [New York Times](#) reported that Afghan prisoners were held for an average of 14 months before being released or transferred to Afghan custody. This is not perhaps quite as worrying as the administration’s refusal to accept that foreign prisoners rendered to Bagram have any rights whatsoever, but it does indicate that further scrutiny is required before the president’s fine words about the treatment of battlefield prisoners can be accepted at face value.

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