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Obama Brings Guantánamo to Bagram

by Andy Worthington

Following briefings by Obama administration officials (who declined to be identified), both the *New York Times* and the *Washington Post* reported yesterday that the government is planning to introduce a new review system for the 600 or so prisoners held at Bagram airbase in Afghanistan, which will, for the first time, allow them to call witnesses in their defense.

On paper, this appears to be an improvement on existing conditions at the prison, but a close inspection of the officials' statement reveals that the proposed plans actually do very little to tackle the Bush administration's wayward innovations regarding the detention of prisoners in wartime, and the officials also provided the shocking news that prisoners are currently being rendered to Bagram from other countries.

Reform at Bagram is certainly needed. Until 2007, there was, as the Post explained, "no formal process to review prisoner status," and, as District Court Judge John D. Bates noted in April, the system that was then put in place — consisting of Unlawful Enemy Combatant Review Boards — "falls well short of what the Supreme Court found inadequate at Guantánamo" (in *Boumediene v. Bush,* the June 2008 ruling recognizing the prisoners' constitutionally guaranteed habeas corpus rights), being both "inadequate" and "more error-prone" than the notoriously inadequate and error-prone review system of Combatant Status Review Tribunals that was established at Guantánamo to review the prisoners' cases.

Revealing the chronic deficiencies of the review system at Bagram, Judge Bates quoted from a government declaration which stated that the UECRBs at Bagram do 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," and added, with a palpable sense of incredulity:

> 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 [which was followed by annual review boards], Bagram detainees receive no review beyond the UECRB itself.

In what appears to be a direct response to Judge Bates' damning criticisms, government officials explained, as the Post described it, that:

> Under the new rules, each detainee will be assigned a U.S. military official, not a lawyer, to represent his interests and examine evidence against him. In proceedings before a board composed of military officers, detainees will have the right to call witnesses and present evidence when it is "reasonably available," the official said. The boards will determine whether detainees should be held by the United States, turned over to Afghan authorities or released.

While this checks all the boxes regarding the deficiencies identified by Judge Bates and includes the additional promise that, "For those ordered held longer, the process will be repeated at six-month intervals," it hardly constitutes progress, as these plans essentially replicate the CSRTs at Guantánamo, which, lest we forget, were condemned as a sham process by Lt. Col. Stephen Abraham, a veteran of U.S. intelligence who worked on the tribunals. In a series of explosive statements in 2007, Lt. Col. Abraham explained that they relied on an evidentiary process that was nothing short of "garbage," and were designed merely to rubberstamp the Bush administration's feeble or non-existent justification for holding the majority of the men.

Hoping to fend off such criticisms, the government officials told the Post that "the review proceedings at Bagram will mark an improvement in part because they will be held in detainees' home countries — where witnesses and evidence are close at hand."

This may be the case, but at no point in the officials' statements was any mention made of the government's obligations to hold prisoners seized in wartime as prisoners of war in accordance with the Geneva Conventions. In practical terms, this would not necessarily help the prisoners secure their release, because the Conventions assert that prisoners of war can be held until the end of hostilities, and at present, from the best estimates made available, prisoners are held for an average of 14 months before being transferred to Afghan custody (or, in some cases, released outright), and around 500 prisoners have left Bagram to date.

However, under Article 5 of the Geneva Conventions, if there is any doubt about the status of prisoners seized in wartime, competent tribunals must be held, close to the time and place of capture, in which prisoners are allowed to call witnesses. As I have explained at length before,

these tribunals were held during every U.S. war from Vietnam onwards, but were deliberately suppressed by the Bush administration (contributing decisively to the filling of Guantánamo with men who had no connection whatsoever to any form of militancy whatsoever), and what President Obama must do, if he is intending to ensure that the United States once more embraces the Geneva Conventions, is to pledge that all prisoners seized in future will be subjected to these tribunals on capture, rather than holding versions of the CSRTs at some unspecified time afterwards.

By refusing to do so, I can only infer that he and his administration have, essentially, accepted the Bush administration's aberrant changes regarding the detention of prisoners in wartime as a permanent shift in policy, with profound implications for the Conventions in general.

If Obama's plan stands, any country anywhere in the world will be able to seize irregular soldiers during wartime (including US forces working undercover, presumably), and, instead of holding competent tribunals, feel justified in holding them for an unspecified amount of time before subjecting them to innovative tribunals, which bear a resemblance to the competent tribunals, but which are, instead, clearly designed to shred Article 5 and to allow prisoners to be held until their circumstances can be explored further — and, again by inference, until they can be milked for their supposed intelligence value, with all the ominous undercurrents that phrase involves.

In the case of Bagram, a further complication is that, according to the Post, the Conventions have been shredded still further, because about 200 of the 500 prisoners who have left Bagram "have been convicted in Afghan courts, all based on evidence the United States provided."

These fundamental assaults on the Geneva Conventions, combined with the evidence regarding the dubious relationship between the U.S. and the Afghan courts, are disturbing enough, as they demonstrate, in defiance of the claims made by government officials, that the Obama administration is only tinkering with its predecessor's fundamental disregard for international laws and treaties.

However, the timing of the government's announcement is also enormously suspicious because, as the Times explained, it comes "as the administration is preparing to appeal a federal judge's ruling in April that some Bagram prisoners brought in from outside Afghanistan have a right to challenge their imprisonment."

That ruling, which I quoted from above, was made by Judge Bates, in the cases of three foreign prisoners seized in other countries and "rendered" to Bagram, where they have languished without rights for up to six years. In April, when Judge Bates ruled on their habeas corpus appeals, he had no hesitation in granting them the right to challenge the basis of their detention through the courts because, as he explained unambiguously, "the detainees themselves as well as

the rationale for detention are essentially the same." He added that, although Bagram is "located in an active theater of war," and that this may pose some "practical obstacles" to a court review of their cases, these obstacles "are not as great" as the government suggested, are "not insurmountable," and are, moreover, "largely of the Executive's choosing," because the prisoners were specifically transported to Bagram from other locations.

As I explained at the time, it was inconceivable that the government could come up with an argument against Judge Bates' ruling, or, indeed, that there was any justification whatsoever for doing so, because "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."

However, although Judge Bates, in a later ruling, sided with the government by refusing to grant habeas rights to an Afghan prisoner seized in the United Arab Emirates in 2002 and also rendered to Bagram, primarily because he agreed with the government's claim that to do so would cause "friction" with the Afghan government regarding negotiations about the transfer of Afghan prisoners to the custody of their own government, the Obama administration refused to accept his ruling about the foreign prisoners and launched an immediate appeal. As a result, it is, I believe, completely justifiable to conclude that the entire rationale for introducing a new review process for all the prisoners at Bagram is to prevent the courts from having access to the foreign prisoners held there. Reinforcing this conclusion is another admission, hidden away towards the end of the Times report, in which it was noted that the officials also explained that "the importance of Bagram as a holding site for terrorism suspects captured outside Afghanistan and Iraq has risen under the Obama administration, which barred the Central Intelligence Agency from using its secret prisons for long-term detention."

This, to put it bluntly, is terrifying, as it seems to confirm, in one short sentence, that, although the CIA's secret prisons have been closed down, as ordered by President Obama, a shadowy "rendition" project is still taking place, with an unknown number of prisoners being transferred to Bagram instead.

The upshot of all this is disastrous for those who hoped that President Obama would not only accept but would positively embrace the opportunity to return to the laws that existed regarding the capture and detention of prisoners, before they were so comprehensively dismissed by the Bush administration. Far from reassuring the world that there are only two acceptable methods for holding people in detention — either as criminal suspects, to be put forward for trials in federal court, or as prisoners of war, protected by the Geneva Conventions — Obama has chosen instead to continue to operate outside the law, implementing Guantánamo-style tribunals at Bagram and acknowledging that he wants the U.S. courts to remain excluded because he is using Bagram as a prison for terror suspects "rendered" from around the world.

To gauge quite how disastrous this news is, imagine how former Vice President Dick Cheney is responding to it. Yes, that is indeed a smile playing over the lips of the architect of America's wholesale flight from the law in the wake of the 9/11 attacks. "I told you so," he mutters contentedly.

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