

Judge Rules Bagram Detainees Can Appeal to U.S. Courts

District Court Decision Could Have Far-Reaching Consequences for Prisoners Held by U.S. in Afghanistan

By Daphne Eviatar 4/3/09 6:00 AM



Bagram Air Field, Afghanistan (army.mil)

For years, the 600 men imprisoned at the Bagram air base in Afghanistan largely escaped public notice. While the detainees at Guantanamo Bay roused the ire of critics of the Bush administration around the world, their counterparts at Bagram, held with fewer rights and much less scrutiny, languished in a U.S.-run prison and in some cases suffered gruesome beatings and even death at the hands of their captors.

Tina Monshipour Foster, the founder and executive director of the

International Justice Network, was for years one of the few U.S. lawyers trying to do anything about it. So when she heard Thursday that a federal district judge in Washington had ruled that three of the four Bagram prisoners she represents have the right to challenge their detention in a U.S. court, she was thrilled.



Illustration by: Matt Mahurin

“I’m very, very happy,” she said, reached by phone Thursday afternoon. “Maybe people will finally start listening to me.”

Foster’s reaction comes out of years of advocating for the Bagram detainees held as prisoners in President Bush’s “war on terror” but without any of the rights to which prisoners of war are usually entitled. And while lawyers from the major advocacy organizations and law firms labored hard to argue that detainees at Guantanamo Bay have constitutional rights, almost no one was willing to make that argument on behalf of the hundreds more men and boys being held at Bagram. The government — first the Bush administration, then the Obama administration — argued that because they were not U.S. citizens and were held outside the United States (and outside Guantanamo Bay), they had no constitutional rights whatsoever. That they were being held in Afghanistan, where the United States is engaged in armed conflict, made Foster’s argument that they had the right to challenge their detention in a U.S. court even more difficult.

But as I’ve written before, and as Judge John D. Bates confirmed in a groundbreaking ruling yesterday, the situation at Bagram is in fact much like that of Guantanamo Bay. Men suspected of participating in or aiding terrorism, or sold for bounty to the U.S. government by Afghan warlords, were imprisoned without charge or trial at the U.S.-run air base, where the U.S. government, which has leased the base indefinitely, has complete authority over them. In its early years, Bagram was the site of horrific abuses, such as the murders of two prisoners who were beaten two death during interrogations. Although the Pentagon says it has improved the conditions at Bagram since then, it’s impossible to know, because no one other than the U.S. military and the International Committee of the Red Cross, which issues only confidential reports to relevant governments, is allowed into the prison.

Foster is one of the few U.S. lawyers who’s even tried to get into Bagram, and traveled to Afghanistan to meet with prisoners’ families. As a result, even after a few earlier cases were dismissed because the Bush administration

transferred them to Afghan prisons, relatives of other prisoners who'd mysteriously disappeared (they later learned they were in Bagram) contacted Foster and her colleagues seeking help.

In the case Bates ruled on Thursday, the International Justice Network, with the help of legal clinics from Yale and Stanford law schools, was representing four men, each abducted by U.S. authorities in various parts of the world — all outside Afghanistan — and brought to Bagram to be imprisoned, some after being tortured, they claim, in CIA “black sites”. They had all been at Bagram without charge, or the right to meet with a lawyer or family member, for more than six years. The court found that as to at least three of them, the Supreme Court’s ruling in *Boumediene v. Bush*, which determined that Guantanamo prisoners have the right to habeas corpus review, applies just as forcefully.

“[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,” wrote Bates, quoting Alexander Hamilton and the U.S. Supreme Court.

Quoting The Supreme Court in *Boumediene*, he continued: “Within the Constitution’s separation-of-powers structure, few exercises of judicial power are as legitimate or as necessary as the responsibility to hear challenges to the authority of the Executive to imprison a person.”

Responding to the government’s arguments that the courts have no right to second-guess the executive in the area of military affairs, the judge wrote: “The writ [of habeas corpus] is a judicial check on Executive detention. . . . Hence, respondents’ recurring theme — that this Court would be overstepping its constitutional role by entertaining habeas petitions filed by these detainees — rings hollow.”

As to one prisoner, Haji Wazir, an Afghan citizen, Bates withheld judgment about his rights, directing the lawyers to file additional briefs explaining how his citizenship should affect the court’s determination. The Supreme Court in *Boumediene* had noted as a factor in favor of providing habeas corpus review that none of the Guantanamo prisoners were citizens of Cuba.

While the judge’s ruling governs only the rights of the particular prisoners named in this case, it has potentially far-reaching consequences.

“It shows that the courts are not going to take cosmetic rhetoric as a substitute for a legal basis for detention,” said Foster. “The rhetoric that we’re in a war on terror and that Afghanistan is in the middle of a war zone doesn’t change the fact that the U.S. government brought people who had nothing to do with the conflict in Afghanistan or the war on terror to be held in its custody in the middle of Afghanistan.”

On the other hand, the judge did make clear that the factors the Supreme Court set out in *Boumediene* to determine when prisoners have habeas rights could lead to different outcomes for different prisoners.

“It’s a balancing test,” explained Eric Lewis, partner in the law firm Baach

Robinson & Lewis who worked with Foster on an earlier case regarding two Afghans imprisoned at Bagram. Their cases were dismissed when, after the lawyers filed the habeas petitions with the federal court, the Bush administration transferred them to Afghan custody and they were eventually freed. Lewis acknowledged that the rights of Afghan citizens picked up by the U.S. military in Afghanistan remain unclear even after yesterday's ruling. "While he didn't decide anything about those scenarios, there seems to be the suggestion that if you're an Afghan national detained in Afghanistan, the idea of an overlapping Afghan sovereign interest would loom large. How that would play out in a specific case is hard to say."

Lawyers watching these cases are hopeful. "Clearly this was not somebody with any ideological agenda or preconceived approach," said Lewis of Judge Bates, who was appointed to the federal court by President George W. Bush and is known as a conservative. "But he understood that there was a role for the judiciary and that keeping people forever in a secure military base, even while it is in a theater of war, at some point the Geneva conventions preclude you from doing that. You have to remove people from an active theater of war. You can't keep prisoners as human shields. I think he basically took that point. So I think it's a very important development."

Now that the International Justice Network has won its case in the district court, more advocates may be willing to take on cases of other Bagram prisoners that will test the limits of yesterday's decision. Lewis said he's already talking to Foster about other potential cases.

"One question will be whether people are still being brought to Bagram from elsewhere as a way to avoid review, and how the U.S. is treating prisoners at Bagram," said Jonathan Hafetz, an attorney with the American Civil Liberties Union's National Security Project who has not participated in these cases, but is watching them closely. He said he expects to see more challenges to the Obama administration's Bagram policy based on the court's ruling. "Right now, they're not being given a fair process and they're being held with less process than prisoners got at Guantanamo."

Indeed, in his order, Judge Bates went out of his way to say that the process that Bagram prisoners are afforded to challenge their detention "is plainly less sophisticated and more error-prone" than even the limited process provided at Guantanamo Bay. Bagram detainees not only have no right to representation in the military's review process, but they cannot speak to the court; they are only allowed 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," wrote Judge Bates. On top of that, their statement is usually in a foreign language that must be translated into English. In short, the procedure provided at Bagram for prisoners to challenge the legitimacy of their detention, concluded Judge Bates, "falls well short of what the Supreme Court found inadequate at Guantanamo."

Advocates hope that finding will tip the balance in favor of other Bagram prisoners seeking habeas corpus rights as well. That right may become even more important as President Obama presses forward with his new strategy for increased engagement in Afghanistan, which could lead to more

prisoners detained there.

For the detainees that were the subject of yesterday's ruling, however, there are more immediate concerns — namely, whether the Obama administration will appeal.

“I don't know what the Obama administration is going to do with this ruling,” said Foster, noting that the Bush administration fought hard for years against all habeas cases on behalf of so-called “enemy combatants.” “Will they dig in their heels? It will be a very good indication of things to come, whether they are willing to expend the resources to argue that the president ought to have a right to take these prisoners — who have been denied their rights for more than six years — and lock them up forever.”

“It's our hope that the Obama administration won't delay this case any further but will give us our day in court,” said Hope Metcalf, a lawyer with the Yale law school clinic that represented some of the Bagram prisoners with Foster. “The worst thing for everybody would be another six years of appeals, going back and forth to the Supreme Court and no opportunity for justice.”

Eric Lewis, who, with the Center for Constitutional Rights, represents four former Guantanamo prisoners suing Bush administration officials for torture, hesitated when asked to predict what the Obama administration will do now. To the surprise of many lawyers, President Obama has refused to change the administration's position in any of the torture cases filed against former Bush officials. It's similarly insisted that Bagram detainees have no rights. “It will be interesting to see how much stomach they have for really pushing this hard at the next level,” said Lewis about the Bagram case.

“My sense is, they say ‘we are going to close Guantanamo, we're going to let some of these people go free or get trials.’ But they don't seem particularly interested in curtailing the power of the executive in the abstract. We saw that in Rasul and in these cases too,” Lewis continued. In both situations, the legal arguments come down to whether the courts have the power to review executive decisions. “How much they want to make that an issue in their administration remains to be seen.”