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Bagram: Is it Obama's new Guantanamo?

By Tom Curry
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Should detainees the United States has shipped to the Bagram air base in Afghanistan have the same constitutional right to challenge their detention in court that prisoners at the Guantanamo prison in Cuba have been given?

President Barack Obama didn't answer that question in a May 21 speech outlining his policy for dealing with alleged terrorists. In fact, Obama didn't mention Bagram at all.

Yet human rights lawyers say Bagram will play a critical role in shaping the Obama administration's detainee policy.

Obama has promised to close the Guantanamo prison by Jan. 22 of next year, but the Bagram prison continues to house alleged terrorists captured by the United States in Pakistan and other nations.

As a candidate for president, Obama praised a Supreme Court ruling last June that granted prisoners at Guantanamo habeas corpus rights to challenge their detention. He applauded Justice Anthony Kennedy's decision in *Boumediene v. Bush* as "a rejection of the Bush administration's attempt to create a legal black hole at Guantanamo."

Do Guantanamo rules reach to Bagram?

But an April 2 decision by U.S. District Judge John Bates that applied the *Boumediene* ruling to some Bagram prisoners is forcing Obama to confront the question of whether he's presiding over his own "legal black hole" at the prison in Afghanistan.

The Obama administration is challenging this ruling in the federal appeals court in Washington, D.C., arguing that Bates' ruling would for the first time in American history extend habeas corpus rights to non-Americans in a theater of war in a foreign territory.

The Bagram site, they contend, is not like Guantanamo because the United States has become

de facto ruler of the Cuban base after maintaining control of it since 1903.

But Bates ruled that some of those held at Bagram who were captured outside Afghanistan “are virtually identical to the detainees in Boumediene,” describing them as “non-citizens who were... apprehended in foreign lands far from the United States and brought to yet another country for detention.”

“The constitutional issues presented are consequential and fundamental: at stake are separation of powers considerations, the president's authority to wage war abroad free from judicial scrutiny, and the constitutional rights of certain aliens detained abroad indefinitely by the United States,” Bates wrote in a separate ruling this week that cleared the way for the appeal.

His original ruling — which is on hold pending the appeal — gave habeas rights to three men at Bagram, all of whom are being held as “illegal enemy combatants”:

Fadi al Maqaleh, a Yemeni who was taken into U.S. custody in 2003 (Obama administration lawyers say he was captured in Afghanistan; al Maqaleh says his capture occurred outside Afghanistan).

Amin al Bakri, a Yemeni, captured by U.S. forces in Thailand in 2002.

Redha al-Najar, a Tunisian who was captured in Pakistan in 2002.

If upheld by the appeals court and Supreme Court, the Bates ruling would open the way to appeals by others at Bagram, though it is not clear how many detainees were moved to the prison after being apprehended outside the country.

Criticism of Obama from abroad

Bates' ruling has fueled criticism of the Obama administration, in the United States and abroad.

The Times of London said in a May 27 signed editorial that Bagram is “the grossly underreported story” of “a U.S.-run jail that Mr. Obama does not want the world to focus on. ... It is Bagram, not Guantanamo, that should trouble the world's conscience.”

Times writer Tim Reid said that at Bagram “more than 600 prisoners, many held for years, and all without charges and indefinitely are packed into conditions far worse than Guantanamo.”

Tina Foster, executive director of the International Justice Network, a legal advocacy group which is representing al Maqaleh and al Bakri, agreed that Obama is aiming to deflect attention from the Afghan prison.

'A completely lawless enclave'

“I think the administration is not talking about Bagram because it is an embarrassing part of their detention policy,” she said.

Obama “has adopted the Bush administration policy which allows the president to maintain a completely lawless enclave any place in the world besides the U.S. and Guantanamo Bay. They'd like the American public to believe they have solved the problem by declaring they are going to close Guantanamo.”

The White House did not respond to msnbc.com's requests for comment on the Bagram issue.

Decision limited to Guantanamo?

But one critic of the Supreme Court's decision on Guantanamo, Brookings Institution legal expert Benjamin Wittes, warned last year that the ruling would lead to judges extending habeas rights to military prisoners held by the United States around the globe.

"I didn't think you could confine it to Guantanamo," he told msnbc.com. "A lot of people said then that I was being alarmist; I think I was being realistic."

Other legal experts said Obama's decision to leave Bagram out of his May 21 speech won't remove his need to confront the legal problems posed by the site.

"It's unfortunate, because Bagram is certainly going to be the focus of concerns for the administration" in dealing with detainee policy from now on, said Gabor Rona, the International Legal Director of the advocacy group Human Rights First.

Noting that a task force appointed by Obama and headed by Defense Secretary Robert Gates and Attorney General Eric Holder is due to report its proposals for a new detainee policy next month, Rona said, "Whatever recommendations it makes are going to be driven by the present state of affairs at Bagram."

Gathering evidence in a theater of war

Bagram is different from Guantanamo in one important respect: It's in an active theater of war.

But the difficulties in gathering evidence and taking depositions "certainly are not insurmountable," Bates said in his decision. (Bates was appointed to the court by President George W. Bush in 2001.)

But Justice Department lawyers argue that responding to habeas petitions from Bagram detainees would "divert the military's attention and resources at a critical time for operations in Afghanistan."

Moreover, they contend, Bates' ruling "encroaches on military judgments about where to detain an individual captured during an ongoing war."

Under the separation of powers doctrine, they argue, the commander in chief and his generals need broad powers to conduct military operations. Allowing habeas litigation under these circumstances would risk harming the president's "ability to succeed in armed conflict and to protect United States' forces."

But law professor Kal Raustiala, the director of UCLA's Burkle Center for International Relations, said Bates' ruling was narrow enough that it would not significantly disrupt military operations.

"Judge Bates ruled on only a handful of individuals, all of whom were brought to Bagram from elsewhere," he said. "Limited to these cases, the diversion is not that great."

He said the crucial point is that Bates “is trying to take away the incentive to bring outsiders (those captured outside Afghanistan) to Bagram. He wants to avoid the problem posed by Guantanamo — that the government is incentivized to move individuals there to avoid habeas and other rights.”

If Bagram or other foreign bases are beyond the reach of habeas corpus, “it creates a mechanism for executive tyranny in a world in which it is easy to fly someone in there on a suspicion,” said Raustiala.

The Pakistan problem

With Obama accelerating military operations in both Afghanistan and Pakistan — seeing the two as “AfPak,” one unified strategic region — Justice Department lawyers emphasized the problem that Pakistan problem in motions filed with Judge Bates.

Granting habeas rights to those held at Bagram would give “the enemies of the United States an incentive to conduct operations from Pakistan, using it as a safe haven and using the U.S. court system as a tactical weapon,” they said, sketching a scenario in which lawyers would tie up the military in protracted proceedings to determine where and under what circumstances each particular prisoner at Bagram was captured.

“This is the hardest issue for the courts,” observed Raustiala. Obama “wants to be able to capture individuals in Pakistan and bring those individuals to Bagram, and there may be much more of this kind of thing in the next months. And it is hard to articulate a principle that would allow that — and yet be consistent with Bates's decision.”