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Is Bagram Obama's New Secret Prison?

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September 15,

On Monday, one day after the [New York Times](#) and the [Washington Post](#) reported that the Obama administration was planning to introduce tribunals for the prisoners held in the U.S. prison at Bagram airbase, Afghanistan, the reason for the specifically timed leaks that led to the publication of the stories became clear.

The government was hoping that offering tribunals to evaluate the prisoners' status would perform a useful PR function, making the administration appear to be granting important rights to the 600 or so prisoners held in Bagram, and distracting attention from the real reason for its purported generosity: a 76-page brief to the Court of Appeals for the District of Columbia [[pdf](#)], submitted yesterday, in which the government attempted to claim that "Habeas rights under the United States Constitution do not extend to enemy aliens detained in the active war zone at Bagram Airfield in Afghanistan."

The main reason for this brazen attempt to secure a PR victory before the appeal was filed is blindingly obvious to anyone who has been studying the Bagram litigation over the last five months. In April, [Judge John D. Bates ruled](#) that three foreign prisoners seized in other countries and "rendered" to Bagram, where they have been held for up to six years, had the right to challenge the basis of their detention in U.S. courts.

Below, I discuss the government's position regarding these men and explain why introducing Guantánamo-style tribunals at Bagram is no substitute for the Geneva Conventions, and at the end of the article I also ask whether the government may not have an even darker motive, related to what I perceive to be comments from administration officials revealing Bagram's ongoing use as a secret prison for foreign suspects "rendered" from other countries.

Why Bringing Guantánamo to Bagram Is Intended to Exclude the U.S. Courts

Despite fierce opposition from Obama's Justice Department, which clung to the line taken by the Bush administration, Judge Bates ruled in April that [Boumediene v. Bush](#) – the Supreme

Court ruling last June that granted constitutionally guaranteed habeas corpus rights to the prisoners in Guantánamo – extended to foreign prisoners "rendered" to Bagram, because "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.

Judge Bates was undoubtedly correct, for two reasons: first, 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"; and second, because he [refused to extend habeas rights](#) to an Afghan prisoner "rendered" to Bagram from the United Arab Emirates in 2002 – and, by extension, to the rest of the Afghans in Bagram, seized in Afghanistan, who constitute all but 30 or so of the 650 men held in the prison – 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.

Reinforcing its hopes that offering tribunals to the prisoners would deflect attention from its desire to keep holding "rendered" prisoners at Bagram indefinitely, the government included an addendum with its brief on Monday, outlining its plans for the new tribunal system. This is designed to replace an existing review system, which, in the words of Judge Bates, "falls well short of what the Supreme Court found inadequate at Guantánamo" in *Boumediene*, being both "inadequate" and "more error-prone" than the notoriously inadequate and error-prone system of Combatant Status Review Tribunals (CSRTs) that was established at Guantánamo to review the prisoners' cases.

Reporters have been quick to spot that the new review system – far from providing an adequate system that would, presumably, satisfy the Supreme Court – is, in fact, little more than a carbon-copy of the CSRTs, which were severely criticized by the Supreme Court in *Boumediene*, and which were also savaged by [Lt. Col. Stephen Abraham](#), a veteran of U.S. intelligence who worked on them, who explained, in a [series of explosive statements](#) in 2007, that they were designed primarily to rubber-stamp the administration's insistence that the men were "enemy combatants," even though they had not been adequately screened on capture.

What Has Happened to the Geneva Conventions?

This omission of screening on capture – which has applied at Bagram ever since – came about because, under instructions from the highest levels of government, the military was obliged to shelve its plans to hold competent tribunals under [Article 5 of the Geneva Conventions](#), despite the fact that they had been pioneered by the U.S., and had been used successfully in every war from Vietnam onward. Held close to the time and place of capture, these tribunals (as opposed to the CSRTs, which mockingly echoed them), comprise three military officers, and are designed to separate combatants from civilians seized in the fog of war, in cases where it is not obvious that prisoners are combatants (when they are not wearing a uniform, for example), by allowing the men in question to call witnesses.

During the first Gulf War, around 1,200 of these tribunals were held, and in nearly three-quarters of the case, the men were found to have been wrongly detained and were released. The [failure to implement these tribunals](#) in the "War on Terror" contributed enormously to the filling of Guantánamo with prisoners who had no connections to any form of militancy whatsoever, and these initial errors were not redressed when a skewed version of the tribunals – the CSRT system – was introduced two and half years later.

As a result, plans to introduce Guantánamo-style tribunals to Bagram – in which prisoners are assigned military representatives instead of lawyers and may call witnesses and present evidence if "reasonably available" – may be an improvement on the existing system of Unlawful Enemy Combatant Review Boards at Bagram, in which the prisoners have no representation whatsoever and are only allowed to make a statement *before* they hear the evidence against them, but it fails to take into account the fact that non-uniformed prisoners seized in wartime, like those at Bagram, should, under the terms of the Geneva Conventions, be given competent tribunals on capture and then, if found to be combatants, held unmolested until the end of hostilities.

Despite being addressed in the DoD's new proposals, these concerns are not mitigated by the fact that, according to these plans, new prisoners will be subjected, on capture, to cursory reviews by "the capturing unit commander" and by the commander of Bagram to ascertain that they "meet the criteria for detention," and the problem is underlined by the DOD's insistence that it is not merely holding prisoners "consistent with the laws and customs of war," but also holding those who fulfill the criteria laid down in the [Authorization for Use of Military Force](#) (the founding document of the "War on Terror," approved by Congress within days of the 9/11 attacks), which authorized the president to detain those who "planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001," or those who supported them.

So Is Bagram Obama's New Secret Prison?

However, while this is a genuinely disturbing development, because it suggests that the Obama administration is essentially following former president Bush's lead by unilaterally rewriting the Conventions, presumably to allow it to continue exploiting prisoners of war for their supposed intelligence value (even though the DoD explained, in its proposal, that "intelligence value, by itself, is not a basis for internment"), only one major media outlet – the *New Yorker* – has picked up on a disturbing disclosure in the *Times*' coverage of the story on Sunday. [I reported this in an article on Monday](#), when I explained that there was something deeply suspicious about the officials' statement 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."

As I explained, this "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."

In a blog post for the [New Yorker](#), Amy Davidson also picked up on the statement, calling it a sentence "that doesn't make much sense," and then asked:

"So closing Guantánamo increases the need for a new Guantánamo, and barring the use of secret prisons just means that you need to find a new place to stash secret prisoners? Have we had it with Guantánamo because it's unfashionable – like a played-out spring-break destination, now overrun with journalists and human-rights lawyers hopping on planes in Florida – or because we actually don't like extrajudicial, indefinite detention?"

While I await further developments, I recall that, back in April, CIA Director [Leon Panetta explained](#) that, although the CIA "no longer operates detention facilities or black sites and has proposed a plan to decommission the remaining sites," the agency "retains the authority to detain individuals on a short-term transitory basis." Panetta added that, although no detentions had occurred since he became director, "We anticipate that we would quickly turn over any person in our custody to U.S. military authorities *or to their country of jurisdiction*, depending on the situation."

Is this what is happening now at Bagram? Shortly after Panetta made his comments, [I noted](#) that "the only logical conclusion" I could draw was that, "essentially, the Obama administration's only real problem with 'extraordinary rendition' is one of scale. The Bush administration's industrial-scale rendition policies have been banished, but the prospect of limited rendition – to third countries rather than to the U.S. court system, as would surely be more acceptable – is being kept as a possible option."

Whether hidden transfers to third countries are taking place is unknown, but from my reading of the officials' comments to the *Times*, I infer that the CIA is now handing suspects over to the U.S. military, including those captured outside Afghanistan, and that this is the reason, above all, that the government is anxious to prevent the U.S. courts from having access to foreign prisoners in Bagram.

Moreover, as with the Bush administration, the indications are that this process focuses solely on the gathering of "actionable intelligence" – or with "decommissioning" suspects – and that those responsible for implementing it have, yet again, chosen to ignore the fact that terrorism is a crime, prosecutable in the U.S. courts, and not an act of war requiring secret prisons and extralegal detention, however much it may be dressed up in review procedures that include only the following "[p]ossible recommendations" for what will happen to those prisoners who "meet the criteria for internment": "continued internment" in Bagram, transfer to the Afghan authorities for prosecution, transfer to the Afghan authorities "for participation in a reconciliation program," and, in the cases of "non Afghan and non-U.S. third-country national[s]," options "that may also include transfer to a third country for criminal prosecution, participation in a reconciliation program, or release." What, I wonder, are the options that were *not* included?