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Bagram, Habeas, and the Rule of Law

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9/16/2009

Andrew C. McCarthy has an article up at *National Review* criticizing a recent decision by Obama administration officials to improve the detention procedures in Bagram, Afghanistan.

McCarthy calls the decision an example of pandering to a "despotic" judiciary that is imposing its will on a war that should be run by the political branches. McCarthy's essay is factually misleading, ignores the history of wartime detention in counterterrorism and counterinsurgency, and encourages the President to ignore national security decisions coming out of the federal courts.

More details after the jump.

McCarthy is Factually Misleading

McCarthy begins by criticizing a decision by District Judge John Bates to allow three detainees in Bagram, Afghanistan, to file habeas corpus petitions testing the legitimacy of their continued detention. McCarthy would have you believe that this is wrong because they are held in a combat zone and that they have already received an extraordinary amount of process by wartime detention standards. He is a bit off on both accounts.

First, this is not an instance where legal privileges are "extended to America's enemies in Afghanistan." The petition from Bagram originally had four plaintiffs, none of whom were captured in Afghanistan – they were taken into custody elsewhere and moved to Bagram,

which is quite a different matter than a Taliban foot soldier taken into custody after an attack on an American base. As Judge Bates says in his decision, "It is one thing to detain t

hose captured on the surrounding battlefield at a place like Bagram, which [government attorneys] correctly maintain is in a theater of war. It is quite another thing to apprehend people in foreign countries – far from any Afghan battlefield – and then bring them to a theater of war, where the Constitution arguably may not reach."

Judge Bates also took into account the political considerations of hearing a petition from Haji Wazir, an Afghan man detained in Dubai and then

moved to Bagram. Because of the diplomatic implications of ruling on an Afghan who is on Afghan soil, Bates dismissed Wazir's petition. So much for judicial "despotism" and judicial interference on the battlefield, unless you define the world as your battlefield.

Second, the detainees have not been given very much process. Their detentions have been approved in "Unlawful Enemy Combatant Review Boards." Detainees in these proceedings have no American representative, are not present at the hearings, and submit a written statement as to why they should be released without any knowledge of what factual basis the government is using to justify their detention. This is far less than the Combatant Status Review Tribunal procedures held insufficient in the Supreme Court's *Boumediene* ruling.

Yes, Fix Detention in Afghanistan

McCarthy then chides the Obama administration for trying to get ahead of the courts by affording more process to detainees: "*See, we can give the enemy more rights without a judge ordering us to do so!"*

Well, yes. We should fix the detention procedures used in Afghanistan to provide the adequate "habeas substitute" required by *Boumediene* so that courts either: (1) don't see a need to intervene; or (2) when they do review detention, they ratify the military's decision more often than not.

Thing is, the only substitute for habeas is habeas. Habeas demands a hearing, with a judge, with counsel for both the detainee and the government, and a weighing of evidence and intelligence that a federal court will take seriously. If the military does this itself, then the success rate in both detaining the right people and sustaining detention decisions upon review are improved.

This is nothing new or unprecedented. Salim Hamdan, Usama Bin Laden's driver, received such a hearing prior to his military commission. The CSRT procedures that the Bagram detainees are now going to face were insufficient to subject Hamdan to a military commission, so Navy Captain Keith Allred granted Hamdan's motion for a hearing under Article V of the Geneva Conventions to determine his legal status.

Allred found that Hamdan's service to Al Qaeda as Osama Bin Laden's driver and occasional bodyguard, pledge of *bayat* (allegiance) to Bin Laden, training in a terrorist camp, and transport of weapons for Al Qaeda and affiliated forces supported finding him an enemy combatant. Hamdan was captured at a roadblock with two surface-to-air missiles in the back of his vehicle. The Taliban had no air force; the only planes in the sky were American. Hamdan was driving toward Kandahar, where Taliban and American forces were engaged in a major battle. The officer that took Hamdan into custody took pictures of the missiles in Hamdan's vehicle before destroying them.

Hamdan's past association with the *Ansars* (supporters), a regularized fighting unit under the Taliban, did not make him a lawful combatant. Though the *Ansars* wore uniforms and bore their arms openly, Hamdan was taken into custody in civilian clothes and had no distinctive uniform or insignia. Based on his "direct participation in hostilities" and lack of actions to make him a lawful combatant, Captain Allred found that Hamdan was an unlawful enemy combatant.

Hamdan's Article V hearing should be the template for battlefield detention. Charles "Cully" Stimson at the Heritage Foundation, a judge in the Navy JAG reserves and former Bush administration detainee affairs official, wrote a proposal to do exactly that, *Holding Terrorists Accountable: A Lawful Detention Framework for the Long War*.

The more we legitimize and regularize these decisions, the better off we are. Military judges should be writing decisions on detention and publishing declassified versions in military law reporters. One of the great tragedies of litigating the detainees from the early days in Afghanistan is that a number were simply handed to us by the Northern Alliance with little to no proof and plenty of financial motive for false positives. My friends in the service tell me that we are still running quite a catch-and-release program in Afghanistan. I attribute this to arguing over dumb cases from the beginning of the war when we had little cultural awareness and a far less sophisticated intelligence apparatus. Detention has become a dirty word. By not establishing a durable legal regime for military detention, we created lawfare fodder for our enemies and made it politically costly to detain captured fighters.

The Long-Term Picture

McCarthy, along with too many on the Right, is fixated on maintaining executive detention without legal recourse as our go-to policy for incapacitating terrorists and insurgents. In the long run we need to downshift our conflicts from warmaking to law enforcement, and at some point detention transitions to trial and conviction.

McCarthy might blast me for using the "rule of law" approach that he associates with the Left and pre-9/11 counterterrorism efforts. Which is fine, since, just as federal judges "have no institutional competence in the conduct of war," neither do former federal prosecutors.

Counterterrorism and counterinsurgency are not pursued solely by military or law enforcement means. We should use both. The military is a tool of necessity, but in the long run, the law is our most effective weapon.

History dictates an approach that uses military force as a means to re-impose order and the law to enforce it. The United States did this in Iraq, separating hard core foreign fighters from local flunkies and conducting counterinsurgency inside its own detention facilities. The guys who were shooting at Americans for a quick buck were given some job training and signed over to a relative who assumed legal responsibility for the detainee's oath not to take up arms again. We moved detainees who could be connected to specific crimes into the Iraqi Central Criminal Court for prosecution. We did all of this under the Law and Order Task Force, establishing Iraqi criminal law as the law of the land.

We did the same in Vietnam, establishing joint boards with the Vietnamese to triage detainees into Prisoner of War, unlawful combatant, criminal defendant, and rehabilitation categories.

The *Washington Post article* on our detention reforms in Afghanistan indicates that we are following a pattern similar to past conflicts. How this is a novel and dangerous course of action escapes me.

Who's the Despot Here?

McCarthy points to FDR as a model for our actions in this conflict between the Executive and Judiciary branches. He says that the President should ignore the judgments of the courts in the realm of national security and their "despotic" decrees. I do not think this word means what he thinks it means.

FDR was the despot in this chapter of American history, threatening to pack the Supreme Court unless they adopted an expansive view of federal economic regulatory power. The effects of an expansive reading of the Commerce Clause are felt today in an upending of the balance of power that the Founders envisioned between the states and the federal government.

McCarthy does not seem bothered by other historical events involving the President's powers as Commander-in-Chief in the realm of national security. The Supreme Court has rightly held that the President's war powers do not extend to breaking strikes at domestic factories when Congress declined to do so during the Korean War, trying American citizens by military commission in places where the federal courts are still open and functioning, and declaring the application of martial law to civilians unconstitutional while World War II was under way.

The Constitution establishes the Judiciary as a check on the majoritarian desires of the Legislature and the actions of the Executive, even during wartime. To think otherwise is willful blindness.