By Andy Worthington From Andy Worthington | Original Article On Friday, the Court of Appeals in Washington D.C. delivered a genuinely disturbing ruling regarding prisoners in the US prison at Bagram airbase in Afghanistan.

This ruling has turned the clock back to the darkest days of the Bush administration, before prisoners seized in the "War on Terror" had any recourse to justice if they claimed they had been seized by mistake.

Ruling in the case of three foreign prisoners — Redha al-Najar, a Tunisian seized in Karachi, Pakistan in 2002, Amin al-Bakri, a Yemeni gemstone dealer seized in Bangkok, Thailand in 2003, and Fadi al-Maqaleh, a Yemeni seized in 2004 — who were seized outside Afghanistan and transferred to Bagram via a number of secret CIA prisons, the Court of Appeals reversed a ruling last March by District Judge John D. Bates, granting the men the right to ask a US court why they were being held.

In January 2009, during a hearing before he delivered his final ruling, Judge Bates had recognized that Bagram was "a 'black hole' for detainees in a 'law-free zone,'" and in his ruling he concluded — correctly — that the habeas rights granted by the Supreme Court to the Guantánamo prisoners in June 2008, in *Boumediene v. Bush*, also extended to foreign prisoners seized in other countries and rendered to Bagram, because, as he explained succinctly, "the detainees themselves as well as the rationale for detention are essentially the same."

My own understanding was that it was 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 — that prevented these three men (and several dozen other foreign prisoners) from joining the 779 men in the offshore prison in Cuba.

This should have been the end of the story, especially as Judge Bates made no suggestion that similar rights should extend to foreign prisoners captured in Afghanistan, and also because, in June 2009, he accepted that a fourth man who had submitted a habeas petition — Haji Wazir, an Afghan seized in the United Arab Emirates — had no right to access a US court.

Although there was undoubtedly a case to be made that an Afghan rendered to Afghanistan from another country was in same position as a foreigner when it came to asking why they were being held, Judge Bates accepted the government's argument that granting habeas rights to

any Afghan would cause “friction” with the Afghan government, because of ongoing negotiations regarding the transfer of Afghan prisoners to the custody of their own government, and refused to grant Haji Wazir’s habeas petition
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However, this was not the end of the story. As soon as Judge Bates delivered his ruling last March, the government announced that it would appeal, and, in September, submitted a 76-page argument (
PDF
), which, as a sweetener to the Court of Appeals, also addressed a problem that Judge Bates had highlighted, even though it was beyond his remit to suggest any remedy.

The problem highlighted by Judge Bates was the review process at Bagram, and in making his ruling about the foreign prisoners rendered to the prison, he had compared it unfavorably to the review process in operation at Guantánamo, noting that the Unlawful Enemy Combatant Review Board (UECRB) at Bagram was both “inadequate” and “more error-prone” than the Combatant Status Review Tribunals at Guantánamo (which were condemned as nothing more than a rubberstamp for executive detention by former officials who worked on them, including, in particular,
Lt. Col. Stephen Abraham
), and concluding that the US military’s control over Bagram “is not appreciably different than at Guantánamo.”

In an analysis of the UECRB process, Judge Bates noted that prisoners were not allowed to have a “personal representative” from the military in place of a lawyer (as at Guantánamo), and were obliged to represent themselves, and also explained, “In addition, 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.” He also noted that, unlike at Guantánamo, where Administrative Review Boards were convened on an annual basis, “Bagram detainees receive no review beyond the UECRB itself.”

It was no wonder that Judge Bates concluded that this process “falls well short of what the Supreme Court found inadequate at Guantánamo,” but in highlighting the review process at Bagram, he also touched on the biggest problem of all — that everyone at Bagram was held with less rights than the largely powerless “enemy combatants” of Guantánamo, and that they were, in particular, not being held as prisoners of war according to the Geneva Conventions.

This would have involved them being screened on capture, to determine whether they were combatants or civilians seized by mistake, and would then have involved them being held

unmolested until the end of hostilities. It certainly would not have involved them not receiving adequate screening on capture, and then being subjected — at some undetermined point after capture — to a review process conjured up out of thin air.

When the government appealed Judge Bates' ruling, the Justice Department's submission included an attachment from the Defense Department, announcing that the UECRB process at Bagram was being replaced with a system that closely matched the tribunal process at Guantánamo — the one that, as Judge Bates noted, was "found inadequate" by the Supreme Court.

Under this new system, prisoners are assigned personal representatives (as at Guantánamo), are allowed to call witnesses (as at Guantánamo, although not a single witness from outside the prison was ever located by the officials in charge), and have their cases reviewed every six months. This certainly addressed the main problems identified by Judge Bates, although, as I explained at the time, by importing the CSRT process to Bagram and refusing to reinstate the Geneva Conventions, Obama 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."

On Friday, sadly, none of these concerns registered with the three judges responsible for reviewing the government's appeal. Instead, Chief Circuit Judge David B. Sentelle, supported by Senior Circuit Judge Harry T. Edwards and Circuit Judge David S. Tatel, discarded Judge Bates' ruling, after disagreeing with his interpretation of three tests required to ascertain the extent to which *Boumediene* applied beyond US territory.

As SCOTUSblog explained, the three tests involved "the process for deciding who is to be detained, the nature of the site where detention occurs, and practical problems of having courts decide the validity of detention."

On the first test, the Circuit Court agreed with Judge Bates that the review process at Bagram "afford[s] even less protection to the rights of detainees in the determination of status than was the case with the CSRT." However, on the second and third tests, the Circuit Court ruled that the nature of the site — leased from the Afghan government, but not under long-established US control like Guantánamo — "weighs heavily in favor of the United States," and also ruled that, because "[i]t is undisputed that Bagram, indeed the whole nation of Afghanistan, remains a theater of war," the right of the courts to interfere was not appropriate, and the balance of the argument therefore tipped "overwhelmingly" in the government's favor.

This was noticeably different from Judge Bates' interpretation of the potential obstacles to habeas review. As he stated in his ruling last March, although Bagram is "located in an active theater of war," and 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.

This latter point ought to have been significant, but it was played down in the Circuit Court, where the judges stated that, although they were not ignoring the prisoners' argument that "the United States chose the place of detention and might be able 'to evade judicial review of Executive detention decisions by transferring detainees into active conflict zones, thereby granting the Executive the power to switch the Constitution on or off at will,'" this is "not what happened here."

The judges did throw a warning shot the government's way, suggesting that a review might be appropriate if a case arises "in which the claim is a reality rather than a speculation," but remained adamant that this had not happened, because it would have required a decision to hold prisoners deliberately at Bagram, rather than at Guantánamo, knowing that, in the future, the
Boumediene
decision would occur.

This was an interesting point, but looking at it the other way, the judges' argument actually fails to explain why, when "the detainees themselves as well as the rationale for detention are essentially the same," as Judge Bates explained, those at Guantánamo, who were deliberately moved to a place where the Executive hoped to "switch the Constitution on or off at will," but were then granted the right to judicial review, differ from those at Bagram, who have been denied the right to a judicial review and seem, therefore, to be very much in a place where the Executive has been able to "switch the Constitution on or off at will."

What will happen next is at present unknown, although it is probable that lawyers for the men will approach the Supreme Court. However, with the retirement of Justice John Paul Stevens, who
played a crucial role
in swinging the Court in favor of the the Guantánamo prisoners in a series of important rulings between 2004 and 2008, culminating in
Boumediene v. Bush
, it is uncertain whether a majority would rule in the Bagram prisoners' favor — especially as Elena Kagan, if confirmed as his replacement in the Court, would have to recuse herself from the case, having represented the government in the litigation to date as Solicitor General.

Moreover, there is no guarantee that the Supreme Court will even take the case, as the Court of Appeals ruling was unanimous, and also covered a broad political spectrum, with the judges comprising a conservative (Sentelle) and two liberals (Edwards and Tatel).

Alarmingly, then, the prisoners at Bagram may have just found themselves consigned once more to the legal black hole that the Bush administration intended for them when they were first seized, with no hope of ever challenging the basis of their detention. For anyone who has understood the reasons behind Judge Bates' ruling last March, this is disgraceful, and those who defend it should recall the words of the Supreme Court in *Boumediene*, when the justices' majority opinion made clear how habeas rights were a necessary check on the kind of unfettered Executive power that the Court of Appeals has just attempted to justify at Bagram. "At its historical core," the opinion stated, "the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest."

If this ruling is allowed to stand, the Supreme Court will have abdicated its responsibility to ensure that no one can be kidnapped anywhere in the world and held indefinitely, without charge or trial, and with no way of challenging the basis of their detention in a satisfactory manner, either in Bagram, or, for that matter, in any other US facility in a foreign land. Moreover, the Bush administration, from beyond the electoral grave, will have won its most significant battle, which was supposedly lost; namely, maintaining that people can, in fact, be seized anywhere in the world and held without any means of judicial review, and without the obligation to face either a criminal trial or detention as a prisoner of war according to the Geneva Conventions.

This is a dark day indeed for America.

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The Guantánamo Files: The Stories of the 774 Detainees in America's Illegal Prison
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