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Is Bagram the New Guantánamo? Habeas Corpus and *Maqaleh v. Gates*

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Introduction

In a momentous decision one year ago, the Supreme Court declared that the right of *habeas corpus* applied to the alien detainees held in Guantánamo Bay, Cuba. By removing one of the main rationales for the detention site – insulation from the federal courts – *Boumediene v. Bush*[1] made the winding down of the infamous facility almost inevitable. Within days of taking office, President Obama issued an executive order to close the detention camp by January 22, 2010.[2]

To date very few detainees have been released by the Obama Administration. In early June the *New York Times* reported that the micro-state of Palau had agreed to take several Uighur detainees.[3] Four Uighurs were later transferred to Bermuda, and another detainee to a federal court in New York. Yet there are still well over 200 left in Guantánamo. With such a paltry record, it is unsurprising that the daunting challenges posed by closing Guantánamo have dominated media attention. Will some detainees be relocated to "supermax" prisons on the mainland? Will others be handed over to abusive foreign governments?

What has received far less attention is what will happen to *future* detainees. As President Obama stated in his national security address last month, the United States remains at war with al Qaeda.[4] This suggests that American forces will continue to capture and detain suspected terrorists. Their place of detention is unlikely to be Guantánamo Bay. Instead, they are far more likely to be held at the "Bagram Theater Internment Facility" at Bagram Air Base in Afghanistan. There are over 600 detainees at Bagram, compared to some 230 at Guantánamo. Increasingly, the frontline of the legal battle over American detention policy will likely become Bagram.

Bagram – The New Guantánamo?

The United States has announced no plans to close the Bagram facility. Moreover, the Obama administration is actively fighting the application of the *Boumediene* framework to Bagram, following closely – at times even exactly – the steps of the Bush administration. Like President Bush, President Obama argues that because they are foreign nationals captured outside

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American territory, the detainees in Bagram lack any *habeas corpus* rights.

The question of exactly what rights, if any, the Bagram detainees possess came to a head in the April 2009 decision of the US District Court for D.C. in *Maqaleh v. Gates*,[5] where Judge John D. Bates, whom George W. Bush nominated to the bench in 2001, was asked to consider the habeas petitions of four Bagram detainees.

Each of the petitioners is a foreign national who claims to have been captured outside Afghanistan and brought to Bagram. Each was designated an enemy combatant by the Pentagon. And like many of the Guantánamo detainees, each has been held for more than six years with no prospect of release. According to their petitions and declarations, Fadi al Maqaleh is a Yemeni captured somewhere near the Afghan border; Haji Wazir an Afghan captured in Dubai; Amin al Bakri a Yemeni captured in Thailand; and Redha al-Najar a Tunisian captured in Pakistan.

While the Obama administration disputes some facts about their capture, it does not deny that the four petitioners are held in Bagram and that three of them are non-Afghans. The government's motion to dismiss in *Maqelah* was instead based on the Military Commissions Act (MCA)[6] , which, it argued, deprives the federal courts of jurisdiction over these petitions. This is precisely the argument advanced by the Bush administration. Indeed, in February of this year, Judge Bates asked the new administration whether it intended to revisit that position; the Obama administration declared that "the Government adheres to its previously articulated position."[7] In response, the petitioners invoked the Suspension Clause. Following the lead set by *Boumediene*, they argued that the MCA provision at issue is an unconstitutional suspension of *habeas corpus*.

Judge Bates began his opinion in *Maqaleh* by noting that the four Bagram petitioners

> are virtually identical to the detainees in *Boumediene*—they are non-citizens who were (as alleged here) apprehended in foreign lands far from the United States and brought to yet another country for detention. And as in *Boumediene*, these petitioners have been determined to be "enemy combatants," a status they contest.[8]

The crucial question, however, was whether Bagram itself was sufficiently similar to Guantánamo Bay for the analysis in *Boumediene* to apply. In *Boumediene* the Supreme Court looked to the citizenship and status of the detainees, as well as the adequacy of the process they had received. But what seemed to really drive the decision was the Court's assessment of the degree of American control over Guantánamo and the practical obstacles to extending habeas rights to non-citizens detained there.

Writing for the majority in *Boumediene*, Justice Kennedy argued that practicality and reasonableness are the touchstones for such an inquiry. In a brief historical survey, he argued that these principles had influenced a welter of prior decisions about the geographic reach of constitutional rights, ranging from *In re Ross*, the late nineteenth-century case involving a

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DOCUMENTS OF NOTE

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consular trial in Japan, to the *Insular Cases*, involving the new American empire gained in the wake of the Spanish-American War of 1898, to the postwar cases of *Reid v. Covert* and *Johnson v. Eisentrager*, granting constitutional rights to American dependents at overseas military bases and denying habeas to German soldiers captured in China, respectively.

In each of these decisions, wrote Kennedy, "practical considerations weighed heavily." There is "a common thread" uniting them: "the idea that questions of extraterritoriality turn on objective factors and practical concerns, not formalism."[9] Kennedy's focus on practicality can directly be traced back to his concurring opinion in the Fourth Amendment case of *United States v. Verdugo-Urquidez*, in which he found the extraterritorial application of the exclusionary rule to be "impracticable."[10] Kennedy's concurrence in *Verdugo*, like his majority opinion in *Boumediene*, rejected bright-line formal categories in favor of attention to practical realities.

When applied in *Boumediene* to the question of habeas rights in Guantánamo Bay, however, this practicality calculus swung in the opposite direction. Kennedy noted the unbroken control of the United States over the naval base, which dated to Spain's repudiation of sovereignty over a century ago.[11] As a result, Guantánamo was "in every practical sense . . . not abroad."[12] Nor was it in an active war zone. In such a situation, Kennedy reasoned, it was hardly impractical to adhere to normal constitutional rules. If sovereignty rather than practicality were dispositive, moreover, the government could easily evade the Constitution by ceding land to another sovereign and then leasing it back. Such expediency would make a mockery of the separation of powers. To allow a situation in which the executive could "switch the Constitution on or off at will" was unacceptable.[13]

This line of reasoning heavily influenced the decision in *Maqaleh v. Gates*. In toting up the comparison between Guantánamo and Bagram, Judge Bates followed the *Boumediene* framework closely. Yet, he also paid close attention to the underlying aims that seemed to animate *Boumediene*. He agreed with the Obama administration that Bagram, unlike Guantánamo, was within an active theatre of war.[14] But Bates noted that the *Boumediene* court was "motivated in no small way by the concern that the Executive could, under its argument, shuttle detainees to Guantánamo 'to govern without legal constraint.'"[15] It is one thing, Bates argued, to capture individuals within Afghanistan and detain them at Bagram. 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. . . Such rendition resurrects the same specter of limitless Executive power the Supreme Court sought to guard against in Boumediene."[16]

Bates also devoted considerable attention to another major postwar habeas-detainee case—the 1950 case of *Johnson v. Eisentrager*. In *Eisentrager*, the Supreme Court had denied the application of *habeas corpus* to German detainees captured in China and held by the Allies in Landsberg prison in postwar Germany. The *Boumediene* court had not overruled *Eisentrager*; instead it distinguished it in various ways, most notably by arguing that American control over Guantánamo Bay was both unilateral and indefinite, whereas the Allies had not planned on, nor engaged in, a very long-term occupation of Germany.[17] In light of this, Bates sought to place Bagram

somewhere along a continuum, with Guantánamo falling on one end, where habeas did apply, and Landsberg prison at the other, where it did not.

To do so, Bates first compared the Status of Forces Agreement in Afghanistan and the Bagram lease agreement to the lease in Guantánamo.[18] Both of the Afghan accords pointed toward "near-total operational control." However, the Guantánamo lease expressly awarded the US "complete jurisdiction and control," whereas the Bagram lease lacked the Guantánamo lease's sweeping language. Taken together, these texts showed that the US had less formal control at Bagram.

Despite this, Bates concluded that the relevant differences were not significant; the actual control of the US over Bagram "is practically absolute." The situation in *Eisentrager*, by contrast, involved appreciable Allied coordination over the prison and therefore meaningful checks on executive power. Bagram, in short, was much more like Guantánamo than it was like the Landsberg prison at issue in *Eisentrager*.

Having ascertained the level of control the U.S. possessed over Bagram, Bates turned next to the central issue of practicality. Applying the framework advanced in *Boumediene*, he acknowledged that the ongoing Afghan war was an important practical obstacle to habeas review. On the other hand, none of the four petitioners in *Maqaleh* were (so they allege) captured within Afghanistan, so any investigation or retrieval of witnesses would not involve wading into a battlefield. Bates then deftly turned *Eisentrager*, a favorite precedent of both the Bush and Obama administrations, to the advantage of the detainees, arguing that if a "'rigorous and adversarial process' was provided at a hastily-constituted military tribunal in post-war China, then it strains credulity to believe that it is impractical to provide meaningful process to detainees held at a large, secure military base, like Bagram, under complete U.S. control."[19]

After weighing all these factors—and several others—Bates held that the provision of the MCA stripping habeas jurisdiction was unconstitutional as applied to the three non-Afghan petitioners, and therefore denied the government's motion to dismiss. For Wazir, the Afghan petitioner, Bates found that the possibility of diplomatic friction with Afghanistan, the host nation of the base, was sufficient to tip the scales toward impracticality. Even with its limited immediate impact – three detainees out of some 600 held at Bagram – the decision in *Maqaleh v. Gates* was momentous, for it continues and extends the process pioneered in *Boumediene* of applying the Great Writ of *habeas corpus* to non-citizens held outside American sovereign territory.

On June 2, 2009 Judge Bates cleared the way for a swift appeal of his ruling.[20] "These are extraordinary cases of significant national and international interest," he wrote.[21] "At stake are separation of powers considerations, the President's authority to wage war abroad free from judicial scrutiny, and the constitutional rights of aliens detained abroad indefinitely by the United States."[22]

Bates is surely correct that these cases raise issues of fundamental importance that will continue to reverberate in the federal courts for years to

come. The incentives to engage in offshore military detention are great, and despite the current cavalcade of political and media attention, the closing of Guantánamo—even if successful and swift—will do little to change this. Nor will Guantánamo's closure end the central legal debates over what rights offshore detainees possess and what role the courts ought to play in policing executive conduct in wartime.

Conclusion

The importance of these questions does not begin and end with legal doctrine. With the war in Afghanistan accelerating, and now bleeding over the border into an increasingly unstable and dangerous Pakistan, the practical issues at stake in adjudicating detentions at Bagram are certainly as great as the legal issues. The D.C. Court of Appeals, and perhaps the Supreme Court after it, will inevitably and appropriately take these factors in account. As Justice Robert Jackson memorably wrote some 60 years ago in *Johnson v. Eisentrager*,

> [i]t would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home.[23]

Yet as Judge Bates noted, an animating principle behind *Boumediene's* landmark decision was that the executive cannot achieve an end-run around the Constitution by cleverly choosing the location of detention. The world has changed significantly since Justice Jackson wrote those words. Flying someone halfway around the world to one of the dozens of offshore American military installations is today simple and easy. As a result, the principle enunciated in *Boumediene* – that the President does "not have the power to determine when and where [the Constitution's] terms apply" – lies very close to the heart of *Maqaleh v. Gates*.[24]

About the Author

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Endnotes

[1] 553 U.S. __ (2008).

[2] Exec. Order No. 13,492 , 74 Fed. Reg. 4,897 (Jan. 22, 2009), *available at* http://www.whitehouse.gov/the_press_office /ClosureOfGuantanamoDetentionFacilities/.

[3] Mark Landler, *Palau Agrees to Take Chinese Detainees, Helping Obama's Guantánamo Plan*, N.Y. TIMES, June 10, 2009, at A6. Palau is a former trust

territory of the United States and party to a Compact of Free Association with the U.S.

[4] President Barack Obama, Remarks by the President on National Security (May 21, 2009) (transcript available at http://www.whitehouse.gov /the_press_office/Remarks-by-the-President-On-National-Security-5-21-09).

[5] Al Maqaleh v. Gates, 604 F. Supp. 2d 205 (D.D.C. 2009).

[6] Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (Oct. 17, 2006).

[7] *Maqaleh*, 604 F. Supp. 2d. at 205.

[8] *Id.* at 208.

[9] Boumediene v. Bush, 128 S. Ct. 2229, 2257, 2258 (2008).

[10] United States v. Verdugo Urquidez, 494 U.S. 259, 278 (1990) (Kennedy, J., concurring).

[11] *Boumediene*, 128 S. Ct. at 2229.

[12] *Id.* at 2261.

[13] *Id.* at 2259.

[14] *Al Maqaleh*, 604 F. Supp. 2d. at 209.

[15] *Id.* at 220.

[16] *Id.*

[17] Allied occupation of Germany was short-lived, though that of West Berlin lasted until 1990.

[18] The U.S. has no Status of Forces Agreement in Cuba.

[19] *Maqaleh*, 604 F. Supp. 2d. at 228 (citing *Boumediene* at 2259). The process Bates referred to occurred soon after capture in China; the detainees were then moved to Landsberg Prison in Germany.

[20] Al Maqaleh v. Gates, No. 06-1669, 08-1307, 08-2143, 2009 WL 1528847 (D.D.C. June 2, 2009).

[21] *Id.* at *5.

[22] *Id.*

[23] Johnson v. Eisentrager, 339 U.S. 763, 779 (1950).

[24] *Boumediene*, 128 S. Ct. at 2259.