ASIL The American Society of International Law

insights

ASIL Insight

June 3, 2010
Volume 14, Issue 13
PDF Print Version

The Writ Stops Here: No Habeas for Prisoners Held by U.S. Forces in Afghanistan

By Faiza Patel

Introduction

One of the most fundamental legal issues to emerge since 9/11 is whether U.S. courts have the authority to review the President's decision to detain indefinitely individuals captured as part of the "war on terror." The question generated a slew of U.S. Supreme Court decisions culminating in *Boumediene v. Bush*[1], which held that detainees at the Guantánamo Bay, Cuba, Naval Facility have a constitutional right to challenge their detention in habeas proceedings in U.S. courts.[2]

In the wake of *Boumediene*, the question remained whether individuals detained by the United States in other parts of the world were also entitled to habeas review. Detainees held at the U.S. military detention facility at Bagram Air Base in Afghanistan (Bagram) challenged their detention on the basis of *Boumediene*. Bagram presented several parallels to that of Guantánamo. As with Guantánamo, the U.S. exercised extensive control over Bagram. Additionally, like the Guantánamo detainees, several Bagram detainees were captured in one country and imprisoned in another. Unlike Guantánamo, Bagram is located in a theater of active hostilities.

The issue is particularly significant because the Obama Administration is reportedly considering using Bagram for military detention of foreign terrorism suspects given that it no longer has a viable facility at Guantánamo and faces political resistance and legal obstacles to such detention in the United States itself. The results of the Guantánamo habeas reviews—so far thirty-six of the fifty detainees whose habeas petitions were heard have won the right to release[3] —have undoubtedly increased pressure on the government to find a suitable facility. The issue will remain important even if the U.S. hands over control of Bagram to the Afghan government, as it has reportedly agreed to do in January 2011,[4] because the U.S. could hold detainees at its facilities in other parts of the world. The potential reviewability of such detention may well form part of the calculus of whether and where to do so.

Click here to become an ASIL member

RELATED ASIL INSIGHTS

Who can be detained in the "War on Terror"? The Emerging Answer

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

The Torture Memos and Accountability

Supreme Court Holds that Noncitizens Detained at Guantanamo Have a Constitutional Right to Habeas Corpus Review by Federal Civilian Courts

D.C. Circuit Upholds Constitutionality of Military Commissions Act Withdrawal of Federal Habeas Jurisdiction for Guantanamo Detainees

The Military Commissions Act of 2006: Examining the Relationship between the International Law of Armed Conflict and US Law

A Conundrum Posed by U.S. Anti-Terrorism Policy

Status of Detainees in Non-International Armed Conflict, and their Protection in the Course of Criminal Proceedings: The Case of Hamdan v. Rumsfeld

District Court Decision in Maqaleh v. Gates

As discussed in a previous *ASIL Insight*,[5] in *Maqaleh v. Gates*, Judge John Bates of the U.S. District Court for the District of Columbia found that he could entertain the habeas petitions of three foreign nationals who claimed to have been captured outside Afghanistan and imprisoned at Bagram.[6] The government had opposed the petitions on the basis of Section 7(a) of the Military Commissions Act (MCA) of 2006, which purported to strip the court of habeas jurisdiction. Based on *Boumediene*, petitioners had argued that Section 7(a) of the MCA was an unconstitutional suspension of the writ.[7] Applying the *Boumediene* test, the district court found that the Suspension Clause was applicable to non-Afghans brought to Bagram; thus it had jurisdiction to hear the contested habeas petitions.[8]

Judge Bates certified his decision for interlocutory appeal.[9] On May 21, 2010, a three-judge panel of the D.C. Circuit reversed and held that the reach of the Suspension Clause—and thus the right to petition for a writ of habeas corpus—did not extend to Bagram.[10]

D.C. Circuit Decision in *Maqaleh v. Gates*

The decision of the three-judge panel of the D.C. Circuit begins by surveying the legal history of attempts to extend the writ of habeas corpus to non-citizens detained overseas. It starts with *Johnson v. Eisentrager*[11], a World War II case in which twenty-one German nationals, convicted by an American military commission in China for violations of the laws of war, petitioned for writs of habeas corpus.[12] Petitioners had been repatriated to Germany to serve their sentences at Landsberg Prison, which was controlled by the U.S. as part of the Allies' post-war occupation. The Supreme Court held that habeas was unavailable to petitioners who were enemy aliens captured and detained outside the territory of the U.S.

Maqaleh then traces the efforts by Congress to strip the federal courts of habeas jurisdiction and the Supreme Court's repeated rebuffs. It emphasizes that the Court had not overruled *Eisentrager*. Rather, in *Boumediene*, the Court identified a common thread uniting *Eisentrager* with the *Insular Cases* (which held that some aspects of the Constitution could apply in territories which were not states): "the idea that questions of extraterritoriality turn on objective factors and practical concerns, not formalism."[13] The "objective factors and practical concerns" identified as pertinent to the reach of the Suspension Clause were: (1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoners' entitlement to the writ.[14]

The touchstone of the D.C. Circuit's analysis of Bagram was "the Supreme Court's interpretation of the Constitution in *Eisentrager* as construed and explained in the Court's more recent opinion in *Boumediene*."[15] The court rejected what it characterized as the "extreme" understandings of the law put forward by both parties. It disagreed with the government's view that the Suspension Clause applied only to territories like Guantánamo where the

The Committee Against Torture Urges an End to Guantánamo Detention

Alleged Secret Detentions of Terrorism Suspects

Prisoner Transfers Out of Iraq

Status of Detainees in International Armed Conflict, and their Protection in the Course of Criminal Proceedings

Insights Archive>>

DOCUMENTS OF NOTE

Boumediene v. Bush

Maqaleh v. Gates (D.D.C. Apr. 2009)

Maqaleh v. Gates (D.D.C. June 2009)

Maqaleh v. Gates (D.C. Cir. 2010)

Johnson v. Eisentrager United States Constitution

ORGANIZATIONS OF NOTE

US Supreme Court

US District Court for the District of Columbia

US Department of Defense Military Commissions

International Committee of the Red Cross (ICRC)

Copyright 2010 by The American Society of International Law ASIL

The purpose of ASIL Insights is to provide concise and informed background for developments of interest to the international community. The American Society of International Law does not take positions on substantive issues, including the ones discussed in this Insight. Educational and news media copying is permitted with due acknowledgement.

The Insights Editorial Board includes: Cymie Payne, UC Berkeley School of Law; Amelia

United States exercised *de facto* sovereignty. This view would contradict *Boumediene*'s rejection of a formalistic, sovereignty-based test.[16] The court was equally unconvinced by the petitioners' argument that U.S. control of Bagram was by itself sufficient to trigger application of the Suspension Clause. This interpretation would create the potential for extending the Suspension Clause to noncitizens held in any U.S. facility in the world,[17] and petitioners had not identified any "limiting principle that would distinguish Bagram from any other military installation."[18]

Applying the *Boumediene* factors, the D.C. Circuit first found that petitioners were in the same position as the Guantánamo detainees with respect to citizenship and status—i.e., they were foreign nationals held as enemy combatants. The process for determining their status as enemy combatants, however, was significantly less rigorous than that afforded to the petitioners in *Eisentrager* and *Boumediene*. Thus, with regard to this factor, petitioners had made "a strong argument that the right to habeas relief and the Suspension Clause apply in Bagram as in Guantánamo."[19]

The second factor—the nature of the sites of apprehension and detention—was found to weigh "heavily" in favor of the government. Petitioners' apprehension abroad weighed against extension of the writ. The D.C. Circuit's analysis here did not address the lower court's concern that petitioners' rendition to the Afghan war theater from elsewhere resurrected *Boumediene*'s concern with the limitless power of the Executive to move detainees physically beyond the reach of the Constitution.[20]

The site of detention was found to weigh more strongly in favor of the government's position than it had in either *Boumediene* or *Eisentrager*. The court held that *de facto* sovereignty was not a sine qua non for extension of the writ, but was nonetheless a relevant factor. Although both Guantánamo and Bagram were held under leaseholds, the court distinguished between them on the basis of "surrounding circumstances." Guantánamo had been under the control of the U.S. for over a century in the face of a hostile government that maintained *de jure* sovereignty. In contrast, there was "no indication of an intention to occupy the [Bagram] base with permanence, nor is there hostility on the part of the 'host' country."[21]

However, the court did not rest its holding on the site-of-detention analysis.[22] It emphasized that the third factor—practical obstacles inherent in resolving the prisoner's entitlement to the writ-combined with the second factor, settled the issue in favor of the government. The fact that Afghanistan, including Bagram, was a theater of war meant that the petitioners were more like the *Eisentrager* detainees than those at Guantánamo.[23] As the Supreme Court noted in *Boumediene*, during the post-War occupation of Europe, the *Eisentrager* Court had been rightly concerned about judicial interference with the military mission. Although such concerns were not present at Guantánamo, at Bagram "similar, if not greater, threats are . . . apparent."[24] The court concluded that "under both *Eisentrager* and *Boumediene*, the writ does not extend to the Bagram confinement in an active theater of war in a territory under neither the *de facto* nor the *de jure* sovereignty of the United States and within the territory of another *de jure* sovereign."[25] It supported this conclusion with the "rationale of *Eisentrager*," that the writ should not be extended where civilian

Porges; and David Kaye, UCLA School of Law. Djurdja Lazic serves as the managing editor.

trials would “hamper the war effort and bring aid and comfort to the enemy.”[26]

Toward the end of the decision, the panel turned to the separation of powers concerns articulated by petitioners and echoed by the District Court, rejecting these as a basis for extending the writ to Bagram. The court questioned whether concerns about the President’s ability to avoid the Constitution by transferring detainees into active conflict zones were directly relevant to either the second or third *Boumediene* factors. In any event, the court found it unnecessary to decide how such concerns might play out, because there was no basis to conclude that the Executive had manipulated the detention of petitioners (who had been brought to Bagram well before the Guantánamo habeas litigation was concluded).[27] The court explicitly left open the possibility that executive manipulation could be considered in a future case. It noted that *Boumediene* had identified *at least* three relevant factors and that perhaps executive manipulation would constitute an additional factor.[28]

Finally, the court noted that reviewing detention within the territory of another nation created practical difficulties. This had led the district court to deny habeas relief to the one petitioner who was an Afghan citizen,[29] and was also relevant to detainees who were alien to both the United States and Afghanistan.[30]

Conclusion

Although the ultimate holding in *Maqaleh* is unsurprising, the court’s emphasis on *Eisentrager*—rather than the more recent *Boumediene*—is striking. One explanation of this emphasis is that the court was leaving open the possibility of review when individuals were detained at U.S. facilities outside war zones. This rationale could also explain the court’s insistence that the case turned on the location of Bagram in an active war zone, as opposed to relying more heavily on the limited U.S. control of the detention facility. Indeed, the court’s suggestion that executive manipulation of detention could be considered in deciding on the reach of the writ may be a signal to the government that it ought not to push the limits of its overseas detention authority.

The court’s reliance on *Eisentrager* also allowed it to avoid an in-depth analysis of the practical effect of extending the writ to a conflict zone like Afghanistan. The issue was discussed at length in *Boumediene* and in the decision of the court below and had been briefed by the parties and *amici*.[31] Rather than evaluate the specific practical difficulties identified by the government, the D.C. Circuit instead chose to follow the path of *Eisentrager* and broadly concluded that dangers potentially present in a war zone weighed against extension of the writ to Bagram.

Another notable aspect of *Maqaleh* is its treatment of separation of powers concerns. While it is true, as the court noted, that separation of powers concerns did not feature in the application of the enumerated factors in *Boumediene*, such concerns clearly framed the issue and animated the Supreme Court’s decision.[32] *Maqaleh*’s suggestion that these concerns could be addressed through an evaluation of executive manipulation may be

regarded as a way to bring the issue more concretely into the *Boumediene* analysis. On the other hand, a move away from potential separation of powers concerns to a focus on *demonstrating* manipulation by the Executive may place an insurmountable burden on petitioners.

The odds are high that *Maqaleh* will stand. It seems unlikely that an *en banc* review would lead to a different result. The panel, composed of judges spanning the ideological spectrum,[33] was unanimous in its decision. Reversal by the Supreme Court is also a long shot. If *certiorari* were granted, the case would most likely be decided by eight Justices, either because Solicitor General Elena Kagan will have been confirmed to Justice Stevens' seat and will recuse herself for prior involvement,[34] or because there will not yet be a replacement for Justice Stevens. Since four of these Justices were unwilling to extend the writ to Guantánamo, it seems unlikely that they would agree to expand its reach to Bagram. The Bagram petitioners could thus expect to garner, at most, four votes in their favor, and a 4-4 result in the U.S. Supreme Court has the procedural effect of an affirmance. Thus, at least for now, extension of the writ to overseas detention has stopped at Guantánamo.

About the Author

Faiza Patel, an ASIL member, is the Director of Planning and Counsel at the Brennan Center for Justice at NYU School of Law.

Endnotes

[1] 553 U.S. 723f, 128 S. Ct. 2229 (2008).

[2] *Id.*

[3] Carol Rosenberg, *Judge Orders Yemeni Freed, Guantánamo Tally 14–36*, MIAMI HERALD, May 26, 2010.

[4] Karen DeYoung, *In Speech, Karzai Expresses Satisfaction with Outcome of Visit*, WASH. POST, May 14, 2010. *But see* Ahmad Qureshi, *Minister Rules Out Bagram Jail Takeover in Two Years*, PAJHWOK AFGHAN NEWS, Mar. 27, 2010 ("The justice minister said on Saturday Afghan security forces could not take over the Bagram detention facility for two years due to lack of requisite preparation."); Saeed Shah, *With New Bagram Prison, U.S. Looks to Put Bad Press of Years Past to Rest*, MIAMI HERALD, Feb. 25, 2010 ("The U.S. plans to hand over the new Bagram to the Afghan military next January, a demanding target that some think it will be unable or unwilling to meet.").

[5] Kal Raustiala, *Is Bagram the New Guantánamo? Habeas Corpus and* Maqaleh v. Gates, ASIL INSIGHTS, June 17, 2009, at 13.

[6] Maqaleh v. Gates, 604 F. Supp. 2d 205, 235 (D.D.C. 2009) (refusing to entertain the fourth habeas petition because the petitioner was an Afghan national, reasoning that reviewing his detention might interfere with relations with the Afghan government.).

[7] U.S. CONST. art. I, § 9, cl. 2 (prohibiting Congress from suspending the

writ of habeas corpus unless required in cases of rebellion, invasion or the public safety).

[8] *Maqaleh*, 604 F. Supp. 2d at 235.

[9] Maqaleh v. Gates, 620 F. Supp. 2d 51, 54–56 (D.D.C. 2009).

[10] Maqaleh v. Gates, No. 09-5265 (D.C. Cir. May 21, 2010).

[11] 339 U.S. 763 (1950).

[12] *Id.*

[13] Maqaleh v. Gates, No. 09-5265, slip op. at 15 (D.C. Cir. May 21, 2010) (quoting *Boumediene v. Bush*, 128 S. Ct. at 2258).

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

[15] *Maqaleh*, slip op. at 15.

[16] *Id.* at 17.

[17] *Id.* at 19.

[18] *Id.*

[19] *Id.* at 21.

[20] The D.C. Circuit did, however, discuss the concern about manipulation by the Executive later in the decision. *See infra* nn. 28–29 and accompanying notes.

[21] *Maqaleh*, slip op. at 22.

[22] *Id*.

[23] *Id.*

[24] *Id.* at 23.

[25] *Id.* at 24.

[26] *Id.* (quoting *Johnson v. Eisentrager*, 339 U.S. 763, 779 (1950)).

[27] *Id.* (explaining that the notion that petitioners were confined to Bagram, rather than Guantánamo, because of the fear of the writ would have required the executive to anticipate the outcome of the complex litigation that led to the *Boumediene* holding—an unlikely possibility).

[28] *Id.* at 25.

[29] *Id.* at 26.

[30] *Id.*

[31] *See, e.g.*, Boumediene v. Bush, 128 S. Ct. 2229, 2257–58 (2008); *Maqaleh*, 604 F. Supp. 2d at 231; Brief for Respondents-Appellants at 33–41, Maqaleh v. Gates, No. 09-5265 (D.C. Cir. Sept. 14, 2009); Joint Brief for Petitioners-Appellees at 13, 20, 27, *Maqaleh*, No. 09-5265 (Oct. 30, 2009); Brief for Constitutional Law Scholars as Amici Curiae Supporting Petitioners-Appellees and Affirmance at 18–23, *Maqaleh*, No. 09-5265 (Nov. 9, 2009).

[32] *Boumediene*, 128 S. Ct. 2239 ("[S]ecurity subsists, too, in fidelity to freedom's first principles, chief among them being freedom from arbitrary and unlawful restraint and the personal liberty that is secured by adherence to the separation of powers.").

[33] The panel was composed of Chief Judge Sentelle, who was appointed by President Ronald Reagan, Judge Harry T. Edwards, appointed by President Jimmy Carter, and Judge David S. Tatel, appointed by President Bill Clinton.

[34] Kagan's signature, for instance, was on the government's appellate briefs in *Maqaleh*.