



Written by [Jack Kenny](#) on May 23, 2010

No Habeas Corpus for Bagram Detainees

A federal court of appeals on May 21 ruled that detainees held by the United States at the Bagram Air Base in Afghanistan have no right to habeas corpus hearings.

The ruling by a three-judge panel for the U.S. District Court of Appeals in Washington, D.C., overturned a District Court finding on behalf two Yemins and a Tunisian who claimed they were mistakenly held as terror suspects and had petitioned for a judicial review of evidence supporting their detention. The appeals court ruled that the Bagram base and its prison are on the "sovereign territory" of another government and beyond the jurisdiction of U.S. courts. The panel's unanimous decision put even more weight, however, on the "pragmatic obstacles" of opening up legal proceedings for the prisoners in "an active theater of war."



All three men claimed they were captured outside of Afghanistan and brought to the prison at Bagram. The Tunisian said he was captured in Pakistan and a Yemini said he was captured in Thailand, both in 2002. The third prisoner, also a Yemini, claimed he was captured outside of Afghanistan in 2003, though the government disputed his claim. Federal District Court Judge John D. Bates, an appointee of President George W. Bush, ruled in favor of the petitioners in April of 2009, basing his decision on a 2008 Supreme Court ruling that habeas corpus rights are applicable to detainees at the U.S. Naval base in Guantanamo, Cuba.

The government appealed, arguing that there is a significant difference between the Bagram and the Guantanamo detentions. The appeals court agreed. Guantanamo is not in an "active theater of war," wrote Chief Judge David B. Sentelle and the United



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States does not have the "de facto sovereignty" over Bagram that it has held over Guantanamo for more than a century.

"In Bagram, while the United States has options as to duration of the lease agreement, there is no indication of any intent to occupy the base with permanence, nor is there hostility on the part of the 'host' country," Bates said.

Lawyers for the detainees argued that the government would be able to avoid judicial review of detentions by moving prisoners to active combat zones, thereby enjoying a power to "switch the Constitution on or off at will." But Sentelle said that was not the reason these detainees were held at Bagram, since they were sent there before the Supreme Court's ruling on Guantanamo.

"We need make no determination on the importance of this possibility, given that it remains only a possibility; its resolution can await a case in which the claim is a reality rather than speculation," the chief judge wrote.

Tina Foster, one of the lawyers for the detainees, promised to keep fighting, suggesting an appeal to the Supreme Court. If Obama nominee Elena Kagan is confirmed by the Senate, she would have to recuse herself since she argued the case for the government as Solicitor General. In all likelihood, the detainees would do no better than a 4-4 tie, since John Paul Stevens, whom Kagan would replace, was part of a 5-4 majority in favor of granting habeas rights to the Guantanamo detainees. A tie vote would leave the appeals court decision in place.

Foster said the decision would allow Obama and future presidents to "kidnap people from other parts of the world and lock them away for the rest of their lives" without having to produce evidence of their involvement in terrorist activities.

"The thing that is most disappointing for those of us who have been in the fight for this long is all of the people who used to be opposed to the idea of unlimited executive power during the Bush administration but now seem to have embraced it during this administration," she told the *New York Times*. That embrace might prove uncomfortable in a few years, she suggested. "We have to remember that Obama is not the last president of the United States."



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