By Andy Worthington

From Andy Worthington | Original Article

In the first of two articles about the Obama administration's detention policies relating to the US airbase at Bagram, Afghanistan, I examined recent revelations about a secret prison inside the base, apparently run by a shadowy branch of the Pentagon, where Bush-era "enhanced interrogations," involving sleep deprivation and isolation, are used, as authorized in Appendix M of the US Army Field Manual. This second article examines the Obama administration's confusing attempts to bring detention policies at the main prison more in line with international accepted standards regarding the treatment of prisoners seized in wartime, with some spectacular failures — the refusal to accept that foreign prisoners rendered to Bagram from other countries should have habeas corpus rights — and some improvements, involving review boards, prisoner releases, and trials, which, nevertheless, betray the kind of confusion that will prevail while the administration insists on accepting its predecessor's unilateral rewriting of the Geneva Conventions.

A new review process at Bagram — and the Obama administration's struggle to withhold habeas corpus rights from foreign prisoners

Beyond the growing scandal of the "black prison," which cries out for further investigation, the US authorities have been attempting, with rather more success, to rebrand the main prison at Bagram, opening a new facility to replace the squalid Russian factory immortalized in the bleak stories of prisoners held there in the early years, releasing the first ever list of prisoners in January, and introducing a new review process designed to release prisoners who, as Max Fisher explained for the *Atlantic* in March, constitute the "80 to 90 percent" of the prison's total population — estimated, at the time, as 750 prisoners — who "are non-ideological or 'accidental' combatants who pose no long-term threat to the US."

The introduction of a new review process was initiated for two reasons, one of which was

considerably more benign than the other. The first involved the military belatedly learning from mistakes in Iraq, after Gen. David Petraeus, the overall commander in Afghanistan and Iraq, appointed Maj. Gen. Doug Stone to run the detention system in Iraq. As an NPR report explained last August, "He had 21,000 detainees. But he found that most of these Iraqi detainees — as many as two-thirds — were not radicals, but mostly illiterate and jobless young people. Some were innocents and others worked for the insurgency because they just needed the money. And Stone worried that detaining them was only making matters worse, actually turning them into radicals."

NPR added that, as a result of his success in Iraq, Gen. Petraeus sent Maj. Gen. Stone to review the detention program in Afghanistan, and that he "went to Afghanistan with a team, interviewed detainees, visited detention facilities," and produced a 700-page report, in which he estimated that "as many as 400 of the 600 held at Bagram can be released," explaining that "many of these men were swept up in raids" and "have little connection to the insurgency."

However, the second reason for introducing a new review process was in response to a court challenge in the US, which was regarded with the utmost severity by the Obama administration, as it had been by President Bush. In March 2009, in the District Court in Washington D.C., Judge John Bates granted habeas corpus rights to three foreign prisoners seized in other countries (including Thailand and Pakistan), transferred to Bagram (via secret CIA prisons), and held for up to eight years.

As Judge Bates recognized, the habeas rights granted to the Guantánamo prisoners by the Supreme Court in June 2008 also extended to foreign prisoners rendered to Bagram because "the detainees themselves as well as the rationale for detention are essentially the same," because the review process at Bagram "falls well short of what the Supreme Court found inadequate at Guantánamo," and because any "practical obstacles" to a court review of their cases were "not insurmountable," and were, moreover, "largely of the Executive's choosing," because the prisoners were specifically transported to Bagram — in an active war zone — from other locations.

Two weeks ago, the Court of Appeals shamefully overturned Judge Bates' ruling, hurling the foreign prisoners rendered to Bagram from other countries back into a legal black hole — and moreover, one which, as

Al-Jazeera suggested
in April, could be swiftly and decisively resolved by transferring them back to the custody of their home countries, thereby avoiding any further calls for accountability. On April 27, Al-Jazeera reported that, when speaking about the foreign prisoners held at Bagram — 32 in total, according to a
New York Times
article in March — Vice Admiral Robert Harward, the commander in charge of detention operations in Afghanistan, stated that the authorities were "currently co-ordinating" with the foreign prisoners' home governments, adding, "We're working to move them back into the legal systems of their countries."

Reporting from Kabul, James Bays claimed, "The Afghans wouldn't want to take control of these detainees when [the prison] came under Afghan control, and that's why America is talking to some of the governments where these prisoners come from to see if they will take these prisoners." This explanation may well contain a kernel of truth, but it also conveniently overlooks the fact that disposing of the prisoners will enable the US government to avoid having to explain why it seized the men in the first place and what was done to them in secret CIA prisons before they even arrived at Bagram.

As well as prompting panic regarding the extension of habeas rights to foreign prisoners in Bagram, Judge Bates' ruling last March also prompted the administration to address one of his particular concerns — the inadequacy of the review process at Bagram — by introducing a new review process, which, rather cynically, the government chose to announce as part of its court appeal last September, no doubt in the hope of persuading the Court of Appeals that significant improvements were being made at Bagram.

As I explained last March, Judge Bates was withering in his criticism of the existing review process at Bagram, noting that the Unlawful Enemy Combatant Review Board (UECRB) was both "inadequate" and "more error-prone" than the review process used at Guantánamo in 2004-05 — the Combatant Status Review Tribunals, 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 .

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."

In the Detainee Review Boards (DRBs) established to replace the UECRBs, prisoners are now given personal representatives and may call witnesses, which is undoubtedly an improvement. However, even beyond the problems inherent in importing from Guantánamo a system that the Supreme Court found "inadequate," a more fundamental problem is that the prisoners at Bagram are still not being held as prisoners of war according to the Geneva Conventions. If they were, as I also explained recently:

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.

In March this year, Jonathan Horowitz of One World Research attended five of these hearings, designed to ascertain "whether a detainee should be released, detained until his next review in six months, or transferred to Afghan authorities for prosecution or reconciliation." He explained how they are indeed an improvement on the UECRBs, but added, "the improvements are relative and the bar was set very low to begin with."

Horowitz was clearly impressed with the ability to call witnesses, and with the personal representatives' efforts to act on the prisoners' behalf, but he worried about the shortage of staff, problems with translators, and a general lack of knowledge about Afghan history and culture, and, in an echo of the problems at Guantánamo, reserved bitter criticism for the use of classified evidence, explaining:

The fact that detainees are not allowed to review classified information seriously jeopardizes the accuracy and legitimacy of the hearings. This classification procedure, though important for protecting identities of informants, makes it nearly impossible for the detainee to effectively

challenge the veracity of the allegations. To solve this problem, the US military and intelligence agencies need to end their culture of over-classification and give greater priority to improving their evidence gathering capacity, as opposed to their intelligence gathering capacity. Without a shift from reliance on secret sources to greater transparency, US detention operations and its detainee review system are doomed.

Horowitz also complained about repeated failures in intelligence gathering, which, of course, have plagued US operations in Afghanistan from the very beginning, as was demonstrated repeatedly with the Afghan prisoners in Guantánamo. In his article, he explained that the military "needs to review its intelligence sources and eliminate those who repeatedly provide false and inaccurate information. One of the biggest complaints Afghans have of the US detention policy is that informants aren't held accountable" — or, he might have added, that the military is all too easily duped by unreliable informants, as the accounts below reveal.

Prisoners released from Bagram

As a result of the DRBs, dozens of prisoners have been released from Bagram since the start of the year. There have been releases before, of course, but the process was devoid of outside scrutiny, and often, it seemed, involved transfers to Afghan custody despite fears that doing so was consigning the prisoners in question to a brutal system where there was even less opportunity for the US rationale for capture to be adequately tested.

New York Times