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Limit on detainees' challenges

In a major victory for the Obama Administration's detention policy, the D.C. Circuit Court [ruled](#) on Friday that foreign nationals held at a U.S. military prison at Bagram airbase outside of Kabul, Afghanistan, do not have a right to challenge in U.S. courts their continued imprisonment. The ruling overturned a federal judge's decision that the Supreme Court's ruling two years ago allowing habeas challenges by prisoners at Guantanamo Bay extends to Bagram, at least for non-Afghan foreign nationals captured outside of Afghanistan and taken there for detention. The three-judge panel was unanimous in

Maqaleh, et al., v. Gates

(Circuit docket 09-5265). The issue is likely to be taken to the Supreme Court by detainees' lawyers, but review there is no certainty.

The case, involving two Yemenis and a Tunisian, poses a broadly significant test of how far beyond U.S. shores a constitutional right to challenge U.S. military detention extends — an issue that potentially affects U.S. bases virtually around the globe. Chief Circuit Judge David B. Sentelle wrote the 26-page decision Friday, joined in full by Circuit Judge David S. Tatel and Senior Circuit Judge Harry T. Edwards. Sentelle is a conservative jurist; the other two are liberals. Their ruling overturned a decision by a judicial moderate, District Judge John D. Bates.

While showing respect for Judge Bates' "thorough and careful" ruling extending habeas to some foreign nationals at Bagram, the Circuit Court took what it regarded as a middle position between "extreme" interpretations by government and detainees' lawyers of the Supreme Court's decision in June 2008 in *Boumediene v. Bush* extending habeas rights to Guantanamo.

On the one hand, it rejected the government argument that *Boumediene* had adopted a bright-line rule that habeas never extends to another country where the U.S. has a military facility, unless it is like Guantanamo Bay where the U.S. has the factual equivalent of national sovereignty. But it also rejected an argument by Bagram detainees' lawyers that habeas extends to a U.S. military base overseas if the U.S. in fact has control of the facility and its management. Neither of those positions, Judge Sentelle wrote, squared with what the Supreme Court actually decided in

Boumediene

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The Circuit Court then moved on to what it described as the two sides' "more nuanced" arguments, and wound up siding with the bulk of the government's assertions at that level. Judge Sentelle noted, as Judge Bates had, that the *Boumediene* decision laid down three tests to apply when deciding how far habeas rights reached beyond the United States' own territory: 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.

The Circuit Court said the first factor worked in the detainees' favor, because their status as "enemy combatants" who must be imprisoned is determined by a military process with even fewer safeguards than Guantanamo prisoners have had.

On the nature of the detention site, the Circuit Court found the government's opposition to habeas weighed more heavily. While the U.S. may control the military facility at Bagram under a lease, the surrounding situation is much different from that at the base at Guantanamo, where the U.S. has long held total control; it noted a lack of permanence at Bagram.

On the third factor, on how hard it would be for courts to judge detention at a foreign site, the Circuit Court concluded that the difficulties tip the balance in favor of the government's view against habeas rights for those held at Bagram. "It is undisputed that Bagram, indeed the entire nation of Afghanistan, remains a theater of war," the opinion commented. "[A]ll of the attributes of a facility exposed to the vagaries of war are present in Bagram."

The Circuit Court closed its opinion with two mini-essays of judicial commentary.

First, it gave current prominence to views that the Supreme Court had expressed in the post-World War II decision on military detention — *Johnson v. Eisentrager* (1950), quoting concerns expressed there about how civilian court trials would “hamper the war effort and bring aid and comfort to the enemy.” The quotation also spoke of the potential for reducing “the prestige of our commanders” and for inhibiting the operations of field commanders.

Second, it commented that, in some future case, it might develop that the U.S. government would chose a foreign place to detain individuals precisely to put them beyond the reach of American courts. That, it said, “remains only a possibility,” and at this point represented only “a speculation.” It went on to reject the idea outright, saying that in this case it was “unsupported by the evidence,” and was “not supported by reason.” If the government were actually interested in “turning off the Constitution” by selecting a war zone for a detention site, military and government officials would have had to anticipate the complex history of litigation that has unfolded during current foreign hostilities and predict what the Supreme Court would do in *Boumediene* far in advance.

The Bagram detainees’ lawyers now have two options: they can ask the full, nine-judge Circuit Court to reconsider Friday’s ruling, or they can ask the Supreme Court to review the case now (or after any further challenge in the Circuit Court is over). The fact that the panel was unanimous, and that it was composed of judges from across the philosophical spectrum, may make it harder to gain further review of the case.

Moreover, there is no chance that a conflict would develop among the Circuit Courts on the underlying question of the extent of habeas overseas, because detention cases now routinely arise only in the federal courts in Washington, D.C. That, however, has not deterred the Supreme Court from reviewing several of the D.C. Circuit’s rulings in recent detainee cases, and overturning some of the major ones among those rulings — as in *Boumediene*.

The government position that habeas rights should not extend beyond Guantanamo was first spelled out by the George W. Bush Administration, but it was embraced by the Obama Administration when it came into office, even as the new Administration sought to make somewhat narrower claims for presidential detention power than had the Bush government.