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# Bagram: Gitmo All Over Again

By Andy Worthington

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Back in September 2005, when I first began researching Guantánamo for my book *The Guantánamo Files*, the prison was still shrouded in mystery, even though attorneys had been visiting prisoners for nearly a year, following the Supreme Court's ruling, in June 2004, that they had habeas corpus rights. Researchers at the *Washington Post* and at CagePrisoners, a human rights organization in the UK, had compiled tentative lists of who was being held, but, although these efforts were commendable, much of it was little more than groping in the dark – a broken jigsaw puzzle based on media reports and interviews with released prisoners – because the Bush administration refused to provide details of the names and nationalities of those it was holding.

In April 2006 – four years and three months after Guantánamo opened – the government finally conceded defeat, after the Associated Press took the Pentagon to court and won. That month, the first ever list of prisoners [.pdf] – containing the names and nationalities of the 558 prisoners who had been subjected to the administration's combatant status teview tribunals (one-sided reviews, designed to rubber-stamp their prior designation as "enemy combatants") – was released, and was followed in May by a list of the 759 prisoners held up to that point (including the 201 who had been released before the tribunals began), which included names, nationalities, and, where known, dates of birth and places of birth [.pdf].

The government also released 8,000 pages of tribunal transcripts and allegations against the prisoners, which pierced the veil of secrecy still further, allowing outside observers, as well as lawyers, the opportunity to examine whether the government's claims that the prison was full of terrorists were true, and to conclude that, actually, the prison was largely populated by innocent men or low-level Taliban foot soldiers, recruited to fight an inter-Muslim civil war

that began long before the 9/11 attacks and had nothing to do with al-Qaeda or international terrorism.

These records revealed that an overwhelming majority of the men had not been seized by U.S. forces on the battlefield, but had been sold to them by their Afghan or Pakistani allies, at a time when bounty payments were widespread, and – perhaps most shockingly – the transcripts also revealed that a vast amount of the government's supposed evidence consisted not of verifiable facts, but of "confessions" made by other prisoners – or by the prisoners themselves – under unknown circumstances. A great deal of demonstrably unreliable information was attributed to unidentified figures in al-Qaeda – in general, the "high-value detainees," including Abu Zubaydah and Khalid Sheikh Mohammed, who were being held in secret CIA prisons where the use of torture had been sanctioned by the Justice Department's Office of Legal Counsel in its notorious "torture memos."

Other information came from unidentified "sources" within Guantánamo, and in the last year, as judges have finally been able to examine these allegations in the district courts charged with hearing the prisoners' habeas corpus cases, many of these sources have been revealed as deeply untrustworthy: talkative informants regarded with suspicion by many of those working behind the scenes in the military and other agencies; mentally ill prisoners; and others whose accounts have not stood up to outside scrutiny and who have been revealed as part of a supposed "mosaic" of intelligence that, as one judge, Gladys Kessler, declared in May, "is only as persuasive as the tiles which compose it and the glue which binds them together." As I explained at the time, Judge Kessler "then proceeded to highlight a catalog of deficiencies in the tiles and the glue," dismissing the "mosaic" as being "composed of second- or third-hand hearsay, guilt by association, and insupportable suppositions."

In addition, although few of the prisoners were willing to talk to a panel of the military officers about how they had been abused in U.S. custody, enough accounts emerged for lawyers and observers (who also drew on official reports about how torture techniques, used in U.S. military schools to train U.S. military personnel to resist enemy interrogation, had been reverse-engineered for use at Guantánamo) to build up their own, more convincing "mosaic" of intelligence, demonstrating that abuse – and, in some cases, torture – was also widespread throughout Guantánamo, raising fears that even confessions that appeared legitimate were fatally tainted because they had been extracted using coercion.

It would be difficult to underestimate how important the release of these documents was to those engaged in a seemingly endless struggle to secure justice for those held without charge or trial, who had, in general, been rounded up indiscriminately and had never been adequately screened to determine whether they constituted a threat to the U.S. or its allies. However, over three years on from the release of these lists – and eight months into the Obama administration – history is repeating itself at the U.S. prison in Bagram airbase in Afghanistan. The difference, however, is that at Bagram the clock has stopped before any painful details of incompetence have been released, leaving lawyers and other observers still groping in the dark.

**Fighting for the Rights of the Bagram Prisoners**

On April 23, the ACLU filed a Freedom of Information Act (FOIA) request with the Department of Defense, the Justice Department, the State Department, and the CIA, asking them to make public "records pertaining to the number of people currently detained at Bagram, their names, citizenship, place of capture, and length of detention, as well as records pertaining to the process afforded those prisoners to challenge their detention and designation as 'enemy combatants.'"

On May 15, the CIA responded [.pdf] by stating that it "can neither confirm nor deny the existence or nonexistence of records responsive to your request," because "The fact of the existence or nonexistence of requested records is currently and properly classified," and on July 28, the DoD also responded [.pdf], stating, tantalizingly, that, although the National Detainee Reporting Center had provided the DoD's Office of Freedom of Information with "a 12-page classified report, current as of June 22, 2009," which contained the prisoners' "names, citizenship, capture date, days detained, capture location, and circumstances of capture," the report was "exempt for release" because it was "properly classified in the interest of national security."

In response, Jonathan Hafetz, a staff attorney with the ACLU National Security Project, stated, "The Obama administration should make good on its own pledge of greater transparency and release these basic facts about who we are detaining and under what conditions." Melissa Goodman, also a staff attorney with the ACLU National Security Project, added, "There are serious concerns that Bagram is another Guantánamo – except with many more prisoners, less due process, no access to lawyers or courts, and reportedly worse conditions. As long as the Bagram prison is shrouded in secrecy, there is no way to know the truth or begin to address the problems that exist there."

In this, the ACLU's lawyers were undoubtedly correct. According to the best available estimates, at least 600 prisoners are held at Bagram, but unlike Guantánamo, no lawyer has ever set foot in the U.S. military's flagship Afghan prison, even though some of the prisoners held there were seized in other countries and "rendered" to Bagram, where they have been held for up to seven years. The prison was particularly notorious in its early days – especially in 2002, when at least two prisoners died at the hands of U.S. forces – but according to a survey conducted by the BBC in June this year, former prisoners, held between 2002 and 2008, stated that they were beaten, deprived of sleep, and threatened with dogs, and they provided no indication that conditions had improved from the beginning to the end of the six-year period.

**Why Foreign Prisoners in Bagram Deserve Habeas Corpus Rights**

To understand why Bagram needs independent scrutiny, it is necessary to distinguish between the prison's two distinct functions, each of which fails to conform to internationally acceptable standards of detention. The first concerns the foreign prisoners (perhaps as many as 30) seized in other countries and "rendered" to Bagram. In March, when enterprising lawyers at the International Justice Network finally managed to bring a habeas corpus petition on behalf of four of these men in front of a U.S. judge (having established that they were held at Bagram through discussions with family members based on letters delivered by the

International Committee of the Red Cross), the judge in question, John D. Bates, recognized the unacceptable discrepancy between the Guantánamo prisoners and those "rendered" to Bagram.

As I explained in an article at the time, "Judge Bates ruled that the habeas rights granted by the Supreme Court to the Guantánamo prisoners last June in *Boumediene v. Bush* also extended to the foreign prisoners in Bagram, because, as he explained succinctly, 'the detainees themselves as well as the rationale for detention are essentially the same.'" He added that, although Bagram is "located in an active theater of war," and that this may pose some "practical obstacles" to a court review of their cases, these obstacles "are not as great" as the government suggested, are "not insurmountable," and are, moreover, "largely of the executive's choosing," because the prisoners were specifically transported to Bagram from other locations.

This was good news for three of the men – Redha al-Najar, a Tunisian seized in Karachi, Pakistan; Amin al-Bakri, a Yemeni gemstone dealer seized in Bangkok, Thailand; and Fadi al-Maqaleh, a Yemeni – because, as I also explained at the time, "only an administrative accident – or some as yet unknown decision that involved keeping a handful of foreign prisoners in Bagram, instead of sending them all to Guantánamo – prevented them from joining the 779 men in the offshore prison in Cuba." However, at the time of writing, it is uncertain whether they will have their day in court, as the government has appealed Judge Bates' ruling.

**Why the Afghans in Bagram Must Be Held According to the Geneva Conventions**

In the same ruling in March, Judge Bates reserved judgment on the case of the fourth man, Haji Wazir, an Afghan seized in 2002 in the United Arab Emirates, but ruled in June that habeas rights did not extend to him (or, by extension, to all the other Afghans held at Bagram), primarily because he agreed with the government's claim that to do so would cause "friction" with the Afghan government, because of ongoing negotiations regarding the transfer of Afghan prisoners to the custody of their own government.

As a result, the government presumably feels entitled to continue to hold the majority of the prisoners in Bagram – who, from what we can gather, are Afghans seized in Afghanistan – beyond any kind of outside scrutiny. However, while this may be acceptable in the sense that Bagram is a prison in an active war zone, it is, to my mind, only acceptable if the government also demonstrates that it is holding prisoners in accordance with the Geneva Conventions. As I explained in an article in June:

*"In one of his first acts as president, Obama signed a number of executive orders, in which he promised to close Guantánamo within a year and to ban torture, and established that the questioning of prisoners by any U.S. government agency must follow the interrogation guidelines laid down in the Army Field Manual, which guarantees humane treatment under the Geneva Conventions. The order relating to interrogations also specifically revoked President Bush's Executive Order 13440 of July 20, 2007, which 'reaffirm[ed]' his 'determination,' on Feb. 7, 2002, that 'members of al-Qaeda, the Taliban, and associated*

*forces are unlawful enemy combatants who are not entitled to the protections that the Third Geneva Convention provides to prisoners of war.'"*

As a result of Obama's stated reforms, it was my belief that:

*"[T]he president would call an immediate halt to what I can only describe as the 'Rumsfeldization' of the U.S. military, in which, following the directives of former defense secretary Donald Rumsfeld (and echoing what was happening with the intelligence agencies, where the FBI was sidelined by the CIA), the detention of prisoners was no longer a matter of holding them humanely until the end of hostilities, but became, instead, an ongoing process of interrogation, dedicated to securing 'actionable intelligence,' which, of course, degenerated into the use of torture when the presumed 'actionable intelligence' was not forthcoming. …*

*"It may be that the policies at Bagram changed overnight after Obama issued his executive orders in January, but the suspicion … is that, as far as the administration is concerned, certain key innovations in the 'War on Terror' – in particular, holding prisoners for their intelligence value, rather than to keep them 'off the battlefield' – has become the post-9/11 norm, as a kind of unilateral reworking of the Geneva Conventions."*

From what I have been able to gather about the workings of Bagram, I have no reason to conclude that the prison is now being run according to the Geneva Conventions, with prisoners kept "off the battlefield" until the end of hostilities (whenever that might be). Instead, as I reported in March, Judge Bates explained that the military's justification for holding the prisoners at Bagram involves a review process similar to the one that was used at Guantánamo, albeit one that is both "inadequate" and "more error-prone," and he concluded that the U.S. military's control over Bagram "is not appreciably different than at Guantánamo." Creating such inadequate tribunals, it should be noted, is quite an achievement, as Guantánamo's tribunals were soundly condemned by former officials who worked on them, including, in particular, Lt. Col. Stephen Abraham, who issued a series of explosive statements in 2007.

In addition, Judge Bates' précis of the review process at Bagram, which, as he also explained, "falls well short of what the Supreme Court found inadequate at Guantánamo," was, in fact, genuinely disturbing. He quoted from a government declaration which stated that the Unlawful Enemy Combatant Review Board (UECRB) at Bagram does not even allow the prisoners to have a "personal representative" from the military in place of a lawyer (as at Guantánamo), and that "Bagram detainees represent themselves," and added, with a palpable sense of incredulity:

*"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. [The government's] far-reaching and ever-changing definition of enemy combatant, coupled with the uncertain evidentiary standards, further undercut the reliability of the UECRB review. And, unlike the CSRT process, Bagram detainees receive no review beyond the UECRB itself."*

**A Challenging Conclusion, Mr. President**

In conclusion, then, it should be apparent that the government cannot maintain the Bush administration's status quo at Bagram, as it is failing on two fronts to hold prisoners according to the internationally acceptable standards of detention that existed before the Bush administration brushed aside the Geneva Conventions for prisoners of war and held criminal suspects beyond the law.

If the Obama administration will not put the foreign prisoners "rendered" to Bagram on trial, then the president needs to allow them to challenge the basis of their detention before an impartial judge; and if he reinstates the Geneva Conventions for prisoners of war, and, with a stroke of the pen, consigns his predecessor's horrendous novelties to history, then he needs to do more than just pay lip service to the reinstatement of the Conventions. Obama needs to prove, beyond a shadow of a doubt, that he is not perpetuating a Rumsfeld-lite form of detention, in which humane treatment is secondary to the quest for "actionable intelligence," because, once the rules are discarded, our recent history shows us that what follows, inexorably, is torture and abuse.