

DC CIRCUIT HELPS OBAMA TURN BAGRAM INTO BLACK HOLE

The DC Circuit just overturned a District Court opinion that granted three Bagram detainees who were captured outside of Afghanistan (though the government contests this claim for one of the detainees) the right to a habeas proceeding.

It based its argument on three factors the Supreme Court listed in deciding in *Boumediene* that detainees at Gitmo did have the right to habeas proceedings.

(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 prisoner's entitlement to the writ.

The Circuit found that the three detainees had actually had a less adequate status determination than the detainees in *Boumediene*. But it said it had to consider the two other named factors. It found that the US has nowhere near the sovereignty over Bagram that it has in Gitmo.

As the Supreme Court set forth, Guantanamo Bay is "a territory that, while technically not part of the United States, is under the complete and total control of our Government." 128 S. Ct. at 2262. While it is true that the United States holds a leasehold interest in Bagram, and held a leasehold interest in Guantanamo, the surrounding circumstances are hardly the same. The United States has maintained its total control of Guantanamo Bay for over a century, even in the face of a hostile

government maintaining de jure sovereignty over the property. 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. Therefore, the notion that de facto sovereignty extends to Bagram is no more real than would have been the same claim with respect to Landsberg in the Eisentrager case. While it is certainly realistic to assert that the United States has de facto sovereignty over Guantanamo, the same simply is not true with respect to Bagram.

[snip]

The Supreme Court expressly stated in Boumediene that at Guantanamo, "[w]hile obligated to abide by the terms of the lease, the United States is, for all practical purposes, answerable to no other sovereign for its acts on the base. Were that not the case, or if the detention facility were located in an active theater of war, arguments that issuing the writ would be 'impractical or anomalous' would have more weight."

And the Circuit placed even more weight on the impracticality of giving detainees at Bagram habeas proceedings.

Afghanistan remains a theater of active military combat. The United States and coalition forces conduct "an ongoing military campaign against al Qaeda, the Taliban regime, and their affiliates and supporters in Afghanistan." These operations are conducted in part from Bagram Airfield. Bagram has been subject to repeated attacks from the Taliban and al Qaeda, including a March 2009 suicide bombing striking the gates of the

facility, and Taliban rocket attacks in June of 2009 resulting in death and injury to United States service members and other personnel.

[snip]

But we hold that the third factor, that is “the practical obstacles inherent in resolving the prisoner’s entitlement to the writ,” particularly when considered along with the second factor, weighs overwhelmingly in favor of the position of the United States. It is undisputed that Bagram, indeed the entire nation of Afghanistan, remains a theater of war.

And on that basis—effectively the fact that the Administration chooses to bring men into a theater of war to detain them—the Circuit overturned the District decision.

We cannot, consistent with *Eisentrager* as elucidated by *Boumediene*, hold that the right to the writ of habeas corpus and the constitutional protections of the Suspension Clause extend to Bagram detention facility in Afghanistan, and we therefore must reverse the decision of the district court denying the motion of the United States to dismiss the petitions.

Now, as the detainees argued, this basically means that the US can avoid any legal obligation to give detainees some kind of legal review by keeping detainees at Bagram or, possibly, taking them there, into a theater of war, so as to deprive them of a right to habeas. In rejecting this argument, the Circuit got a little silly.

We do not ignore the arguments of the detainees that the United States chose the place of detention and might be able “to evade judicial review of Executive detention decisions by transferring detainees into active conflict zones,

thereby granting the Executive the power to switch the Constitution on or off at will." Brief of Appellees at 34 (quotation marks and citation omitted). However, that is not what happened here. Indeed, without dismissing the legitimacy or sincerity of appellees' concerns, we doubt that this fact goes to either the second or third of the Supreme Court's enumerated factors. 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 a speculation.

In so stating, we note that the Supreme Court did not dictate that the three enumerated factors are exhaustive. It only told us that "at least three factors" are relevant. *Boumediene*, 128 S. Ct. at 2259 (emphasis added). Perhaps such manipulation by the Executive might constitute an additional factor in some case in which it is in fact present. However, the notion that the United States deliberately confined the detainees in the theater of war rather than at, for example, Guantanamo, is not only unsupported by the evidence, it is not supported by reason. To have made such a deliberate decision to "turn off the Constitution" would have required the military commanders or other Executive officials making the situs determination to anticipate the complex litigation history set forth above and predict the *Boumediene* decision long before it came down.

Yes, it is true that the US has detained these men in Bagram since before the *Boumediene* decision. But to suggest the Bush and Obama Administrations haven't, constantly and repeatedly, been making these kinds of

calculations is simply naive. Furthermore, the decision to take these men to Afghanistan—particularly Amin Al-Bakri, a Yemeni captured in Thailand—was clearly a decision to take them outside the realm of existing sovereign nations that were not then at war.

Plus, unless SCOTUS overturns this, this is just an open invitation to take men from Gitmo (for example, Abu Zubaydah's lawyer signed an amicus brief on this case) and deposit them in Bagram to take them beyond the reach of US law. Not US transportation and control mind you, just US law.