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No Habeas For You! Al Maqaleh v. Gates, The Bagram Detainees, and the Global Insurgency

NOTE

NO HABEAS FOR YOU! *AL MAQALEH V. GATES*, THE BAGRAM DETAINEES, AND THE GLOBAL INSURGENCY

MICHAEL J. BUXTON*

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INTRODUCTION

The U.S. invasion of Afghanistan, following the September 11, 2001 terrorist attacks on the United States, was initiated in order to neutralize the leadership of a global insurgency¹ ideologically led by al Qaeda. Recently,

* Senior Staff Member, *American University Law Review*, Volume 60; J.D. Candidate, *American University Washington College of Law*, May 2011. This Note is a reduced version of a Comment originally selected for publication in this edition. The Comment was mooted by *Al Maqalah v. Gates*, 605 F.3d 84 (D.C. Cir. 2010), the case at issue in this Note, because it reached the same conclusions about the habeas claims of Bagram detainees as stated in the original Comment.

I wish to dedicate this piece to those who have provided the most support to me during the writing process, namely Zuza, Peaches, Tigger, Pillow, Saliha, and Jerry Seinfeld. Many thanks to Professor Daniel Marcus and Professor Stephen Vladeck for their guidance, and to the law review staff for editing the piece.

1. See MICHAEL SCHEUER, *IMPERIAL HUBRIS: WHY THE WEST IS LOSING THE WAR ON TERROR* 60, 217 (2004) (explaining that insurgency better defines the war against al Qaeda and its affiliates because a majority of these persons have military training, whereas a minority have training in terrorist tactics). The term “insurgency” or “insurgents” will thus be used throughout this Case Note instead of “terrorism” or “terrorists” because this term

a number of violent encounters have occurred along the ungoverned border between Afghanistan and Pakistan as a result of the escalating conflict between U.S. soldiers, Taliban, and al Qaeda forces. Such military engagement inevitably results in a number of complex challenges for the U.S.; one of these challenges is the handling of captured enemies, and the appropriate role of U.S. courts in resolving these issues. While the Supreme Court in *Boumediene v. Bush*² afforded constitutional habeas corpus rights to detainees, questions remained as to the applicability of this case to other U.S.-run detention centers, such as the one in Bagram, Afghanistan. A recent decision by the U.S. Court of Appeals for the District of Columbia, *Al Maqaleh v. Gates*,³ concluded that Bagram detainees were not entitled to habeas corpus protection, but left two major questions unanswered: (1) what effect does the global nature of the insurgency have on habeas jurisprudence,⁴ and (2) what is the appropriate process due to combatants in wartime?⁵

I. PROCEDURAL HISTORY

Following the terrorist attacks that occurred on September 11, 2001, the Bush administration began detaining noncitizen combatants at Guantánamo Bay, Cuba, leading to several court challenges by detainees and culminating in the Supreme Court granting constitutional habeas corpus protection to these detainees in *Boumediene*. In deciding that the Guantánamo detainees were entitled to constitutional habeas corpus rights even though they were captured overseas,⁶ the Court looked to *Johnson v. Eisentrager*⁷ for guidance, deriving the following factors from that opinion:⁸ “(1) the citizenship and status of the detainee and the adequacy

better defines the nature and severity of the threat.

2. 553 U.S. 723 (2008).

3. 605 F.3d 84 (D.C. Cir. 2010).

4. *See id.* at 98 (limiting the discussion to the fact that Bagram was clearly in an active theater of war).

5. The circuit court explained that the detainees received inadequate process under the Unlawful Enemy Combatant Review Board, but did not extend the discussion to what would constitute adequate process. *See id.* at 96.

6. *See Boumediene*, 553 U.S. at 739 (“In deciding the constitutional questions now presented we must determine whether petitioners are barred from seeking the writ or invoking the protections of the Suspension Clause either because of their status, i.e., petitioners’ designation by the Executive Branch as enemy combatants, or their physical location, i.e., their presence at Guantánamo Bay.”).

7. 339 U.S. 763 (1950).

8. *See id.* at 778–79 (holding that German combatants captured in China during World War II were not entitled to habeas corpus protection, noting that “the scenes of [the detainees’] offense, their capture, [and] their trial and [. . .] punishment” were all outside of sovereign U.S. territory and jurisdiction and that the impracticality of affording “alien enemies” Suspension Clause protection during hostilities “would hamper the war effort and bring aid and comfort to the enemy”).

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."⁹ In applying these factors, the Court in *Boumediene* concluded that the process afforded Guantánamo detainees was insufficient,¹⁰ that the United States intended to govern Guantánamo Bay indefinitely,¹¹ and that no practical obstacles stood in the way of granting detainees habeas protection.¹² The Court did note that its analysis might be different if the detention facility were located within an "active theater of war."¹³ One question remaining after *Boumediene* was how this reasoning would apply to enemy combatants detained outside the United States, but not at Guantánamo Bay.

Prior to the *Boumediene* decision, the United States began using Bagram Air Base as a detention center for newly-captured detainees, even transferring insurgents captured outside of Afghanistan to Bagram, where there are now over 750 prisoners, of whom thirty are non-Afghans.¹⁴ In *Al Maqaleh v. Gates*, four Bagram detainees sought habeas corpus protection in the U.S. District Court for the District of Columbia, a challenge both the Bush administration and the Obama administration opposed.¹⁵ The district court granted habeas corpus rights to some of the detainees at Bagram under *Boumediene*'s functional test.¹⁶ The district court claimed that the site of apprehension factor weighed in favor of granting habeas protection to the detainees because they had been captured outside of Afghanistan and

9. *Boumediene*, 553 U.S. at 766.

10. *See id.* at 767 (deciding that the first factor weighed in favor of granting the detainees Suspension Clause protection because the government provided insufficient process). The Court also explained that the *Eisentrager* prisoners received far more process than the Guantánamo detainees, as they were tried by a military commission for violations of the laws of war. *Id.*

11. *See id.* at 768 (contrasting Guantánamo Bay with Landsberg Prison, a post-World War II prison that the United States did not intend to govern indefinitely).

12. *See id.* at 769 (concluding that the "[g]overnment present[ed] no credible arguments that the military mission at Guantánamo would be compromised if habeas corpus courts had jurisdiction to hear the detainees' claims," which, when viewed "in light of the plenary control the United States asserts over the base, none [were] apparent to [the Court either]").

13. *See id.* at 770 (citing *Reid v. Covert*, 354 U.S. 1, 74 (1957) (Harlan, J., concurring in result)) (recognizing that the argument that issuing a writ would be "impracticable" or "anomalous" would carry more weight were the detention facility in an "active theater of war").

14. Alissa J. Rubin, *U.S. Readies New Facility for Afghan Detainees*, N.Y. TIMES, Nov. 16, 2009, at A8; Alissa J. Rubin & Sangar Rahimi, *In Shift, U.S. Military Names 645 Detainees Held at Key Afghanistan Base*, N.Y. TIMES, Jan. 17, 2010, at A6.

15. Charlie Savage, *Embracing Bush Argument, Obama Upholds a Policy on Detainees in Afghanistan*, N.Y. TIMES, Feb. 22, 2009, at A6.

16. *See Al Maqaleh v. Gates*, 604 F. Supp. 2d 205, 231–32 (D.D.C. 2009), *rev'd*, 605 F.3d 84 (D.C. Cir. 2010) (granting the non-Afghan detainees habeas corpus protection but not the Afghan detainee because of potential tension with the Afghanistan government).

transferred to Bagram thereby avoiding constitutional issues.¹⁷ The court noted that this apparent “limitless Executive power” to avoid judicial review of Executive detention decisions raised separation of powers concerns, reasoning that

[i]t is one thing to detain those captured on the surrounding battlefield at a place like Bagram, which . . . is in a theater of war. It is quite another thing to apprehend people in foreign countries—far from any Afghan battlefield—and then bring them to a theater of war, where the Constitution arguably may not reach.¹⁸

The district court also examined the site of detention factor,¹⁹ concluding that Bagram is substantially similar, although not identical, to Guantánamo and that the United States exercises practical control over the detention center.²⁰ The court also concluded that the adequacy of process provided to Bagram detainees weighed heavily in favor of extending the protections of the Suspension Clause, even more than it did in *Boumediene*.²¹ Regarding practical obstacles in granting the writ to Bagram detainees, the court determined that producing detainees for habeas hearings would not be difficult, as modern day technology such as video conferencing could be used,²² and any burden created by such a process would be on lawyers and administrative personnel, not U.S. soldiers on the battlefield.²³

In considering this ruling on appeal, the U.S. Court of Appeals for the District of Columbia had to determine whether the district court appropriately applied *Boumediene*'s three-factor test. Concluding that the district court did not, the D.C. Circuit relied on factors two and three of the *Boumediene* analysis.²⁴ Regarding the second, the court contrasted Guantánamo Bay with Bagram, noting that the United States has exercised

17. *See id.* at 220 (emphasizing that the Guantánamo detainees had all been captured elsewhere and brought to Guantánamo Bay “with which they had no previous connection,” just like the four detainees before the court who were transferred to Bagram from other countries).

18. *Id.* (internal quotation and brackets omitted) (citing *Boumediene*, 553 U.S. at 765).

19. *Id.* at 215.

20. *See id.* at 221–26 (finding that the site of detention factor, while not supporting the Bagram detainees to the “same extent” as it did the Guantánamo detainees, nevertheless still shows that “the United States has a high objective degree of control at Bagram”).

21. *See id.* at 227 (citing the fact that the government conceded that the process for Bagram detainees was “less comprehensive” than the CSRT process).

22. *See id.* at 228 (commenting that modern methods of communication are routinely used in Guantánamo habeas proceedings in the U.S. District Court for the District of Columbia, which means that the government does not have to physically transfer the detainees to the United States).

23. *See id.* at 228–29 (dismissing the government’s concern that it would have to “pull[] potential witnesses from the battlefield” to testify in habeas proceedings because “all four petitioners in these cases claim to have been captured outside Afghanistan, far removed from any battlefield”).

24. *Al Maqaleh v. Gates*, 605 F.3d 84, 96 (D.C. Cir. 2010).

de facto sovereignty over Guantánamo Bay for over 100 years, whereas in Bagram the United States has shown “no indication of any intent to occupy the base with permanence.”²⁵ As to the third factor, the court immediately noted that Afghanistan “remains a theater of war,”²⁶ stating that it was undisputed that Bagram Air Base is “exposed to the vagaries of war,” thus rendering it impractical to grant detainees habeas protection.²⁷ Even though the D.C. Circuit agreed with the district court that the process afforded the Bagram detainees was less than that afforded to the Guantánamo detainees, this factor did not outweigh the second and third factors,²⁸ which weighed strongly in favor of declining to extend habeas protection to the Bagram detainees.²⁹

II. UNANSWERED QUESTIONS

A. *A War Without Borders*

Based on the three factor test enunciated by *Boumediene*, the D.C. Circuit in *Al Maqaleh* properly concluded that constitutional habeas corpus rights do not extend to Bagram detainees. Yet, the D.C. Circuit did not go far enough. Because *Boumediene*'s analysis considers whether the detention facility is located in an active theater of war,³⁰ we are left with the question as to the scope of that theater. This analysis shows that the war against al Qaeda and the insurgency is global in nature, logically extending the theater of war to any country with an insurgent presence. This means that a detainee captured outside of a particular theater of war, such as Afghanistan, has still been captured in *some* theater.

The D.C. Circuit did not take into consideration this global dynamic. The court understood that there was no evidence in this case that the Executive intentionally sought to avoid the reach of the constitution by transferring the detainees to an active theater of war, especially considering that the Executive could not have “anticipate[d] the complex litigation

25. *Id.* at 97.

26. *See id.* (“[T]he position of the United States is even stronger in this case than it was in *Eisentrager*” because active hostilities had come to an end in Germany when the German nationals were captured and convicted in China and detained in Landsberg Prison in Germany).

27. *Id.*

28. *See id.* at 96–97 (stating that even though the detainees made a strong case regarding the insufficiency of the process afforded to them, this did not end the habeas analysis under *Boumediene*).

29. *Id.* at 98.

30. *See Boumediene v. Bush*, 553 U.S. 723, 770 (2008) (citing *Reid v. Covert*, 354 U.S. 1, 74 (1957) (Harlan, J., concurring in result)) (acknowledging that a detention facility located in an active theater of war would affect its analysis because “arguments that issuing the writ would be ‘impracticable or anomalous’ would have more weight”).

history . . . and predict the *Boumediene* decision long before it came down.”³¹ However, the court noted that *Boumediene* did not claim that its three factors were exhaustive; instead, the D.C. Circuit noted that future litigants might be successful arguing that the Executive intentionally sought “to evade judicial review of . . . detention decisions by transferring detainees into active conflict zones, thereby granting the Executive the power to switch the Constitution on or off at will.”³²

Such an opening for future detainees contesting their detention in federal court demonstrates a poor understanding of the Obama administration’s ineptly phrased “overseas contingency operations.”³³ Notably, the Authorization for Use of Military Force (AUMF) presumes the global nature of this war by broadly defining potential targets as “nations, organizations, or persons” and defines the purpose as “prevent[ing future] acts of *international* terrorism.”³⁴

Prior to September 11, 2001, al Qaeda employed a hierarchical structure in Afghanistan, similar to how a military operates,³⁵ but still maintained significant global ties.³⁶ During the 1990’s, al Qaeda had an annual budget of \$30 million and had trained 10,000 to 20,000 fighters.³⁷ Since the U.S.-led war against al Qaeda and the Taliban, al Qaeda has shifted its organizational structure to adapt to a changing environment.³⁸ As with any insurgent organization, its top priority is to avoid complete destruction by a

31. *Al Maqaleh*, 605 F.3d at 98–99.

32. *Id.* at 98 (quoting Joint Brief for Petitioners-Appellees at 34, *Al Maqaleh*, 605 F.3d 84 (Nos. 09-5265, 09-5266, 09-5277)).

33. Scott Wilson & Al Kamen, “*Global War On Terror*” Is Given New Name, WASH. POST, Mar. 25, 2009.

34. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (emphasis added).

35. See JOHN ROBB, BRAVE NEW WAR: THE NEXT STAGE OF TERRORISM AND THE END OF GLOBALIZATION 140 (2007) (explaining that al Qaeda operated along hierarchical lines in Afghanistan and maintained a dispersed network elsewhere).

36. NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT 55–56 (2004) [hereinafter 9/11 COMMISSION REPORT]. Bin Laden envisioned himself “as head of an international jihad confederation,” and deservedly so because he had formed an “Islamic Army Shura” that coordinated the activities of terrorist organizations spread throughout the world. See *id.* at 58 (finding that these organizations were located in countries such as Saudi Arabia, Egypt, Jordan, Lebanon, Iraq, Oman, Algeria, Libya, Tunisia, Morocco, Somalia, and Eritrea, and noting that Bin Laden also had links, albeit “less formal,” with terrorist groups in Chad, Mali, Niger, Nigeria, Uganda, Burma, Thailand, Malaysia, Indonesia, and Bosnia).

37. MICHAEL SCHEUER, IMPERIAL HUBRIS: WHY THE WEST IS LOSING THE WAR ON TERROR 60 (2004); Eben Kaplan, *The Rise of al-Qaedaism*, COUNCIL ON FOREIGN RELATIONS (2007), http://www.cfr.org/publication/11033/rise_of_alqaedism.html (last updated July 18, 2007).

38. See ROBB, *supra* note 35, at 140 (observing that once the U.S. completed the invasion of Afghanistan and assassinated “key individuals,” al Qaeda “fragment[ed]” due to the “limits on group size” associated with concentrating large groups of people in one discernible location).

single attack or military campaign.³⁹ As such, al Qaeda has created “small units with good administrative capabilities” that “will spare [them] big losses,” in contrast to “[l]arge military units [that] occupy large areas which are difficult to conceal from air reconnaissance and air attack.”⁴⁰ These networks of small units are not run by Osama bin Laden or any of his top associates, making it more difficult to disrupt the network by killing al Qaeda’s top leaders.⁴¹

Globalization has empowered these networks of “global guerrillas,” as “[t]hey are wired, educated, and globally mobile.”⁴² Moreover, “[t]hey build complex supply chains, benefit from global money flows, travel globally, innovate with technology, and attack shrewdly.”⁴³ These groups employ open-source warfare, where individuals join based on the promise that teamwork will generate “amazing results.”⁴⁴ This promise unites the entire community, and does not mean that the individual members or groups share the same motivations.⁴⁵ Most importantly, these small units can still have devastating effects, as the September 11th attacks demonstrate.⁴⁶

This structure has allowed al Qaeda to retain its influence in many of the countries in which it had a presence prior to September 11th.⁴⁷ It has also

39. SCHEUER, *supra* note 1, at 60.

40. *See id.* at 60–61 (quoting Sayf al-Adil, al Qaeda’s chief of military operations).

41. *See* ROBB, *supra* note 35, at 139 (arguing that assassinating “a single operational leader will not work,” just as killing the leader of the 9/11 attacks, Mohamed Atta, would not have disrupted the four-team network with one pilot each, as each group could function independently of Atta).

42. *Id.* at 146; *see* ROBERT M. CASSIDY, COUNTERINSURGENCY AND THE GLOBAL WAR ON TERROR: MILITARY CULTURE AND IRREGULAR WAR vii (2006) (cautioning that al Qaeda has “harnessed the advantages of globalization” to “undermine the Western system of states”).

43. ROBB, *supra* note 35, at 146; *see* SCHEUER, *supra* note 1, at 219–20 (discussing how the internet facilitates al Qaeda’s advancement by allowing individuals throughout the world to receive online training without traveling to an insurgent training camp).

44. *See* ROBB, *supra* note 35, at 116 (stating that the promise of remarkable results is the “central connection” that binds all members of the network); *see also* MARC SAGEMAN, UNDERSTANDING TERROR NETWORKS 135 (2004) (arguing that terrorist networks acquire new members not through “common notions of recruitment and brainwashing,” but instead through social bonds).

45. *See* ROBB, *supra* note 35, at 116 (listing potential motivations such as “patriotism, hatred of occupation, ethnic bigotry, religious fervor, [or] tribal loyalty,” but claiming that these do not necessarily matter so long as they all agree that they can achieve significant results).

46. *See id.* at 139 (citing the terrorist cells responsible for 9/11 as examples of how “[s]trategic attacks are possible with a network of less than seventy people”). Most importantly, the operational style of the terrorist cell responsible for 9/11 served as a precursor to al Qaeda’s decentralized structure today, where the members of the cell “used a sparse operational network,” had a leadership structure “despite a lack of formal hierarchy,” and were run by “relative unknowns” where the removal of a “single operational leader” would not have disrupted the network. *Id.* at 137–39.

47. *See* SCHEUER, *supra* note 1, at 71 (noting that al Qaeda’s reach still extends to

been able to launch a series of attacks or attempts since September 11th, including the London train bombings, the train bombings in Madrid, a series of attacks in Saudi Arabia, multiple attacks in Iraq and Pakistan, and the recent Christmas Day attempted bombing of a commercial airplane flying into the United States.⁴⁸ These global guerrillas have the capability to cause major infrastructure disruptions through targeted attacks on oil production and transportation as well as attacks on the U.S. power grid, to name a few.⁴⁹

While al Qaeda does not concentrate its forces in one location like a military, its members nevertheless have military training. Therefore the term “insurgent” better defines the al Qaeda member than “terrorist,” as al Qaeda’s training camps primarily “provide quality and uniform religious and paramilitary—or insurgent—training to young Muslims.”⁵⁰ These camps have trained thousands of insurgents, who then travel home to “fight and train others—not swarms of terrorists.”⁵¹ While al Qaeda does train terrorists in these camps, they are more accurately described as “al Qaeda’s urban warfare arm, or special forces.”⁵² Thus, the insurgents who have made their way through al Qaeda’s training camps have familiarity with various combat skills and weapons, and thus pose a threat to the United States and its overseas interests.⁵³ Even more troubling is the fact that new

“Somalia, Kenya, and the East Coast of Africa; the Pacific countries of Indonesia, Malaysia, and the Philippines; Chechnya, Kashmir, and the new Central Asian states; the countries of Western Europe; and Yemen, Saudi Arabia, the United States, and Canada”).

48. See, e.g., U.S. Dep’t of State, *Significant Terrorist Incidents, 1961–2003: A Brief Chronology*, http://www.fas.org/irp/threat/terror_chron.html (last visited Oct. 8, 2010) (Pakistan); *Al-Qaeda group claims bomb plot*, BBC NEWS (Dec. 28, 2009), http://news.bbc.co.uk/go/pr/fr/-/2/hi/middle_east/8433151.stm (attempted Christmas Day bombing); *Timeline: Al-Qaeda*, BBC NEWS (Sept. 4, 2006), http://news.bbc.co.uk/go/pr/fr/-/2/hi/in_depth/3618762.stm (Saudi Arabia, London, Madrid).

49. See ROBB, *supra* note 35, at 94–110 (describing potential vulnerabilities by explaining how the interconnectedness of the global economy and infrastructure systems allows for insurgents to target only a few aspects of a network but achieve near total system collapse). For instance, if insurgents targeted the U.S. power grid, they could “shut down 60 percent of the grid with the removal of only 2 percent of the high-load nodes.” *Id.* at 105. Some experts believe that another attack on U.S. soil is inevitable and would likely be bigger than September 11th. See STEPHEN FLYNN, *THE EDGE OF DISASTER: REBUILDING A RESILIENT NATION* 36, 96 (2007).

50. See SCHEUER, *supra* note 1, at 217 (noting that these camps have taught insurgents “a deep skill set over a narrow range,” producing insurgents instead of terrorists); CASSIDY, *supra* note 42, at 11 (stating that the United States has “limited” its definition of the enemy by mischaracterizing the war as one solely against terrorism as opposed to an insurgency).

51. See SCHEUER *supra* note 1, at 217 (describing how the camp-system operated in Afghanistan, but also noting that such camps existed in Sudan, Yemen, the Philippines, Chechnya, and Saudi Arabia, each of which primarily trained insurgents, not terrorists).

52. See *id.* (criticizing the United States’ fixation on a “small number of terrorists” and “ceasing producing assassins and suicide bombers,” instead of addressing the key issue: the several thousand insurgents with combat-training produced from these camps).

53. See *id.* (listing the various combat skills al Qaeda insurgents have learned, such as

recruits can receive online training without having to travel to a training camp.⁵⁴

This analysis indicates that the insurgency has global roots and global capabilities to launch attacks in a variety of countries. It shows that defining an active combat zone as one where traditional military operations take place ignores the manner in which the current enemy operates. Because the insurgency stretches beyond the borders of any one country, the theater of war logically extends to not only Afghanistan where al Qaeda still operates, but to any locale in which al Qaeda and its affiliates recruit operatives, plan operations, carry out attacks, or evade capture. Consequently, the separation of powers concerns that motivated the *Boumediene* court, namely transferring detainees from one particular region of an active war to a place outside that theater as a means to avoid judicial review, does not have the same application to Bagram or other similarly situated detention facilities. Furthermore, this conclusion renders irrelevant the argument that the Executive has intentionally transferred combatants to an active conflict zone. Unlike the D.C. Circuit, courts considering this issue in the future should recognize that traditional notions of warfare no longer apply and take into account the fact that *Boumediene* only concerned the issue of combatants captured on the battlefield and transferred off the battlefield to Guantánamo Bay, far away from any hostilities. In striking contrast, the detainees involved in *Al Maqaleh* were captured on the global battlefield and transferred to another theater of the same war.⁵⁵

While some may counter that this argument is inconsistent with *Boumediene* because the Guantánamo detainees had also been captured in an active theater of war, such an argument ignores the fact that Guantánamo Bay is not in an active theater of war by the accepted definition or by the definition proposed herein. Bagram is clearly in an active theater of war, and based on this analysis, detainees captured outside

how to use “AK-47s, Stinger missiles, GPS systems, advanced land navigation, RPGs, map reading, demolition techniques, celestial navigation, hand-to-hand combat techniques, trench digging, weapons deployment, escape and evasion techniques, first aid, scientific calculations to plot artillery fire, first aid, [and] secure communications”).

54. *See id.* at 219–20 (discussing how any individual with internet access can receive jihadist training, thus increasing the pool of potential recruits).

55. Regarding the four detainees involved in *Al Maqaleh*, each was either a national of or captured in a country with an al Qaeda presence, which further supports the argument that Bagram detainees have been transferred from one theater of the war to another theater of the same war. *See Al Maqaleh v. Gates*, 604 F. Supp. 2d 208, 209 (D.D.C. 2009) (noting that the four Bagram detainees before the court were captured in the United Arab Emirates, Thailand, Pakistan, and outside Afghanistan respectively, and were originally from Yemen, Afghanistan, and Tunisia), *rev'd*, 605 F.3d 84 (D.C. Cir. 2010); THE 9/11 COMMISSION REPORT, *supra* note 36, at 58 (noting that al Qaeda has a presence in multiple countries, including Thailand, Pakistan, and Afghanistan).

of Afghanistan have still been captured in *part* of a theater of war. Moreover, to claim that this argument is inconsistent with *Boumediene* ignores the fact that *Boumediene* emphasized the unique characteristics of Guantánamo Bay, effectively limiting the extension of this doctrine to other detention facilities.⁵⁶

To be true to *Boumediene*, we also must consider the impracticalities created by courts ignoring the global dynamic of the insurgency. As has been well-documented, Guantánamo Bay is closed to new detainees.⁵⁷ But the war against this global insurgency did not end when President Obama took office; rather, in some respects it intensified.⁵⁸ A real need therefore exists to house newly-captured detainees. If courts involved in future litigation find reason to believe that the Executive has intentionally transferred insurgents to active war zones to avoid the reach of the constitution and consequently grants habeas corpus protection to the insurgents, then the United States faces at least two options, each of which creates significant impracticalities. One option is to find a location within the country of capture to detain insurgents, likely leading to the transfer of the insurgent to the custody of that country's government. Such a step may increase the likelihood that the insurgent will be tortured⁵⁹ or may make it easier for the insurgent to escape from custody.⁶⁰ A second option involves confining insurgents in secretly-run U.S. detention centers in various locations around the world.⁶¹ However, this

56. See *Boumediene v. Bush*, 553 U.S. 723, 763–65 (2008) (discussing how Guantánamo Bay is considerably different than post-World War II Landsberg Prison in Germany).

57. Ernesto Hernández-López, *Boumediene v. Bush and Guantánamo, Cuba: Does the "Empire Strike Back"?*, 62 SMUL. REV. 117, 124 (2009).

58. See, e.g., Greg Miller & Julian E. Barnes, *Drone Plan Opens New War Front*, L.A. TIMES, Dec. 14, 2009, at A1 (discussing the expansion of the CIA Predator drone strikes in Pakistan).

59. See, e.g., *Mohamed v. Jeppesen Dataplan, Inc.*, 563 F.3d 992, 997–98 (9th Cir. 2009) (describing how the plaintiffs were either captured by the United States and then transferred to the custody of other governments and allegedly tortured, or captured by countries other than the United States and allegedly tortured before being transferred to U.S. custody), *rev'd on reh'g en banc*, 614 F.3d 1070 (9th Cir. 2010); Jane Mayer, *Outsourcing Torture*, THE NEW YORKER, Feb. 14 & 21, 2005, at 106, 108–09, 115, 123 (discussing how the United States captured combatants and allegedly transferred them to countries where they were tortured, including Uzbekistan, Bosnia, Egypt, and Syria).

60. See, e.g., *Main Suspects in USS Cole Bombing Escape from Yemeni Prison*, FOXNEWS.COM (Apr. 11, 2003), <http://www.foxnews.com/story/0,2933,83890,00.html> (stating that ten of the major suspects in the USS Cole bombing escaped from a Yemeni prison on April 11, 2003, including the primary suspect).

61. See Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, WASH. POST, Nov. 2, 2005, at A1 (reporting that the CIA ran secret detention centers throughout the world in the aftermath of September 11th). With the coming of the Obama administration, it was generally assumed that secret CIA detention centers would be closed, which, according to most accounts, is the case. Joshua Partlow & Julie Tate, *2 Afghans Allege Abuse at U.S.*

could lead to less support from U.S. allies⁶² and increase insurgent recruitment,⁶³ thus negatively affecting the war effort.⁶⁴ Each option presents choices with consequences that proponents of granting habeas protection to detainees would generally consider abhorrent.

B. *Dis-incentivizing Judicial Intervention*

This analysis does not support the proposition that Bagram detainees, or any other detainees captured and detained by U.S. forces overseas, should be detained indefinitely without adequate procedural protection. The *Boumediene* Court concluded that the process received by Guantánamo detainees was an inadequate habeas substitute,⁶⁵ and the D.C. Circuit correctly concluded that the process afforded Bagram detainees was less than that of the Guantánamo detainees, but the D.C. Circuit did not define “adequate process.”⁶⁶ Reports indicate that Bagram detainees have faced harsh treatment and poor living conditions that are “in many ways rougher and . . . bleak[er] than its counterpart in Cuba.”⁶⁷ Yet, in late 2009, Bagram detainees moved into a new facility that will eventually be operated and controlled by the Afghan government.⁶⁸

Along with this new facility, the United States recently implemented enhanced procedural protections for the Bagram detainees, including the creation of detainee review boards that allow detainees to contest their detention within sixty days of imprisonment and every six months

Site, WASH. POST, Nov. 28, 2009, at A1. However, recent reports indicate that U.S. Special Forces are running such a facility in Afghanistan, away from Bagram Air Base, where recent reports of detainee abuse surfaced. *Id.*

62. TASK FORCE ON U.S. STANDING IN WORLD AFFAIRS, AMERICAN POLITICAL SCIENCE ASSOCIATION, U.S. STANDING IN THE WORLD: CAUSES, CONSEQUENCES, AND THE FUTURE, 10 (2009), available at <https://apsanet.org/media/PDFs/APSAUSStandingShortFinal.pdf>.

63. See, e.g., President Barack Obama, Remarks by the President on National Security (May 21, 2009), available at <http://www.gpoaccess.gov/presdocs/2009/DCPD-200900388.pdf> (arguing that both Guantánamo Bay and allegations of torture have helped al Qaeda’s recruiting efforts).

64. See, e.g., *id.* (stating that Guantánamo Bay and allegations of torture have undermined the war on terrorism).

65. See *Boumediene v. Bush*, 553 U.S. 723, 767, 790–92 (2008) (discussing the deficient procedural protections available to Guantánamo detainees, ultimately holding that these were an inadequate habeas substitute).

66. *Al Maqaleh v. Gates*, 605 F.3d 84, 96 (D.C. Cir. 2010).

67. See Tim Golden & Eric Schmitt, *A Growing Afghan Prison Rivals Bleak Guantánamo*, N.Y. TIMES, Feb. 26, 2006, at A1 (“Men are held by the dozen in large wire cages, the detainees and military sources said, sleeping on the floor on foam mats and, until about a year ago, often using plastic buckets for latrines. Before recent renovations, they rarely saw daylight except for brief visits to a small exercise yard.”).

68. See Kim Gamel, *Afghans Agree on Handover Plan for U.S. – Run Prison*, AP, Jan. 9, 2010 (noting that the Afghan government said that it would immediately commence training exercises for approximately 800 Afghan soldiers to prepare them for running the detention facility).

thereafter.⁶⁹ These review boards seek to determine whether the detainees provided “substantial support” to the Taliban, al Qaeda, or related forces engaging in hostilities against coalition forces, representing a change from the previous standard of “support.”⁷⁰ The review board itself consists of three U.S. officers advised by a military attorney.⁷¹ Bagram detainees are individually assigned a “personal representative” to “advocate on [their] behalf,” explain to the detainees the review process in place,⁷² and gather evidence,⁷³ but these representatives are not lawyers.⁷⁴ Detainees are notified of the review board’s decision in writing within one week, and will be released “as soon as practicable” if they do not meet the criteria.⁷⁵

While these changes are significant, the next step should be improving the status determination process so as to remove the primary rationale for judicial interference in Executive detention decisions; namely, the indefinite detention of alleged combatants without sufficient process. In commenting on the Combatant Status Review Tribunal (CSRT) process at Guantánamo Bay, the Court cited the constraints placed upon detainees to contest the factual basis of their detention, noting that detainees have “limited means to find or present evidence to challenge the Government’s case against [them, do] not have the assistance of counsel[,] and may not be aware of the critical allegations that the Government relied upon to order [their] detention.”⁷⁶

An enhanced process should give the detainees the right to challenge their detention while also affording the U.S. government the ability to use

69. Gerry J. Gilmore, *Bagram Detention Facility to Implement Case Review Panels*, U.S. DEP’T OF DEFENSE (Sept. 14, 2009), <http://www.defense.gov/news/newsarticle.aspx?id=55831> (last visited Mar. 26, 2010).

70. SAHR MUHAMMEDALLY, HUMAN RIGHTS FIRST, *FIXING BAGRAM: STRENGTHENING DETENTION REFORMS TO ALIGN WITH U.S. STRATEGIC PRIORITIES 4* (2009), available at www.humanrightsfirst.info/pdf/Fixing-Bagram-110409.pdf.

71. See Rubin *supra* note 14 (contrasting the review board’s new duties with those of the past, which involved reviewing a detainee’s case only once, followed by renewal detention orders based purely on a “paper record”).

72. Alissa J. Rubin, *U.S. Readies New Facility For Afghan Detainees*, N.Y. TIMES, Nov. 16, 2009, at A8.

73. MUHAMMEDALLY, *supra* note 70, at 5.

74. See Rubin, *supra* note 14 (noting that human rights advocates claim that these new procedures will leave detainees with “little more recourse” than they have already).

75. MUHAMMEDALLY, *supra* note 14, at 6; see Rubin, *supra* note 71 (reporting that release rates rose “drastically” in Iraq after similar procedures were put in place); Ron Synovitz, *New U.S. Plan Reportedly to Let Afghan Prisoners Challenge Incarceration*, RADIO FREE EUROPE/RADIO LIBERTY (Sept. 14, 2009), http://www.rferl.org/content/New_US_Plan_Reportedly_To_Let_Afghan_Prisoners_Challenge_Incarceration/1822216.html (concluding that this process resembles the process used in Iraq, where officials determine which detainees pose the most significant threat and which can be rehabilitated and released back into society).

76. *Boumediene v. Bush*, 553 U.S. 723, 783–84 (2008).

evidence in a manner that would not compromise national security. This could be done by creating procedures that allow the government to use classified evidence much in the same way that the Classified Information Procedures Act (CIPA) enables the government to use classified evidence in civilian courts.⁷⁷ This would also give detainees the right to review the evidence used to justify their detention, provided that this evidence is presented in a manner that would not compromise national security.⁷⁸ Classified information and sources could also be protected by placing a rebuttable presumption in favor of the government's evidence,⁷⁹ as well as admitting hearsay evidence as the most reliable evidence when necessary.⁸⁰

As for procedural protections, each detainee should be entitled to an attorney, possibly a military lawyer (as opposed to personal representatives), who can present exculpatory witnesses and evidence.⁸¹ Also, the review panels should be replaced with a neutral magistrate, such as a military judge, who would have the authority to release detainees if the evidence favors such a decision.⁸² These attorneys, however, should not

77. Classified Information Procedures Act, 18 U.S.C. app. 3 §§ 1–16 (2006).

78. *See, e.g., id.* (providing procedures for the use of classified evidence in civilian trials); *United States v. Lee*, 90 F. Supp. 2d 1324, 1325 (D.N.M. 2000) (explaining that CIPA “provides for pretrial procedures to resolve questions of admissibility of classified information in advance of its use in open court”). CIPA defines classified information as “‘information and material’ subject to classification or otherwise requiring protection from public disclosure,” meaning that “CIPA applies to classified testimony as well as to classified documents.” *See Lee*, 90 F. Supp. 2d at 1325 n.1 (citing 18 U.S.C. app. 3 § 1 (2006)); Sarah Lorr, Comment, *Reconciling Classified Evidence and a Petitioner’s Right to a “Meaningful Review” at Guantánamo Bay: A Legislative Solution*, 77 *FORDHAM L. REV.* 2669, 2673 (2009) (arguing that a “CIPA-like statute” should be passed by Congress to deal with classified evidence issues in Guantánamo habeas proceedings so that detainees can have a meaningful review of their detention).

79. *See, e.g., Hamdi v. Rumsfeld*, 542 U.S. 507, 533–34 (2004) (holding that a U.S. citizen deemed an enemy-combatant is entitled to due process protections, but noting that “the exigencies of the circumstances may demand that . . . enemy-combatant proceedings . . . be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict” by placing a “presumption in favor of the government’s evidence, so long as that presumption remained a rebuttable one and fair opportunity for rebuttal were provided”).

80. *See, e.g., id.* (stating that hearsay evidence could be admissible in enemy combatant proceedings for a U.S. citizen as a further means to deal with national security concerns); BENJAMIN WITTES, ROBERT CHESNEY & RABEA BENHALIM, *GOVERNANCE STUDIES AT BROOKINGS, THE EMERGING LAW OF DETENTION: THE GUANTÁNAMO HABEAS CASES AS LAWMAKING* 35 (2010), available at http://www.brookings.edu/papers/2010/0122_guantanamo_wittes_chesney.aspx (discussing the different forms of hearsay evidence used in habeas hearings for Guantánamo detainees, including intelligence reports summarizing information from a variety of sources, records produced from interrogating detainees, and summaries of statements made by detainees during CSRT hearings).

81. *See, e.g., Rubin, supra* note 14 (reporting that the U.S. government released the names of the detainees held at Bagram, but noting that human rights advocates believed that while this was an important step, it did not go far enough because “[l]awyers need more than detainees’ names to find their families and see if they want legal representation”).

82. *See, e.g., Hamdi*, 542 U.S. at 509 (concluding that a U.S. citizen held in the United

have access to the detainees until the United States has had reasonable time to interrogate them for useful information that could prevent future attacks against U.S. forces and civilians. Yet, the grounds for continued detention should be independent of any information gathered during interrogation. Finally, because the magistrate's factual findings and status determination will not be free from error even with these procedures in place, there should also be a periodical review process conducted by a military judge who can hear new evidence that may exonerate a detainee and order release when circumstances permit such an outcome.⁸³

Implementing these procedural protections would enhance national security by promoting the rule of law in Afghanistan while ensuring that dangerous detainees remain imprisoned.

CONCLUSION

While the D.C. Circuit took an important step in not extending habeas corpus protection to Bagram detainees, they left unanswered two crucial questions. Because the court did not acknowledge how the global nature of the insurgency affects the habeas analysis, future litigation may turn on whether there is evidence that the Executive transferred combatants to an active war zone to avoid the reach of the Constitution. Moreover, even though the court did not comment on the appropriate procedural protections due to detainees, the Executive should still be mindful that further judicial intervention could undermine war efforts.

States as an enemy combatant must "be given a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker"); Rubin, *supra* note 14 (stating that the new review procedures will lead to a quicker release of erroneously held detainees at Bagram).

83. *Boumediene v. Bush*, 553 U.S. 723, 786 (2008).