WARTIME DETENTION AND THE EXTRATERRITORIAL HABEAS CORPUS DOCTRINE: REFINING THE *BOUMEDIENE* FRAMEWORK IN LIGHT OF ITS GOALS AND ITS FAILURES

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In Boumediene v. Bush*, the Supreme Court held that the right to the writ of habeas corpus extended to noncitizen detainees captured abroad and detained at the American naval base in Guantánamo Bay, Cuba. Although* Boumediene *extended habeas corpus to Guantánamo and formulated a practical extraterritorial habeas corpus framework, the decision may have been a limited victory for civil rights advocates, as it did not resolve the question of the writ's reach to any other American detention facilities located abroad, including the Bagram Theater Internment Facility in Afghanistan. In* Al Maqaleh v. Gates*, the D.C. District Court concluded that the petitioners detained at Bagram, like those at Guantánamo, had the right to petition for the writ of habeas corpus, but the D.C. Circuit reversed the lower court on appeal. The D.C. District and Circuit courts came to different conclusions because they took drastically different approaches to the* Boumediene *framework. This Note argues that the district court came to the right conclusion because its analysis was more faithful to* Boumediene*, it was more conscious of* Boumediene*'s separation-of-powers concerns, and, like the Supreme Court, it was appropriately receptive to the possibility that the Executive was attempting to "switch off" the Constitution by strategically detaining suspected enemy combatants in a location unlikely to receive judicial review. Furthermore, the fact that the district and circuit courts were unable to apply the framework consistently suggests that the* Boumediene *analysis may require refinement or clarification. This paper attempts to provide that.*

 J.D., 2013, New York University School of Law. I am deeply grateful to Professor Stephen J. Schulhofer for his guidance and direction. I would also like to thank the N.Y.U. Law Review staff, particularly Julie Mecca, Audrey Feldman, David Leapheart, and Stefanie Neale, without whom this Note would not have been possible. And of course, I would like to thank my wife Lara Irias, without whom I would not be possible.

Introduction

In response to the terrorist attacks of September 11, 2001, the United States initiated the War on Terror: an international military campaign against suspected terrorists and enemy combatants. During those ongoing operations, the United States has captured thousands of suspected enemy combatants both at home and abroad and transported them to detention centers around the world.[1] Many detainees have petitioned for the writ of habeas corpus in U.S. federal courts,[2] seeking to contest their enemy combatant status and the legality of their detention.[3]

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[1] Although the precise number of such detainees is unknown, according to the New York Times the United States has detained a total of 779 persons at the American naval base in Guantánamo Bay, Cuba alone. Andrei Scheinkman et al., *The Guantánamo Docket: The Detainees*, N.Y. Times, http://projects.nytimes.com/guantanamo/detainees (last visited Aug. 8, 2013). Estimates of the total number of detainees at the Bagram detention facility in Afghanistan range from 1700 to 3000. *See* Human Rights First, Detained and Denied in Afghanistan: How to Make U.S. Detention Comply with the Law (2011), *available at* http://www.humanrightsfirst.org/wp-content/uploads/pdf/Detained-Denied-in-Afghanistan.pdf (estimating that 1700 detainees were being held in Bagram as of June 2011); Agence France-Presse, *US to Transfer Last Afghan Prisoners from Bagram Jail*, Global Post (Mar. 6, 2013, 10:00 AM), http://www.globalpost.com/dispatch/news/afp/130306/us-transfer-last-afghan-prisoners-bagram-jail (estimating that more than 3000 detainees are being held in Bagram as of March 2013).

[2] *See* Marc D. Falkoff & Robert Knowles, *Bagram,* Boumediene*, and Limited Government*, 59 DePaul L. Rev. 851, 861 (2010) (discussing the number of habeas corpus hearings for Guantánamo detainees decided on the merits since *Boumediene*).

[3] The writ of habeas corpus requires a custodian, such as a prison official, to produce before a court the prisoner petitioning for the writ and proof of detention authority, so that

In 2008, the Supreme Court in *Boumediene v. Bush*[4] asked whether the Constitution's suspension clause, and accordingly the constitutional right to the writ of habeas corpus, extended to non-citizen detainees captured abroad and detained at the American naval base in Guantánamo Bay, Cuba.[5] Though Supreme Court precedent suggested that the writ would not extend to detainees in Guantánamo, and that U.S. courts therefore would not have jurisdiction to hear such petitions,[6] the Court upheld the detainees' right to the writ.[7] In doing so, the Supreme Court revisited and refined the extraterritorial habeas corpus doctrine it had developed in its World War II–era decision *Johnson v. Eisentrager*.[8] The Court rejected a formalistic, territorial sovereignty–based interpretation of *Eisentrager* in favor of a functional, multifactor approach that accounted for important differences between traditional war and the War on Terror.

The *Boumediene* Court's decision to extend habeas corpus to Guantánamo was animated by separation-of-powers concerns. As Stephen Vladeck notes, *Boumediene*, which invoked the separation of powers more than ten times, saw habeas corpus as "a structural mechanism protecting individual liberty *by* preserving the ability of

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the court can inquire into the legality of the imprisonment. If the court concludes that the imprisonment is unlawful, it can grant appropriate relief, which may include discharge from imprisonment. If the court concludes that the imprisonment is in fact lawful, then the requested relief is denied. In either case, the writ has been granted. Ronald P. Sokol, *Federal Habeas Corpus Practice*, 20 AM. JUR. TRIALS 1, 10 (1973).

4 553 U.S. 723 (2008).

5 The suspension clause provides that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. CONST. art. I, § 9, cl. 2. By implying that the writ of habeas corpus is available in the absence of a valid suspension, which requires the existence of at least one of the two listed circumstances, the clause provides a strong limit to the executive branch's detention power. Amanda L. Tyler, *The Forgotten Core Meaning of the Suspension Clause*, 125 HARV. L. REV. 901, 903–04 (2012). In 2006, Congress denied federal courts jurisdiction to hear habeas petitions by aliens suspected of being enemy combatants. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified at 10 U.S.C. §§ 948–950, 18 U.S.C. § 2441, 28 U.S.C. § 2241, 42 U.S.C. § 2000). The issue in *Boumediene*, therefore, was whether the suspension clause reached Guantánamo, in which case Congress's denial of habeas jurisdiction would be an unconstitutional suspension of the writ. 553 U.S. at 732–33.

6 *See* Johnson v. Eisentrager, 339 U.S. 763, 777, 781 (1950) (holding that the writ of habeas corpus did not extend to the petitioners, who were enemy aliens captured and detained abroad); *infra* Part I.A (discussing the holding in *Eisentrager*). Prior to *Boumediene*, *Eisentrager* was the Court's only decision on the extraterritorial reach of habeas corpus.

7 *Boumediene*, 553 U.S. at 798.

8 *Eisentrager*, 339 U.S. 763.

the courts to check the political branches."[9] *Boumediene*'s conclusion stresses:

> Security subsists . . . in fidelity to freedom's first principles. Chief among these are freedom from arbitrary and unlawful restraint and the personal liberty that is secured by adherence to the separation of powers. It is from these principles that the judicial authority to consider petitions for habeas corpus relief derives. . . . Within the Constitution's separation-of-powers structure, few exercises of judicial power are as legitimate or as necessary as the responsibility to hear challenges to the authority of the Executive to imprison a person.[10]

Although *Boumediene* extended habeas corpus to the Guantánamo Bay detention camp and formulated a practical extraterritorial habeas corpus framework, the decision was a limited victory for civil rights advocates. The Court failed to resolve whether the writ reached to other American detention facilities located abroad—including the Bagram Theater Internment Facility in Afghanistan,[11] which when *Boumediene* was decided held a prison population twice the size of Guantánamo's.[12] Rather, the Supreme Court left it to lower federal courts to resolve whether habeas corpus should extend to Bagram detainees, an issue of particular importance in light of the facility's size and its reputation as a legal "black hole."[13] In *Al Maqaleh v. Gates*,[14] the D.C. District Court concluded that the petitioners detained at Bagram, like those at Guantánamo, had the right to petition for the writ of habeas corpus.[15] But the D.C. Circuit reversed the lower court on appeal, denying the Bagram petitioners of the right to challenge their detention before a civilian court.[16] This

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[9] Stephen I. Vladeck, Boumediene*'s Quiet Theory: Access to Courts and the Separation of Powers*, 84 NOTRE DAME L. REV. 2107, 2110 (2009).

[10] *Boumediene*, 553 U.S. at 797.

[11] Bagram is now known as the Parwan Detention Facility. *See* Rob Nordland, *Issues Linger as Afghans Take Control of a Prison*, N.Y. TIMES, Sept. 11, 2012, at A5 (describing the shift in control from Americans to Afghans that prompted the name change). Because *Al Maqaleh v. Gates* was decided by the D.C. District and Circuit Courts before the name change, all references in the courts' opinions are to Bagram. For the sake of consistency and clarity, this Note will continue to refer to the facility as Bagram.

[12] *See* Tim Golden, *Defying U.S. Plan, Prison Expands in Afghanistan*, N.Y. TIMES, Jan. 7, 2008, at A1 ("The American detention center, established at the Bagram military base as a temporary screening site after the invasion of Afghanistan in 2001, is now teeming with some 630 prisoners—more than twice the 275 being held at Guantánamo.").

[13] *See* Daphne Eviatar, *Bagram's Black Hole: Guantánamo Bay Was Bad Enough—Bagram Is Worse*, AM. LAW., Nov. 13, 2008, at 78 (detailing Bagram detainees' limited procedural protections).

[14] 604 F. Supp. 2d 205 (D.D.C. 2009), *rev'd*, 605 F.3d 84 (D.C. Cir. 2010).

[15] *Id.* at 235.

[16] In September 2012, the district court granted the Bagram petitioners another opportunity to present new evidence in their support, but the trial court, now following the

Note argues that the district court in *Al Maqaleh* was more faithful to the spirit of *Boumediene*, more conscious of *Boumediene*'s separation-of-powers concerns, and, like the Supreme Court's analysis, was appropriately receptive to the possibility that the Executive was attempting to "switch off" the Constitution by strategically detaining suspected enemy combatants in a location unlikely to receive judicial review.[17] The circuit court's analysis, by contrast, reverted to *Eisentrager*'s formalistic, rather than *Boumediene*'s functional, approach.

The disparate outcomes in the district and circuit courts were the result of the courts' drastically different applications of *Boumediene*'s three-factor test. The *Boumediene* test has thus proven too vague to meaningfully check the Executive's wartime detention power.[18] This Note seeks to clarify the *Boumediene* framework in order to provide lower courts with sufficient guidance.

The *Boumediene* Court expressly delegated to lower courts the power to create the procedural, evidentiary, and substantive rules for habeas cases.[19] Yet the D.C. Circuit has misused this power with "both the intent and the effect of vitiating the Supreme Court's 2008 decision."[20] Admittedly, refining the *Boumediene* framework in order to

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appellate court's mode of analysis, granted the government's motion to dismiss. Al Maqaleh v. Gates (*Al Maqaleh III*), 899 F. Supp. 2d 10, 12–13 (D.D.C. 2012); *see also infra* note 106 (discussing the petitioners' new evidence and the court's ultimate dismissal).

[17] *See Boumediene*, 553 U.S. at 765 (noting that Congress and the President do not have "the power to . . . decide when and where [the Constitution's] terms apply," and holding that allowing "the political branches [to] switch the Constitution on or off at will [would] lead[ ] to a regime in which [they], not this Court, say 'what the law is'" (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803))).

[18] Furthermore, by delegating to the lower courts the power to fashion substantive laws, procedural rules, and evidentiary rules that govern habeas claims, the Court has further contributed to the lack of effective constraints on the Executive's detention power. *See infra* notes 19–20 and accompanying text.

[19] *Boumediene*, 553 U.S. at 798. For a thorough discussion of the substantive law and procedural and evidentiary rules to be applied in habeas cases, see generally HUMAN RIGHTS FIRST, HABEAS WORKS: FEDERAL COURTS' PROVEN CAPACITY TO HANDLE GUANTÁNAMO HABEAS CASES (2010), *available at* http://www.constitutionproject.org/wp-content/uploads/2012/10/414.pdf; BENJAMIN WITTES, ROBERT CHESNEY & RABEA BENHALIM, THE EMERGING LAW OF DETENTION: THE GUANTÁNAMO CASES AS LAWMAKING (2010), *available at* http://www.brookings.edu/~/media/research/files/papers/2010/1/22%20guantanamo%20wittes%20chesney/0122_guantanamo_wittes_chesney.pdf; Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 HARV. L. REV. 2029 (2007).

[20] Stephen I. Vladeck, *The D.C. Circuit After* Boumediene, 41 SETON HALL L. REV. 1451, 1453 (2011). For a similar view, see Editorial, *The Court Retreats on Habeas*, N.Y. TIMES, June 14, 2012, at A34, discussing Judge Tatel's dissent in *Latif v. Obama*, where he observed "that 'it is hard to see what is left of the Supreme Court's command' if the appeals court is allowed to repudiate Boumediene and 'calls the game in the government's favor,'" and noted that "[t]he same can be said about that court's handling of almost all

ensure that the writ is not wrongly suspended abroad may prove a limited success in curbing executive detention powers, insofar as the lower federal courts may still consistently decide the cases on the merits in favor of the Executive. But a bad shot is better than no shot at all.[21]

The time is ripe to revisit the *Boumediene* doctrine in order to provide for a more effective check on executive detention powers. Although there is no end in sight to the War on Terror, the United States has ended or significantly decreased operations in the two primary theaters of combat.[22] The United States formally ended the Iraq War in December 2011[23] and has begun to wind down operations in Afghanistan, with the hopes of ending the U.S. war in Afghanistan in 2014.[24] The end of military operations in these two regions is relevant

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other Guantánamo cases. In the 19 appeals it has decided, the court has never allowed a prisoner to prevail." (quoting Latif v. Obama, 666 F.3d 746, 779, 765 (D.C. Cir. 2011) (Tatel, J., dissenting)).

[21] As the *Boumediene* Court noted, the petitioners' "access to the writ is a necessity to determine the lawfulness of their status, even if, in the end, they do not obtain the relief they seek." *Boumediene*, 553 U.S. at 797.

[22] *See* Arthur H. Garrison, *The Judiciary in Times of National Security Crisis and Terrorism: Ubi Inter Arma Enim Silent Leges, Quis Custodiet Ipsos Custodes?*, 30 AM. J. TRIAL ADVOC. 165, 167–68 (2006) ("If the decision is made after hostilities have ceased, it is more likely to favor civil liberty than if made while hostilities continue." (quoting WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME 224 (1998)). Furthermore, under the *Boumediene* framework, the winding down of a major theater of operation may have a strong impact on a court's decision to find habeas jurisdiction. *See infra* Part I.B and Part III.C (discussing the impact of a war zone location on the practicability of extending habeas). As actions in the two major theaters of war conclude, the Court could become less deferential toward the Executive in detention cases. However, the lack of a foreseeable end to the War on Terror elsewhere may reduce such a possibility. *See* Greg Miller, *U.S. Set to Keep Kill List for Years*, WASH. POST, Oct. 24, 2012, at A1 (noting that some senior Obama administration officials see no end in sight to the War on Terror). Certainly, the Court has yet to indicate a willingness to revisit its extraterritorial habeas doctrine, despite the government's perfect record with respect to Guantánamo habeas cases in front of the D.C. Circuit Court. Editorial, *supra* note 20. It has denied certiorari to every habeas case since *Boumediene*. *Id.* The exception is *Kiyemba v. Obama*, 555 F.3d 1022 (D.C. Cir. 2009), in which the Court issued a three-paragraph per curiam opinion remanding the case to the D.C. Circuit. Kiyemba v. Obama, 559 U.S. 131 (2010) (per curiam). As a New York Times editorial put it: "In refusing to correct the appeals court's misguided rulings, the justices fail to support important principles proclaimed in *Boumediene* and diminish their own authority." Editorial, *supra* note 20.

[23] Tim Arango, *U.S. Marks End to a Long War for an Uncertain Iraq*, N.Y. TIMES, Dec. 16, 2011, at A1.

[24] Elisabeth Bumiller, *U.S. to End Combat Role in Afghanistan as Early as Next Year, Panetta Says*, N.Y. TIMES, Feb. 2, 2012, at A8; President Barack H. Obama, *Weekly Address: Ending the War in Afghanistan and Rebuilding America*, THE WHITE HOUSE (Jan. 12, 2013), http://www.whitehouse.gov/photos-and-video/video/2013/01/11/weekly-address-ending-war-afghanistan-and-rebuilding-america#transcript. Even with the drawdown of U.S. troops in Afghanistan, *Al Maqaleh* remains relevant because the United States maintains custody of detainees at Bagram. Although the United States recently has reiterated

because the Court traditionally has been less deferential to the Executive and more likely to decide cases in favor of civil liberties after the cessation of military hostilities.[25]

Twelve years after the 9/11 attacks, American troops are returning home. At the same time, many suspected enemy combatants remain in detention centers without any hope of release or access to unbiased civilian tribunals. These circumstances—the end of combat operations and the stagnant detainee population—provide an opportunity and an incentive to rethink the remaining detainees' rights. Otherwise, and despite the Supreme Court's efforts in *Boumediene*, Justice Black's admonition in *Eisentrager* that "[t]he Court is fashioning wholly indefensible doctrine if it permits the executive branch, by deciding where its prisoners will be tried and imprisoned, to deprive all federal courts of their power to protect against a federal executive's illegal incarcerations" will continue to ring true today.[26]

Part I of this note examines the Supreme Court's extraterritorial habeas corpus doctrine, from *Eisentrager* to *Boumediene*. It aims to show that the *Boumediene* Court intended to account for the complexities of the War on Terror while still providing a meaningful check on executive detention powers. Part II compares the D.C. District and Circuit courts' applications of the *Boumediene* framework in order to illustrate the framework's failures to provide clear guidance or to check executive abuse. Part III clarifies some of the existing factors in the *Boumediene* framework and proposes adding two new factors, thereby helping to fulfill *Boumediene*'s goals of establishing a flexible framework that acknowledges the War on Terror's realities, while also limiting the Executive's detention power. The proposed guidance will also result in clearer and more consistent results among the lower courts.

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plans to withdraw from Afghanistan, its planned transfer of the Bagram facility to Afghanistan has seen several setbacks and delays. *See* Rod Nordland & Charlie Savage, *U.S. Again Delays Transfer of Bagram Prison to Afghan Forces*, N.Y. TIMES, Mar. 10, 2013, at A10, *available at* http://www.nytimes.com/2013/03/09/world/asia/us-cancels-transfer-of-bagram-prison-to-afghans.html (describing setbacks and delays); Mark Mazzetti, *U.S. and Afghans Reach Deal on Bagram Prison Transfer*, N.Y. TIMES, Mar. 24, 2013, at A8, *available at* http://www.nytimes.com/2013/03/24/world/asia/us-and-afghanistan-reach-deal-on-bagram-prison.html (describing deal for prison transfer reached after months of delays).

[25] *See, e.g.*, Garrison, *supra* note 22 (discussing the increased likelihood of courts favoring civil liberties in times of peace than in times of war).

[26] Johnson v. Eisentrager, 339 U.S. 763, 795 (1950) (Black, J., dissenting).

I
THE SUPREME COURT'S EXTRATERRITORIAL HABEAS CORPUS DOCTRINE, FROM *EISENTRAGER* TO *BOUMEDIENE*

A. Johnson v. Eisentrager *Develops a Clear Rule for a Clear War*

The Supreme Court first considered the extraterritorial reach of habeas corpus in *Johnson v. Eisentrager*,[27] a case decided shortly after the end of the Second World War. In *Eisentrager*, American forces had captured twenty-one Germans who were suspected of violating the laws of war by continuing military activities against the United States after Germany's surrender.[28] The Germans were captured, tried and convicted by an American military commission in China, and then transported to Landsberg Prison in Germany.[29] The detainees filed petitions for habeas corpus, arguing that although they were not American citizens and never had entered American sovereign territory, they nonetheless had a right to contest the legality of their detention in a civilian court.[30]

The Court ultimately rejected the Germans' petitions for habeas corpus and seemingly refused to extend the writ to aliens captured and detained outside of U.S. sovereign territory. The Court explained:

> We are cited to no instance where a court, in this or any other country where the writ is known, has issued it on behalf of an alien enemy who, at no relevant time and in no stage of his captivity, has been within its territorial jurisdiction. Nothing in the text of the Constitution extends such a right, nor does anything in our statutes.[31]

Although the majority also highlighted the practical considerations that weighed against extending the writ to the German prisoners specifically,[32] it was the Court's emphasis on the location of capture and detention that suggested a bright-line, territorial sovereignty–based limit to the reach of habeas corpus that categorically

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[27] 339 U.S. 763 (1950).

[28] *Id.* at 765–66. The German prisoners were suspected of collecting and providing intelligence regarding U.S. forces to the Japanese. *Id.* at 766.

[29] *Id.* at 766.

[30] *Id.* at 767–68. The prisoners relied primarily on two prior Supreme Court decisions: *Ex Parte Quirin*, 317 U.S. 1 (1942), and *In re Yamashita*, 327 U.S. 1 (1946). As the Court noted, however, their reliance was misplaced, as the *Quirin* and *Yamashita* petitioners were tried and detained in U.S. sovereign territory. *Eisentrager*, 339 U.S. at 779–80.

[31] *Eisentrager*, 339 U.S. at 768.

[32] *Id.* at 778–79. These considerations included the logistical obstacles to transporting the prisoners and witnesses to American soil for trial, the need to call military commanders to court to defend the challenged detentions, the resulting drain on the commanders' time and prestige, and the resulting comfort for American enemies due to the conflict between American judicial and military opinions. *Id.*

denied the writ to enemy aliens captured and detained abroad.[33] The Court emphasized that the German prisoners were (a) enemy aliens; (b) had never stepped foot in the United States; (c) were captured and detained outside U.S. sovereign territory; (d) were tried and convicted by a military commission sitting outside the United States; (e) for offenses committed outside the United States; and (f) were at all times imprisoned outside the United States.[34] Until the later *Boumediene* decision, many, including the Bush Administration, considered *Eisentrager* to stand for the proposition that the writ of habeas corpus had no extraterritorial reach.[35] This rigid application of the Suspension Clause reflects the straightforward nature of World War II, a conflict characterized by traditional interstate conflict with easily identifiable enemies. When *Eisentrager* was decided, there was little risk of wrongfully detaining enemy combatants. The same is not true of the War on Terror. I discuss below how this distinction was reflected in *Boumediene*'s nuanced application of the Suspension Clause.

B. Boumediene v. Bush *Revisits and Refines the Extraterritorial Habeas Corpus Doctrine in Light of the Complexities Inherent in the War on Terror*

Eisentrager's seemingly formalistic approach to determining whether to extend constitutional habeas corpus abroad was the controlling habeas corpus precedent when the United States began military operations in Iraq and Afghanistan.[36] These operations, and the War on Terror generally, changed the nature of international armed conflict,[37] as the war reflected "the global front to fighting the enemy

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[33] *Id.* at 777.

[34] *Id.*

[35] *See* Douglass Cassel, *Liberty, Judicial Review, and the Rule of Law at Guantánamo: A Battle Half Won*, 43 NEW ENG. L. REV. 37, 48 (2008) ("It may also reflect the evidence, widely reported by 2008, that a belief that federal court jurisdiction did not extend to Guantánamo was at least one important reason why the Executive originally chose to detain post-9/11 prisoners there."); Tim J. Davis, *Extraterritorial Application of the Writ of Habeas Corpus After* Boumediene*: With Separation of Powers Comes Individual Rights*, 57 U. KAN. L. REV. 1199, 1223–24 (2009) ("After *Eisentrager*, the Executive attempted to take advantage of the bright-line rule regarding sovereignty by holding prisoners outside of U.S. sovereign territory to prevent the writ from extending to such prisoners.").

[36] Luke R. Nelson, Note, *Territorial Sovereignty and the Evolving* Boumediene *Factors:* Al Maqaleh v. Gates *and the Future of Detainee Habeas Corpus Rights*, 9 U.N.H. L. REV. 297, 302 (2011) (citing David Weissbrodt & Amy Bergquist, *Methods of the "War on Terror*,*"* 16 MINN. J. INT'L L. 371, 374–84 (2007)).

[37] *Id.*; *see also* Michael Bahar, *As Necessity Creates the Rule:* Eisentrager*,* Boumediene*, and the Enemy—How Strategic Realities Can Constitutionally Require Greater Rights for Detainees in the Wars of the Twenty-First Century*, 11 U. PA. J. CONST. L. 277, 316–21 (2009) (describing those changes); Glen M. Sulmasy, *The Legal Landscape After* Hamdan*:*

and the lack [of] identifiable enemy nations."[38] Over the course of U.S. operations in Iraq, Afghanistan, and throughout the world, suspected enemy combatants were captured, transported to, and detained in military prisons located outside the United States, such as the detention facility in Guantánamo Bay, Cuba. Under *Eisentrager*, the writ of habeas corpus was thought not to reach these foreign enemy combatants, who were captured and detained abroad,[39] and the Bush Administration likely relied on this understanding of the writ's reach in its decision to detain suspected enemy combatants in Guantánamo.[40] In fact, President Bush was advised by Department of Justice attorneys that Guantánamo was beyond the reach of U.S. courts.[41]

In *Boumediene v. Bush*, however, the Supreme Court rejected the government's position and held that the constitutional right of habeas corpus extended to detainees captured abroad and detained at Guantánamo Bay.[42] Although the Court agreed that the United States lacks de jure sovereignty over Guantánamo,[43] it rejected the government's premise that "de jure sovereignty is the touchstone of habeas corpus jurisdiction."[44] The Court noted that although *Eisentrager* had

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The Creation of Homeland Security Courts, 13 NEW ENG. J. INT'L & COMP. L. 1, 5 (2006) (same).

38 Nelson, *supra* note 36, at 302; *see also* President George W. Bush, Address to a Joint Session of Congress and the American People, THE WHITE HOUSE (Sept. 20, 2001), *available at* http://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010920-8.html ("Our war on terror begins with al Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped, and defeated.").

39 *See supra* note 6 (restating the holding in *Eisentrager*); Boumediene v. Bush, 553 U.S. 723, 828 (2008) (Scalia, J., dissenting) ("[T]he President's Office of Legal Counsel advised [the President] that the great weight of legal authority indicates that a federal district court could not properly exercise habeas jurisdiction over an alien detained at [Guantánamo Bay]." (third alteration in original) (internal quotation marks omitted)).

40 *See* Justin D. D'Aloia, Note, *From Baghdad to Bagram: The Length & Strength of the Suspension Clause After* Boumediene, 33 FORDHAM INT'L L.J. 957, 985 (2010) ("The Bush administration sought a location to house detainees where it could exercise a high level of control with minimal oversight or restraint and turned to the base at Guantanamo Bay for its unique location and legal status.").

41 *See* Memorandum from Patrick F. Philbin, Deputy Assistant Att'y Gen., U.S. Dep't of Justice, & John C. Yoo, Deputy Assistant Att'y Gen., U.S. Dep't of Justice, to William J. Haynes, II, Gen. Counsel, U.S. Dep't of Defense, Possible Habeas Jurisdiction over Aliens Held in Guantánamo Bay Cuba 1 (Dec. 28, 2001), *available at* http://www.pegc.us/archive/DOJ/20011228_philbinmemo.pdf ("We conclude that the great weight of legal authority indicates that a federal district court could not properly exercise habeas jurisdiction over an alien detained at [Guantánamo Bay].").

42 553 U.S. at 732.

43 *See id.* at 753 ("[U]nder the terms of the lease between the United States and Cuba, Cuba retains 'ultimate sovereignty' over the territory while the United States exercises 'complete jurisdiction and control.'").

44 *Id.* at 755.

refused to extend habeas corpus to the detainees in Landsberg Prison, *Eisentrager* had not relied exclusively on a mechanical, territorial sovereignty determination.[45] Instead, the Court had assessed "the degree of control the military asserted over the facility."[46] Furthermore, practical obstacles and considerations related to extending the writ to the German prison had been integral to the Court's ultimate decision.[47] In fact, *Boumediene* noted the "common thread uniting" *Eisentrager* and other cases determining the Constitution's extraterritorial effect: "the idea that questions of extraterritoriality turn on objective factors and practical concerns, not formalism."[48] The Court also noted that the government's proposed formal, sovereignty-based analysis raised "troubling separation-of-powers concerns."[49] After all, allowing the government to evade judicial review in Guantánamo—where it has maintained "complete and uninterrupted control" for over a century—merely because it lacks formal sovereignty would be to grant it the power to determine when and where the Constitution applies.[50]

Based on these considerations and on the factors discussed in *Eisentrager*,[51] *Boumediene* articulated a functional, multifactor extraterritorial habeas corpus framework. The Court declared:

> [A]t least three factors are relevant in determining the reach of the Suspension Clause: (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.[52]

While *Eisentrager* considered only territorial sovereignty, *Boumediene*'s more flexible framework accounted for the complexities inherent in, and unique to, the War on Terror: the lack of easily identifiable enemies, the worldwide nature of the war and sites of apprehension and detention, the varied means of capturing suspected

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[45] *Id.* at 762–64.

[46] *Id.* at 763. Because the formal legal status of a territory affects the government's control over that territory, de jure sovereignty may still be one factor that determines the reach of extraterritorial constitutional rights. *Id.* at 764.

[47] *See id.* at 762 ("The Court stressed the difficulties of ordering the Government to produce the prisoners . . . . It 'would require allocation of shipping space, guarding personnel, billeting and rations' and would damage the prestige of military commanders at a sensitive time . . . . [T]he Court sought to balance the constraints of military occupation with constitutional necessities." (quoting *Eisentrager*, 339 U.S. 763, 779, 769–79)).

[48] *Id.* at 764.

[49] *Id.*

[50] *Id.* at 764, 765.

[51] *See supra* note 32 (discussing the factors *Eisentrager* considered).

[52] *Boumediene*, 553 U.S. at 766.

enemy combatants, and the indeterminate length of the war.[53] After all, it is much harder to determine if a person is an enemy combatant when they are nonuniformed and captured thousands of miles from any combat zone (as opposed to uniformed and captured near a delineated battlefield, as the *Eisentrager* prisoners had been). The circumstances surrounding the War on Terror had thus broadened the Executive's unchecked detention powers—the exact harm habeas corpus is intended to remedy. The prospects of indefinite detention that accompany a war with no discernible end point further elevated the risk of unlawful imprisonment.

Applying the first factor (related to citizenship, combat status, and process), the Court found that the petitioners, like those in *Eisentrager*, were noncitizens. However, the *Boumediene* petitioners, unlike those in *Eisentrager*, contested their enemy combatant status determination.[54] Furthermore, the Court found that the process which had determined the status of the *Boumediene* petitioners fell "well short of the procedures and adversarial mechanisms that would eliminate the need for habeas corpus review."[55] Unlike the *Eisentrager* petitioners, who were afforded a full military commission, the Guantánamo detainees' statuses had been determined by a Combatant Status Review Tribunal (CSRT).[56] The Court noted the following procedural deficiencies of those proceedings: The petitioners had not received lawyers or even advocates, but only "[p]ersonal [r]epresentative[s];" government evidence was presumed valid; and the detainees' ability to present evidence was limited by the circumstances of their confinement and their lack of counsel.[57]

Applying the second factor, the Court noted that the location of the petitioners' apprehension and detainment, "*technically* outside the sovereign territory of the United States," weighed against finding they had a right to habeas corpus, much as it had in *Eisentrager*.[58] However, the Court noted critical differences between Landsberg and Guantánamo. While the United States exercised limited control over

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[53] *See* Joshua A. Geltzer, *Decisions Detained: The Courts' Embrace of Complexity in Guantánamo-Related Litigation*, 29 BERKELEY J. INT'L L. 94, 112 (2011) (noting that the Court's holding in *Boumediene* reflects the complex nature of the War on Terror).

[54] *See Boumediene*, 553 U.S. at 766 ("Petitioners, like those in *Eisentrager*, are not American citizens. But the petitioners in *Eisentrager* did not contest, it seems, the Court's assertion that they were 'enemy alien[s].'" (alteration in original)).

[55] *Id.* at 767.

[56] *Id.* at 766–67.

[57] *Id.*

[58] *Id.* at 768 (emphasis added).

Landsberg and planned only a limited occupation period,[59] its control over Guantánamo was absolute and its presence indefinite.[60] The Court concluded that "[i]n every practical sense Guantánamo is not abroad; it is within the constant jurisdiction of the United States."[61]

Applying the third factor, the Court conceded that extending the writ to the Guantánamo detainees might create practical obstacles, require the expenditure of government resources, and inconvenience military personnel, but it did not find these concerns dispositive. The Court noted that the government presented "no credible arguments that the military mission at Guantánamo would be compromised if habeas corpus courts had jurisdiction to hear the detainees' claims," and that the threats that existed in post-war Germany were much greater than those present at Guantánamo.[62]

After weighing the three factors and considering the separation-of-powers concerns, alongside the fact that the detainees could be held for the duration of a conflict that was already among the longest wars in U.S. history, the Court held that the writ extended to the Guantánamo detainees. Importantly, the Court, likely anticipating future habeas litigation, remarked in dictum that arguments against extending the writ would have more weight if doing so would cause friction with the host government or if the detention facility were located in an active theater of war.[63] Although the Court grounded its decision on *Eisentrager*,[64] it seems clear that the Court intended *Boumediene* to be a more flexible framework that would take into account complex fact patterns inherent in War on Terror detention cases and provide more of a check on executive detention than had *Eisentrager*.

Despite the Court's lengthy opinion, however, it only dedicated a few short pages to formulating and applying its functional

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[59] *See* ARTHUR H. GARRISON, SUPREME COURT JURISPRUDENCE IN TIMES OF NATIONAL CRISIS, TERRORISM, AND WAR 404 (2011) (noting that the United States shared control over the prison with the combined Allied forces and had no plans for a long-term German occupation).

[60] *Boumediene*, 553 U.S. at 768.

[61] *Id.* at 769.

[62] *Id.* at 769–70. ("[T]he American forces stationed in Germany faced potential security threats from a defeated enemy. . . . Similar threats are not apparent here; nor does the Government argue that they are. At present . . . the only long-term residents are American military personnel, their families, and a small number of workers." (internal citations omitted)).

[63] *Id.*

[64] *See supra* notes 42–50 and accompanying text (discussing the *Boumediene* Court's new interpretation, as opposed to rejection, of *Eisentrager*).

framework.[65] The Court provided little guidance to lower courts applying the framework in later litigation, as it did not explain how to weigh the factors, identify which practical obstacles should matter, or explain how much control was necessary to a finding of *de facto* sovereignty. The lack of guidance would lead to conflicting applications of the *Boumediene* framework when D.C. federal courts later sought to determine whether to extend habeas corpus to the Bagram Theater Internment Facility in *Al Maqaleh v. Gates*. In the end, the circuit court overruled the district court's decision to extend the writ. The circuit court's application of the *Boumediene* framework and its ultimate holding denying habeas jurisdiction in *Al Maqaleh* (and every other Guantánamo habeas case to come before it)[66] evinces *Boumediene*'s failure to meaningfully check the Executive's detention power.

II
Boumediene's Failure: The Differing Approaches to the *Boumediene* Framework in *Al Maqaleh v. Gates*

A. Al Maqaleh *in the D.C. District Court*

In 2009, in *Al Maqaleh v. Gates*, the District Court for the District of Columbia applied the *Boumediene* framework to determine whether habeas corpus should extend to detainees held at a U.S. air base in Bagram, Afghanistan. The four petitioners had been captured outside of Afghanistan (in Pakistan, Thailand, and the United Arab Emirates) and then transported to Bagram for detention. To clarify the analysis, the court subdivided the three *Boumediene* factors into six:

> (1) the citizenship of the detainee; (2) the status of the detainee; (3) the adequacy of the process through which the status determination was made; (4) the nature of the site of apprehension; (5) the nature of the site of detention; and (6) the practical obstacles inherent in resolving the petitioner's entitlement to the writ.[67]

The court also assessed a seventh factor that had "tacitly informed *Boumediene*'s analysis: the length of a petitioner's detention

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[65] *See* James Thornburg, *Balancing Act in Black Robes: Extraterritorial Habeas Corpus Jurisdiction Beyond* Boumediene, 48 Duq. L. Rev. 85, 88–89 (2010) (noting that the *Boumediene* Court provided little guidance for applying its framework).

[66] *See supra* note 20 and accompanying text (discussing the D.C. Circuit Court's subversion of *Boumediene*'s principles and the Executive's perfect record with respect to extraterritorial habeas cases before that federal court of appeals).

[67] Al Maqaleh v. Gates, 604 F. Supp. 2d 205, 215 (D.D.C. 2009), *rev'd*, 605 F.3d 84 (D.C. Cir. 2010).

without adequate review,"[68] and emphasized throughout its opinion that the *Boumediene* decision was partly animated by separation-of-powers concerns and the possibility of indefinite detention without judicial oversight.[69]

The court concluded that the Bagram detainees were similarly situated to the Guantánamo detainees with respect to the first, second, and fourth factors. None of the Bagram and Guantánamo detainees were U.S. citizens, they contested their enemy combatant status, and they had been captured outside of the United States.[70] The court concluded that, like in *Boumediene*, the petitioners' citizenship weighed against a right to habeas corpus, and the length of their detention and the site of their apprehension weighed in favor of such a right.[71] The court took special note of the fact that the petitioners had been apprehended outside of the Afghan theater of operations and subsequently transported there for detention, which raised separation-of-powers concerns and the fear of executive manipulation:

> It is one thing to detain those captured on the surrounding battlefield at a place like Bagram, which respondents correctly maintain 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. Such rendition resurrects the same specter of limitless Executive power the Supreme Court sought to guard against in *Boumediene*—the concern that the Executive could move detainees physically beyond the reach of the Constitution and detain them indefinitely . . . . The site of apprehension factor, therefore, is of more importance here than it was for the Guantánamo detainees in *Boumediene*, and for these petitioners cuts in their favor because, for purposes of respondents' current motion, all were apprehended outside of Afghanistan.[72]

The court then analyzed the remaining three factors—the site of detention, adequacy of process, and practical obstacles—which it

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[68] *Id.* at 216 (citing *Boumediene*, 553 U.S. at 793–94). However, the court noted that, because *Boumediene* did not include the length of detention in its "explicit list of factors," the court would likewise refrain from considering it as a separate factor. *Id.* at 216–17. "Instead, the length of detention must exceed that 'reasonable period' to which the Executive is entitled and also may shade other factors, like the practical obstacles inherent in resolving a petitioner's entitlement to the writ." *Id.* at 217 (quoting *Boumediene*, 553 U.S. at 793–94).

[69] *Id.*

[70] *Id.* at 218.

[71] *Id.* at 221. The court noted that the detainee-status factor was not sufficiently developed in *Boumediene* and held that it neither helped nor hurt the petitioners. *Id.*

[72] *Id.* at 220–21 (internal citations omitted).

considered *Boumediene*'s "primary drivers."[73] In assessing the site of detention factor, the court conducted a detailed analysis of the objective degree and duration of control that the United States has had over Bagram,[74] and examined whether Bagram is in this respect more like *Boumediene*'s Guantánamo Bay—to which the Supreme Court had extended habeas corpus—or like *Eisentrager*'s Landsberg Prison—to which it had not.[75] The court found that under the lease and Status of Forces Agreement (SOFA), the United States had "near-total operational control at Bagram."[76] The court found that the lease grants the United States exclusive use of Bagram premises, and that the United States does not share control with allies, as it did in Landsberg. The court conceded, however, that the very existence of the SOFA was a "manifestation of the full sovereignty of the state on whose territory it applies" and that under the SOFA, the United States has criminal jurisdiction over U.S. personnel, but not over Afghan workers or allied personnel.[77] Furthermore, because the United States has had a short presence at Bagram and does not intend to stay beyond the conclusion of military operations, the duration of control weighed slightly in favor of the government position.[78] Still, the court concluded that with respect to the degree of U.S. control, Bagram more closely resembled Guantánamo on the "Guantánamo-Landsberg spectrum,"[79] and therefore extended the writ.[80]

The district court then examined the adequacy of the process the Bagram petitioners received and compared it to the procedures at Guantánamo and Landsberg. It found that the Unlawful Enemy Combatant Review Board (UECRB) process at Bagram fell "well short of what the Supreme Court found inadequate" to eliminate the need for habeas corpus review at Guantánamo.[81] The court found that the UECRB process was "less sophisticated and more error-prone"

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[73] *Id.* at 218.

[74] *Id.* at 221–22.

[75] *Id.* The district court called this the "Guantánamo-Landsberg spectrum." *Id.* at 222.

[76] *Id.* at 221–22

[77] *Id.* at 222–23.

[78] *Id.* at 224–25.

[79] *See supra* note 75 and accompanying text.

[80] *See Al Maqaleh*, 604 F. Supp. 2d at 231 (summarizing the court's balancing of the *Boumediene* factors).

[81] *Id.* at 227. The procedures at Bagram fell even shorter still than the "rigorous adversarial process" the *Eisentrager* petitioners received during their trial by military commission. *Id.* at 226–27; *see also* 1 DONALD P. KOMMERS ET AL., AMERICAN CONSTITUTIONAL LAW?: ESSAYS, CASES, AND COMPARATIVE NOTES? 242 (2009) (discussing the comprehensive procedures afforded to the *Eisentrager* petitioners to test the legality of their detention, including being charged by a bill of particulars, representation by counsel, and the ability to introduce evidence and cross-examine witnesses).

than *Boumediene*'s CSRT process:[82] Bagram detainees represented themselves and had no access to personal representatives, did not know the evidence against them, and had no opportunity to appeal a decision against them. Because of these procedural shortcomings, the court held that the adequacy of process factor weighed even more heavily in petitioner's favor than it had in *Boumediene*.

In analyzing the final factor—practical obstacles to extending the writ—the district court conceded the existence of obstacles (especially in light of Bagram's presence in an active theater of war) but held that they were not sufficient to "warrant depriving [the detainees] of the protections of the Great Writ."[83] Following *Boumediene*, the district court focused on the logistical obstacles to holding habeas proceedings; the possibility of friction with Afghanistan, the host government; the impact of extending the writ on the U.S. military mission; and the fact that Bagram is located in an active theater of war.[84] The court found that advances in technology, such as real-time videoconferencing,[85] mitigated the logistical obstacles, and that there was no possibility of friction with the Afghan government with respect to the non-Afghan detainees.[86]

Regarding the impact on the military mission and the prison's location in a theater of war, the court found that Bagram was more similar to Landsberg than Guantánamo, but that the high level of U.S. control over the facility would provide sufficient stability to facilitate extending the writ.[87] Despite Bagram's location, the court found it was possible "to provide meaningful process to detainees held at a large, secure military base, like Bagram, under complete U.S. control."[88] Finally, the court noted that the only reason the petitioners were in an active theater of war was that the U.S. government transported them there. Echoing *Boumediene*, the district court declared "it would be . . . anomalous to allow respondents to preclude a detainee's habeas rights by choosing to put him in harm's way through

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[82] *Al Maqaleh*, 604 F. Supp. 2d at 227.

[83] *Id.* at 231.

[84] *Id.* at 227–31.

[85] Federal courts have held videoconferencing to be an acceptable alternative to live testimony when security or expense concerns counsel against issuing the writ ad testificandum. *See, e.g.*, Thornton v. Snyder, 428 F.3d 690, 698 (7th Cir. 2005); Montes v. Rafalowski, No. C 09-0976 RMW, 2012 WL 2395273, at *2 (N.D. Cal. June 25, 2012); Twitty v. Ashcroft, 712 F. Supp. 2d 30, 33 (D. Conn. 2009).

[86] *Al Maqaleh*, 604 F. Supp. 2d at 230. However, the court held that extending habeas corpus to one of the four detainees, an Afghan national, would create friction with Afghanistan. *Id.* It therefore refused to grant his petition. *Id.* at 235.

[87] *Id.* at 228.

[88] *Id.*

detention in a theater of war."[89] After its exhaustive analysis and balancing of the *Boumediene* factors, along with separation-of-powers concerns and the risk of executive manipulation, the district court extended the writ to the three non-Afghan petitioners.[90]

B. Al Maqaleh *in the D.C. Circuit Court*

The district court's decision to extend habeas corpus to the Bagram detainees was soon overruled by the Court of Appeals for the D.C. Circuit.[91] While the circuit court applied the same *Boumediene* framework, its analysis was less thorough and in conflict with the primary drivers and principles animating *Boumediene*.

Following the *Boumediene* three-factor test, the circuit court agreed with the lower court's analysis of the first factor: The detainees were non-U.S. citizens who were held as enemy combatants and who had received insufficient process.[92] However, the circuit court's analyses of the second and third factors were different than the district court's. The circuit court found that the locations of apprehension and detention weighed heavily against extending the writ: The detainees were apprehended outside the territorial United States, and were detained in an active theater of war in a facility over which the United States exerted limited control and where it had no intent to stay indefinitely.[93] The circuit court found that the third factor—practical obstacles—weighed overwhelmingly against extending the writ, primarily due to Bagram's location in a theater of war.[94]

The circuit court failed to give special consideration to the fact that the detainees were apprehended in countries outside of Afghanistan and transported to the active warzone. Though it acknowledged the district court's separation-of-powers concerns and fear of executive manipulation—that the Executive might have transported the detainees to an active theater of war for detention in order to evade judicial oversight—it summarily disregarded the notion,

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[89] *Id.* at 231; *see also supra* notes 18–19 and accompanying text (explaining how *Boumediene* could undermine checks on the Executive's wartime detention powers).

[90] *Al Maqaleh*, 604 F. Supp. 2d at 235.

[91] Al Maqaleh v. Gates (*Al Maqaleh II*), 605 F.3d 84 (D.C. Cir. 2010).

[92] *Id.* at 93–96.

[93] *Id.* at 96–97.

[94] *Id.* at 97–98.

stating simply that "that is not what happened here."[95] It thus reversed the district court's grant of habeas corpus.[96]

C. *Comparing the D.C. District and Circuit Courts' Applications of the* Boumediene *Framework*

The district court's extraterritorial habeas corpus analysis was in keeping with *Boumediene*'s practical, non-formalistic approach and the underlying separation-of-powers concerns that animated the decision. It therefore correctly concluded that habeas corpus should apply to the Bagram petitioners.[97] The circuit court, on the other hand, used a formalistic analysis that *Boumediene* had rejected, gave short shrift to the threat of executive manipulation, and wrongly overruled the lower court.[98]

The two courts roughly agreed on the factors relating to citizenship, status, the process used to determine that status, and the location of apprehension.[99] However, they used different approaches to the factors related to location of detention and practical obstacles. The district court followed the Supreme Court's example in *Boumediene* and conducted a thorough and nuanced examination of the degree of objective control that the United States had over Bagram.[100] The circuit court, on the other hand, focused solely on indicators of U.S. territorial sovereignty over Bagram.[101] In doing so, the circuit court performed a formalistic, rigid analysis of the sort the Supreme Court had rejected in favor of *Boumediene*'s functional and pragmatic balancing test.[102]

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[95] *Id.* at 98. The court concluded that the Executive was not attempting to evade habeas jurisdiction by transporting the detainees to Bagram, since it did so before the Supreme Court decided *Boumediene*. *Id. But see supra* note 89 and accompanying text (discussing the district court's finding of executive manipulation, based on the government's intentional transportation of detainees to a detention center located in a theater of war).

[96] *Al Maqaleh II*, 605 F.3d at 99.

[97] The court held only that the detainees before it had a right to seek habeas relief, not that habeas corpus should extend to all Bagram detainees. *See* Al Maqaleh v. Gates, 604 F. Supp. 2d 205, 215 (D.D.C. 2009) (applying the *Boumediene* factors in an "individualized, detainee-specific manner").

[98] *See* Saurav Ghosh, Boumediene *Applied Badly: The Extraterritorial Constitution After* Al Maqaleh v. Gates, 64 STAN. L. REV. 507, 519–23 (2012) (comparing the D.C. District and Circuit Courts' differing approaches in *Al Maqaleh*). For an argument that the district court erred in its decision, see Thornburg, *supra* note 65.

[99] *See supra* Part II.A–B (discussing the courts' analyses of the relevant factors).

[100] *See Al Maqaleh*, 604 F. Supp. 2d at 222 (finding that the lease and SOFA gave the United States near total control in Bagram, thus making it more similar to Guantánamo than Landsberg); *supra* notes 74–77 and accompanying text (discussing the district court's analysis of the site of detention factor).

[101] *See Al Maqaleh II*, 605 F.3d at 97; *supra* note 93 and accompanying text (discussing the circuit court's analysis of the site of detention factor).

[102] *See Al Maqaleh II*, 605 F.3d at 97.

The district court's analysis of the practical-obstacles factor was also more consistent with *Boumediene* than the circuit court's approach. Although the district court "recognized that practical obstacles would accompany the extension of the writ into active combat theaters, [it] did not find these obstacles insurmountable and observed that judicial process had been provided in active theaters before."[103] After all, the Supreme Court in *Boumediene* noted only that arguments against extending the writ would have more weight if the detention facility were located in an active theater of war, not that such a factor would be dispositive.[104] The *Boumediene* Court noted and weighed the actual obstacles that were likely to present themselves if habeas corpus were extended.[105] Furthermore, the district court recognized the risk that the Executive had selected or could select detention sites in order to evade judicial oversight. In comparison, the circuit court provided a much more cursory and mechanical analysis that seemed to take for granted the position that being located in an active theater of war was itself an insurmountable obstacle, and it did not seriously consider the risk of executive manipulation.

Because the district court undertook a nuanced analysis of factors such as apprehension and detention sites and practical obstacles, and because it seriously considered the possibility of executive manipulation, the district court in *Al Maqaleh* applied the *Boumediene* framework faithfully and concluded that habeas corpus should extend to the Bagram petitioners. In contrast, the circuit court's rigid analysis was inconsistent with the Supreme Court's practical approach in *Boumediene*. Its overly deferential stance with respect to executive manipulation reflects a failure to provide a meaningful check on the Executive's detention power.[106]

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[103] Ghosh, *supra* note 98, at 521.

[104] Boumediene v. Bush, 553 U.S. 723, 770 (2008).

[105] *See supra* note 62 and accompanying text (discussing, inter alia, the cost and inconvenience of extending the writ and finding that such obstacles were not insurmountable, given Guantánamo's size, location, and personnel strength).

[106] The district court recently granted the petitioners an opportunity to present new evidence that, they argued, would support a finding of executive manipulation and would show that there were no practical obstacles to extending the writ. This time, however, the district court followed the circuit court's analysis and granted the government's motion to dismiss. *See Al Maqaleh III*, 899 F. Supp. 2d 10, 22 (D.D.C. 2012) ("[T]he Court simply sees no way to accept petitioners' argument under the framework laid out by the D.C. Circuit."). In support of their contention of executive manipulation, petitioners presented declarations from two former government officials indicating a belief that detainees were transported to Bagram to evade judicial review. The district court rejected this evidence as pure speculation. *Id.* at 23 n.13. Petitioners also presented evidence that dozens of Afghan criminal trials were proceeding at Bagram for some Afghan prisoners, but the court found that the existence of Afghan trials did not indicate a lack of practical obstacles to U.S. proceedings at the base. *Id.* at 19.

III
FULFILLING *BOUMEDIENE*'S PROMISE: PROPOSED REFINEMENTS TO THE *BOUMEDIENE* FRAMEWORK

In *Boumediene*, a Supreme Court animated by separation-of-powers concerns sought to reign in the executive branch's ability to detain individuals indefinitely while evading judicial oversight.[107] In *Al Maqaleh v. Gates*, however, the Circuit Court of Appeals for the District of Columbia disregarded those principles. This, and the fact that the district and circuit courts took drastically different approaches to the *Boumediene* framework, suggest that the framework in its current state is not sufficiently clear.[108] This flaw must be addressed in order for the *Boumediene* framework to serve one of its primary purposes: limiting unchecked executive detention power. Clarifying the framework will also foster consistency of its application among the lower courts.

Although unclear, the *Boumediene* framework nonetheless provides a good starting point because its multifactor approach allows courts to weigh the complexities of the War on Terror.[109] Furthermore, *Boumediene*'s three factors—detainee status, location of apprehension and detention, and the practical obstacles to extending the writ—appropriately take into account the interests of both the petitioners and the state, and focus on real-world considerations. However, although the *Boumediene* Court considered executive manipulation and length of detention, it did not include them as specific factors and therefore failed to ensure that lower courts would properly take them into account. In order to address the framework's shortcomings, this Part suggests the addition of explicit executive manipulation and length of detention factors, and provides objective questions for courts to ask when analyzing these factors.[110] This Part

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[107] *See Boumediene*, 553 U.S. at 727 ("The Nation's basic charter cannot be contracted away like this. The Constitution grants Congress and the President the power to acquire, dispose of, and govern territory, not the power to decide when and where its terms apply. To hold that the political branches may switch the Constitution on or off at will would lead to a regime in which they, not this Court, say 'what the law is.'" (internal citation omitted)); *supra* note 17 and accompanying text.

[108] *See, e.g.*, Davis, *supra* note 35, at 1223 ("[T]he central deficiency of the Court's opinion in *Boumediene* is that it failed to truly restrain the Executive—the problem that the opinion itself purported was of serious concern.").

[109] *See supra* note 53; *infra* note 116 and accompanying text (noting the framework's ability to "capture" the complex fact patterns common in War on Terror detention cases).

[110] The Supreme Court, as well as the district court, discussed these factors in its opinions, but the Supreme Court did not weigh them explicitly in the analysis. *See* Al Maqaleh v. Gates, 604 F. Supp. 2d 205, 216–17 (D.D.C. 2009) ("Because the Supreme Court did not include the length of detention in its explicit list of factors . . . this Court will not separately consider that circumstance here. Instead, the length of detention must exceed that

also provides some clarification and guidance for analyzing the practical-obstacles factor.[111]

A. Executive Manipulation as an Explicit Factor

The Supreme Court in *Boumediene* sought to limit the executive branch's ability to switch the Constitution on or off by selecting detention sites that are likely to evade judicial oversight.[112] However, as Nelson Berardinelli has argued, *Boumediene* has "fail[ed] to truly restrain the executive branch," as the Executive is still able to strategically place detainees in sites where habeas corpus would be unlikely to reach under the *Boumediene* framework itself.[113] The Executive could, for example, transport suspected enemy combatants to detention sites that arguably present practical obstacles to habeas corpus—*Boumediene*'s third factor—and then successfully argue the impracticability of extending the writ.

In order to limit the executive branch's ability to "switch off" the Constitution, the *Boumediene* framework should include an explicit executive-manipulation factor. A court's finding of executive manipulation in a given case should be nearly determinative in favor of extending the writ of habeas corpus to a petitioner. That is, a finding of intent to evade judicial review would create a rebuttable presumption of habeas jurisdiction.[114] This would place the petitioner in the

'reasonable period' to which the Executive is entitled and also may shade other factors . . . ."); *id.* at 209, 216 n.7, 220–21, 230–31 (discussing executive manipulation of the site of detention); *see also* Nelson Berardinelli, Boumediene v. Bush*: Does It Really Curtail Executive Manipulation?*, 37 OHIO N.U. L. REV. 169, 187 (2011) (noting that the district court in *Al Maqaleh* allowed the possibility of executive manipulation and the length of detention to shade its analysis without analyzing them as discrete factors in the *Boumediene* framework).

[111] Although the *Boumediene* multifactor balancing test has created confusion in the lower courts and failed to produce results consistent with *Boumediene*'s animating principles, the core framework is still preferable to either a bright-line rule or a totality-of-the-circumstances approach. The former is incompatible with the war on terror, which is characterized by difficult-to-identify enemies, multitudinous theaters of operation, and an uncertain end date. The latter would provide even less guidance for lower courts, result in less consistency and predictability, and likely be more resource-intensive. Furthermore, it is likely that because of the great imbalance between petitioners' and the government's access to evidence, records, and resources, a totality-of-the-circumstances approach would unduly favor the government's position, at the expense of petitioners' access to judicial review of their detention. Finally, such an approach may be highly susceptible to the changing whims of public sentiment.

[112] *See Boumediene*, 553 U.S. at 727 (arguing that the political branches must not be permitted to dictate where constitutional protections apply by restricting judicial oversight); *supra* note 107 (describing the same).

[113] Berardinelli, *supra* note 110, at 171.

[114] The presumption in favor of extending habeas jurisdiction after a finding of executive manipulation should be rebuttable because there may be circumstances that would

position he would have been absent executive manipulation.[115] Furthermore, it would deter executive attempts to evade judicial review.

In keeping with the established framework, the inquiry should be an individualized, detainee-specific analysis.[116] As such, a finding of manipulation would benefit the petitioners in that specific case but would have no bearing on the extension of habeas corpus to other detainees at the same detention location.[117] Additionally, although a finding of executive manipulation should weigh in favor of detainees seeking habeas relief, a negative finding should not weigh against them. That is, this factor should only help, but not hurt, detainees.[118] The proposed analysis would obviate the need to assess subjective intent of executive officials, a difficult inquiry even in non–national security matters made nearly impossible given the possible need to summon military commanders for testimony. Furthermore, the proposed analysis, unlike the circuit court's approach, would give

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justify refusing to extend the writ, despite a finding of manipulation. Of course, the government should have to meet a high burden to rebut the presumption.

[115] Had the government not attempted to manipulate legal doctrine to avoid judicial review of a petitioner's detention, the petitioner presumably would have been entitled to the writ. As such, a presumption in favor of habeas jurisdiction would merely be undoing the government's manipulation.

[116] Al Maqaleh v. Gates, 604 F. Supp. 2d 205, 215 (D.D.C. 2009) (noting that "*Boumediene*'s repeated rejection of bright-line rules . . . coupled with its choice of certain detainee-specific factors, strongly supports . . . [an] individualized approach"). Although an individualized approach is certainly more complex and resource intensive than a location-centered categorical rule (extending or refusing the writ for all detainees at a certain site), the latter approach would be undesirable at Bagram. Unlike Guantánamo, to which the Court, in effect, categorically extended the writ, Bagram is located in an active theater of war. As such, extending the writ to all Bagram detainees—regardless of potential obstacles and of the detainees' citizenship, combatant status, and location of their apprehension—would be an extreme and unnecessary burden on the military. Additionally, doing so would set a dangerous precedent for future warzone detention cases. Conversely, denying the writ to all Bagram detainees—regardless of their combatant status, the extent of the process they received in determining their status, the site of their apprehension, and the possibility of executive manipulation—would provide a clear, efficient rule and would discourage repetitive litigation as wartime conditions changed, but it would be overly harsh and would grant the Executive nearly limitless detention power. *See* Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 HARV. L. REV. 2029, 2058 (2007) (discussing the negative repercussions of refusing to extend the writ of habeas corpus abroad). That being said, it may make sense to use a categorical approach at other detention sites more similarly situated to Guantánamo.

[117] Even if a court finds that the Executive chose to transport certain suspected enemy combatants to Bagram for detention in order to evade judicial review for those detainees, there would still be many detainees at Bagram whose detention location had nothing to do with executive manipulation. This would include, for example, suspected enemy combatants captured near Bagram.

[118] Berardinelli, *supra* note 110, at 177 n.54.

petitioners a realistic opportunity to show that their detention site was chosen in order to deny them judicial review.

Instead of simply determining whether sites of apprehension and detention are outside of the United States or under the objective control of the United States, as is the case with the second factor, courts applying the executive-manipulation factor should analyze the relationship *between* the sites of apprehension and detention.[119] In particular, courts should consider the site of apprehension and possible detention-site alternatives when analyzing the reasonableness of the executive branch's detention-site decision.[120] The following questions could provide an objective analysis through which courts could use readily available and verifiable evidence to infer the presence of executive manipulation:[121]

(1) Was the detainee transported for detention away from the apprehension site?
(2) If so, were there detention site alternatives, at least as reasonable as the chosen site, that the Executive could have chosen?
(3) Is the chosen detention site less favorable to detainees seeking habeas corpus relief?
    (a) Is the chosen detention site in a location under less U.S. control than possible alternatives?
    (b) Is the chosen detention site in an active theater of war?
    (c) Does the chosen detention site create more practical obstacles to extending the writ than possible alternatives do?
(4) Is there any other evidence of executive intent to evade judicial oversight, whether related to locations of capture and detention or not?

Following this analysis, courts would first ask if the detainee was transported to a detention site away from the location of capture. If the answer to this question is no, then there would be no indication of executive manipulation, unless the court found evidence of such intent unrelated to the locations of capture and detention. As such, suspected enemy combatants, captured in and subsequently detained on or near a battlefield or in an active theater of war, would likely be unable to show executive manipulation; this subfactor would not aid such detainees seeking habeas relief.

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119 *Id.* at 175–78.

120 *Id.* at 176.

121 This objective analysis is preferable to the circuit court's current approach, which requires petitioners to produce direct evidence of intent to evade judicial review—a nearly insurmountable obstacle. *See* Berardinelli, *supra* note 110, at 195 ("Requiring direct evidence of the Executive's specific intent to avoid judicial review . . . will, in almost all cases, be equivalent to ignoring the issue altogether.").

If detainees were transported to a location away from the site of their apprehension, then courts should examine the second subfactor: whether there were locations that were at least as reasonable in which the Executive could have detained the suspected enemy combatant. This portion of the analysis would require courts to inquire first whether there were alternative detention sites. If there were, then the court should inquire if such alternatives were at least as reasonable as the chosen site. This inquiry should include, inter alia, the alternative site's distance from the site of apprehension in comparison to the chosen site's distance from the site of apprehension, and the alternative's capacity to process, detain, and provide security for detainees. This inquiry aims to assess the reasonableness of the Executive's chosen detention site in comparison to alternatives. If there were alternative detention sites but they were, for example, prohibitively distant or unequipped to detain the suspected enemy combatants, then the court should defer to the executive branch's decision, as it would not be suggestive of intent to evade judicial oversight. If there were no alternative detention sites that were at least as reasonable as the chosen site, this factor would not weigh in favor of extending habeas corpus to the petitioners.

If the transportation and alternative subfactors weigh in favor of the detainees, then courts could proceed to subfactor three and check for indicators that the chosen detention site is less likely under the *Boumediene* framework to receive habeas corpus, as this would suggest an intent to manipulate the framework in order to evade judicial oversight. This inquiry would include an analysis of the *Boumediene* factors that would weigh against habeas petitioners: a lack of U.S. control over the detention site, its presence in a theater of war, or the existence of practical obstacles to extending the writ. Then, following the fourth subfactor, courts should also consider any other evidence indicating intent to evade judicial oversight. If subfactors three or four are not satisfied—that is, (3) there is insufficient evidence that the chosen site was less likely to be subject to habeas jurisdiction than possible alternative sites or (4) there is no other evidence suggesting intent to evade judicial review—then the Executive's decision to detain a suspected enemy combatant in a given location, even if there are reasonable alternative locations, should not be interpreted to indicate intent to manipulate and therefore should not weigh in favor of the petitioners.

The executive-manipulation factor would help courts assess the presence of executive intent to evade judicial review and limit the Executive's indefinite detention power, as it would allow courts to infer executive manipulation from strong evidence. In *Al Maqaleh II*,

the circuit court placed "an unreasonable burden on detainees by requiring them to produce direct evidence of the Executive's specific intent to avoid judicial review before it would fully examine the executive manipulation issue."[122] This approach was both burdensome and unrealistic, as detainees are unlikely to be able to provide such evidence. Under the circuit court's analysis, therefore, executive manipulation would rarely if ever be found, even in the face of strong circumstantial evidence. These proposed questions should provide a method to realistically consider and limit executive manipulation.[123] Furthermore, the existence of executive manipulation as an explicit factor in the *Boumediene* framework may deter any possible future intent to evade judicial oversight. Last, the guided analysis can provide for more consistent results and would "ensure that courts fully and openly discuss their reasoning, thereby reducing the chance of reaching an arbitrary result."[124]

B. Length of Detention as an Explicit Factor

The detainee's period of detention without adequate status review should also be an explicit factor for courts to consider and weigh in the *Boumediene* framework. In *Boumediene*, the Supreme Court noted that the petitioners had been detained for six years, which it considered an unreasonable length of time without adequate review, but it did not weigh the length of the petitioner's detention as an explicit factor.[125] The district court in *Al Maqaleh* did the same.[126] Instead of only allowing the length of detention to shade the analysis, courts should explicitly weigh it against the other factors. Furthermore, in light of the indeterminate length of the War on Terror, courts should ask whether the detainees are subject to remain

122 Berardinelli, *supra* note 110, at 185.

123 Admittedly, even if the analysis indicates the likely presence of executive manipulation, military commanders would still have the opportunity to produce affidavits or testimony of their good faith and lack of intent to evade judicial review. Under the proposed approach, however, this testimony would not necessarily be decisive, as it would be weighed against the strength of the petitioner's evidence.

124 Berardinelli, *supra* note 110, at 178.

125 *See Boumediene*, 553 U.S. at 730; Al Maqaleh v. Gates, 604 F. Supp. 2d 205, 216 (D.D.C. 2009) (discussing the *Boumediene* Court's treatment of the length of habeas petitioners' detention, and noting that Court reasoned that "it likely would be both an impractical and unprecedented extension of judicial power to assume that habeas corpus would be available at the moment the prisoner is taken into custody," and held that "the Executive is entitled to a reasonable period of time to determine a detainee's status before a court entertains that detainee's habeas corpus petition." (internal citations omitted)).

126 *See supra* note 110 (discussing the courts' reviews of the respective petitioners' lengths of detention).

in indefinite detention.[127] Although there is little precedential guidance on what constitutes an unreasonable length of detention, both the Supreme Court and the D.C. District Court considered six years excessive.[128] It should follow that six years of detention without adequate status review should be considered unreasonable per se, and such a finding, while not determinative, should weigh in a petitioner's favor. Admittedly, this is a line-drawing exercise, but a line—especially one grounded in the Supreme Court's own language—is better than no guidance at all.[129]

Courts applying the length of detention factor should inquire whether the years in detainment have eliminated the possibility that the suspect might return to the battlefield.[130] Realistically, this subfactor should only benefit petitioners whose charges are below some minimal threshold of seriousness—thus excluding any petitioners charged with directly engaging in combat or violence—and who are extremely unlikely to pose any danger if released. Courts should be extremely deferential to the Executive with respect to this inquiry, but the Executive should have to provide some justification for continued lengthy detentions.

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[127] *See* Jonathan Hafetz, *Stretching Precedent Beyond Recognition: The Misplaced Reliance on World War II Cases in the "War on Terror,"* 28 REV. LITIG. 365, 374–75 (2008) (noting that, unlike most wars, the war on terror "has no identifiable ending point, such as the cessation of active hostilities or the signing of a peace treaty" (citing Bob Woodward, *CIA Told to Do "Whatever Necessary" to Kill Bin Laden; Agency and Military Collaborating at "Unprecedented" Level; Cheney Says War Against Terror "May Never End,"* WASH. POST, Oct. 21, 2001, at A22 ("It is different than the Gulf War was, in the sense that it may never end. At least, not in our lifetime."))).

[128] *Supra* note 125 and accompanying text.

[129] There is support for this kind of line-drawing in the Supreme Court's immigration detention jurisprudence. In *Zadvydas v. Davis*, 533 U.S. 678, 699–700 (2001), the Court held that the Fifth Amendment's Due Process Clause entitles a removable alien, who cannot be repatriated, to be released from custody after a reasonable period of detention—set at six months. If the detainee is to be held longer, then the government must show either that the detainee will be released in the foreseeable future or that there are special circumstances justifying the longer period of detention. *Id.* Although *Zadvydas* limited its holding to detainees held within the United States, there is no reason that *Zadvydas*'s logic should not apply to extraterritorial detention cases as well.

[130] The D.C. District Court has taken these two factors into consideration when ordering the release of petitioners in two Guantánamo habeas cases. *See* Al Ginco v. Obama, 626 F. Supp. 2d 123 (D.D.C. 2009) (taking into account the petitioner's vitiated connections to terror groups in deciding to release him); Basardh v. Obama, 612 F. Supp. 2d 30 (D.D.C. 2009) (taking into account the low likelihood of the petitioner's return to the battlefield in deciding to release him). Admittedly, because *Boumediene* held that the writ of habeas corpus extends to Guantánamo, these two cases were decided on the merits—the federal court's jurisdiction was not at issue. On the other hand, a detainee's period of detention should be at least as relevant in determining whether he should have access to an impartial tribunal to contest his detention as it is in determining whether he should be let free.

Such an inquiry would be more consistent with the laws of war that justify the indefinite detention of suspected enemy combatants in the first place.[131] Furthermore, as the War on Terror stretches into its second decade with no end in sight, it is sensible to question, as Baher Azmy does, an underlying premise of the laws of war that govern military detention: that an enemy's loyalty to an enemy nation cannot be vitiated.[132] Although the Supreme Court in *Boumediene* and the district court in *Al Maqaleh* considered the detention period, they did not explicitly weigh it as a factor, and the circuit court did not take it into account at all.[133] Adding the length of detention as a factor in the *Boumediene* framework would ensure that courts weigh this important issue in their analyses.[134] This would be in line with the Supreme Court's concern regarding the Executive's indefinite detention powers.

C. Clarifying the Practical Obstacles Factor

The third prong of the existing *Boumediene* framework requires courts to assess the practical obstacles involved in extending the writ to detainees held abroad. In analyzing this factor, *Boumediene* considered the actual logistical obstacles and expenditures involved in holding habeas proceedings, the impact of extending the writ on the military mission, and potential friction with the host government.[135] The Court also stated that the level of U.S. control over the site and whether the detention site was located in an active theater of war could affect the analysis.[136] However, the Court did not provide

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[131] *See* Baher Azmy, *Executive Detention,* Boumediene*, and the New Common Law of Habeas*, 95 IOWA L. REV. 445, 510 (2010) (discussing durational limitations to detention, and noting that the Supreme Court commented "that as long as active hostilities were still ongoing in Afghanistan, the laws of war justified Hamdi's detention *in order to prevent him from returning to the battlefield*" and stated that "if the 'practical circumstances of a given conflict' reveal themselves to be unlike those which informed the creation of the laws of war, then this prior understanding may 'unravel'" (emphasis added) (citing Hamdi v. Rumsfeld, 542 U.S. 507, 520 (2004))). The Geneva Convention Relative to the Treatment of Prisoners of War art. 118, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, states that "[p]risoners of war shall be released and repatriated without delay after the cessation of active hostilities."

[132] Azmy, *supra* note 131, at 512.

[133] *See supra* Part II.B (discussing the circuit court's three-factor analysis, which did not consider the petitioner's length of detention).

[134] As it stands now, a petitioner's period of detention merely shades the court's analysis of the other factors. *See supra* note 68 and accompanying text (discussing the court's use of the length-of-detention factor to inform its analysis of the other factors, such as the practical obstacles to extending the writ).

[135] Boumediene v. Bush, 553 U.S. 723, 769 (2008); *supra* note 62 and accompanying text (finding practical concerns existed but were not dispositive).

[136] *Boumediene*, 553 U.S. at 770.

guidance on how to assess and weigh these factors, apart from its discussion on the differing threat levels at Guantánamo and Landsberg prison. As a result of this lack of guidance, the district and circuit courts in *Al Maqaleh* took drastically different approaches in assessing the logistical obstacles, impact on the military mission, and the detention site's location in a theater of war. While the district court did an in-depth inquiry into the actual impediments to extending the writ—taking into account Bagram's location—and the actual impact on the military mission, the circuit court performed a much more superficial analysis, in which it took for granted that the military mission, level of U.S. control, and site location were factors inherently weighing against extending habeas corpus.[137] The vast difference in approaches illustrates the need for guidance in order to ensure consistent application of the *Boumediene* framework.

1. Logistical Obstacles to Extending Habeas Corpus

Though courts should be attentive to any logistical obstacles inherent in extending the writ abroad, this factor should only weigh in favor of the government if the logistical obstacles surpass some threshold level of burden, taking into account possible solutions. In *Boumediene*, for example, the Court acknowledged that extending habeas proceedings to Guantánamo would require military personnel time and financial expenditures, but concluded that this was unpersuasive because "[c]ompliance with any judicial process requires some incremental expenditure of resources."[138] Courts should seek and consider possible solutions to these obstacles, such as the use of technology to eliminate the need to transport petitioners, witnesses, or military personnel to a federal court.[139] Furthermore, courts should take into account the possibility of modifying habeas corpus procedures in order to facilitate extending the writ.[140] If logistical obstacles still exist, then courts can weigh this factor in the government's favor in accordance with the general magnitude of the obstacle.

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[137] *See Al Maqaleh II*, 605 F.3d 84, 97–99 (D.C. Cir. 2010) (analyzing the practical-obstacles factor); Al Maqaleh v. Gates, 604 F. Supp. 2d 205, 227–31 (D.D.C. 2009) (same).

[138] *Boumediene*, 553 U.S. at 769.

[139] *See supra* note 85 and accompanying text (discussing the use of videoconferencing in habeas corpus proceedings).

[140] *See Boumediene*, 553 U.S. at 770 (noting that "[t]o the extent barriers arise, habeas corpus procedures likely can be modified to address them"); *supra* note 85 (discussing the accepted use of videoconferencing as an alternative to live testimony in habeas corpus proceedings when security or expense concerns counsel against issuing the writ ad testificandum).

2. Impact on the Military Mission

Unquestionably, courts should accord the executive branch a high degree of deference in matters pertaining to the conduct of military operations. Yet even in the national security context, courts must be careful not to abdicate their judicial duties. When examining the impact that extending the writ would have on the military mission, courts must still require the Executive to provide "credible arguments" of a negative impact.[141]

Additionally, courts must not assume that providing detainees with access to American courts is bad for national security.[142] *Eisentrager*'s assumption that habeas proceedings "would hamper the war effort and bring aid and comfort to the enemy" and "diminish the prestige of our commanders, not only with enemies but with wavering neutrals"[143] is no longer tenable. In fact, many experts as well as military leaders now believe the opposite: that *denying* judicial remedies to detainees in fact harms the United States's legitimacy with its allies and invigorates its enemies.[144] Furthermore, as Michael Bahar argues, a successful counterterrorism strategy requires more, not less, adherence to American legal principles.[145]

3. Location in an Active Theater of War

In *Boumediene*, the Supreme Court noted that if a detention center were located in a theater of war, arguments that extending the writ to the detention facility would be impracticable would have "more weight."[146] The Court did not indicate that the presence of this factor would be dispositive, or even particularly determinative. As such, this should not be a binary analysis in which courts place "overwhelming" weight on the government's side principally because the

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[141] *See Boumediene*, 553 U.S. at 727 (noting that the Executive had not provided "credible arguments that the military mission at Guantánamo would be compromised if habeas corpus courts had jurisdiction" to hear the detainees' claims).

[142] *See id.* at 797 ("Security subsists, too, in fidelity to freedom's first principles . . . .").

[143] Johnson v. Eisentrager, 339 U.S. 763, 779 (1950).

[144] *See, e.g.*, *Extraterritoriality and the War on Terror*, 124 HARV. L. REV. 1258 (2011) (arguing that perceived human rights abuses and a lack of judicial process for detainees are harmful to the U.S. military effort).

[145] Bahar, *supra* note 37, at 316–21. Of course, some—including Justice Scalia—fear that judicial overreach into military matters can create national security risks. In his *Boumediene* dissent, Scalia argued that the Court, the branch with the least knowledge of national security, had appropriated the power to "handle enemy prisoners," and that this would likely lead to more American deaths. *Boumediene*, 553 U.S. at 827–28, 831 (Scalia, J., dissenting).

[146] *Boumediene*, 553 U.S. at 770.

detention site is located in a theater of war.[147] Courts considering this factor should instead follow the district court's example in *Al Maqaleh* and engage in a detailed analysis of the obstacles and dangers inherent in extending process to a site on or near a warzone, and whether such obstacles can reasonably be circumvented.

CONCLUSION

Boumediene sought to create a functional approach to determine the extraterritorial reach of the writ of habeas corpus, taking into account the complex and indefinite nature of the War on Terror and separation-of-powers concerns. However, it provided little guidance to lower courts tasked with applying the framework in future cases. This has led to conflicting applications of the framework as well as an application inconsistent with *Boumediene*'s animating principles. This Note has proposed transforming executive manipulation and the length of detention from informal considerations to explicit factors in the *Boumediene* analysis. Furthermore, it has provided objective inquiries for these new factors and for the poorly applied practical-obstacles factor. These proposals should help to clarify the extraterritorial habeas framework, and to thereby make it more predictable and more consistent with *Boumediene*'s goal of providing an effective judicial check on executive detention powers.

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147 *See Al Maqaleh II*, 605 F.3d 84, 97 (D.C. Cir. 2010); *supra* note 93 and accompanying text (discussing the circuit court's strong reliance on Bagram's location for its decision to deny habeas jurisdiction).