
THE *BOUMEDIENE* ILLUSION: THE UNSETTLED ROLE OF HABEAS CORPUS ABROAD IN THE WAR ON TERROR*

I. INTRODUCTION

In November 2003, Houcine Al-Najar received a letter at his home in Switzerland, mailed by the International Committee of the Red Cross.¹ The letter announced that Houcine's brother, Redha, was a prisoner at the Bagram Theater Internment Facility, on the United States Bagram Airbase in Afghanistan.² Eighteen months had passed without word of Redha's whereabouts—his wife and children had last seen him as he was taken from their home in Karachi, Pakistan at gunpoint by masked men.³ The Al-Najar family is one of an untold number that have received similar letters forwarded by the Red Cross—each of them relating the detention of missing family members as part of the United States' efforts to defeat terrorism.⁴ Many of these letters originated in Bagram,⁵ others from Guantanamo Bay, Cuba.⁶

Redha Al-Najar eventually became one of the petitioners in *Al Maqaleh v. Gates*,⁷ requesting habeas corpus relief and prevailing at the district court level.⁸ The Court of Appeals for the D.C. Circuit reversed, however, ruling that it did not possess jurisdiction to issue the writ on behalf of Al-Najar and his fellow petitioners.⁹ This ruling was based on an application of the factors relevant to the extent of the writ announced in *Boumediene v. Bush*,¹⁰ which held that detainees at Guantanamo Bay could petition for habeas relief under the Suspension Clause of the Constitution.¹¹ The

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1. Lou Dubose, *Rendering Justice at Bagram*, WASH. SPECTATOR, Feb. 1, 2010, <http://www.washingtonspectator.com/index.php/component/content/article/3-archive/741-rendering-justice-at-bagram>.

2. *Id.*

3. *Id.*

4. See AM. RED CROSS, GLOBAL IMPACT REPORT: FISCAL YEAR 2010, at 14 (2010), available at <http://www.redcross.org/www-files/Documents/pdf/international/10ISDreport.pdf> (describing how the Red Cross relays news between prisoners of war and their families).

5. See *infra* Part II.E.1 for a discussion of the Bagram Theater Internment Facility.

6. See *infra* Part II.A.2 for an overview of the establishment and maintenance of the detention facility at Guantanamo Bay.

7. 604 F. Supp. 2d 205 (D.D.C. 2009).

8. *Al Maqaleh*, 604 F. Supp. 2d at 235. One of the petitioners, an Afghan national, was denied access to the writ on the grounds of the potential for ensuing friction with Afghanistan, the host country of the Bagram facility. *Id.*

9. *Al Maqaleh v. Gates*, 605 F.3d 84, 99 (D.C. Cir. 2010).

10. 553 U.S. 723 (2008).

11. *Boumediene*, 553 U.S. at 771.

court of appeals distinguished the Bagram petitioners from the Guantanamo petitioners primarily based on the former's incarceration in a nation considered to be an active war zone.¹² This was despite the fact that the three petitioners before the court of appeals all claimed to have been captured outside that war zone, in peaceful civilian settings, only to be transported by the United States into Bagram.¹³

Denial of habeas jurisdiction under these circumstances allows the Executive to profit from obstacles arising from its own decision to transport prisoners.¹⁴ The writ of habeas corpus, however, is not merely a safeguard for personal liberty and individual rights.¹⁵ It is also an indispensable aspect of the separation of powers at the heart of the American system of government, as well as a guarantor of the legitimate exercise of those powers.¹⁶ In order for the writ to so function, it must be insulated from the attempts, well-intentioned or otherwise, of the political branches to manipulate it. The role of habeas corpus in the context of the war on terror involves weighty considerations of separation of powers and national security and has engendered heated debate over the balance to be struck between these competing concerns.¹⁷ This Comment argues that the Supreme Court's decision in *Boumediene*, although listing factors appropriate for consideration in determining the extent of the writ's force, provides inadequate guidance for the application of those factors in future cases. In particular, this lack of guidance undermines the writ's status as a check on executive power in the amorphous, ill-defined war on terror.

Part II.A briefly chronicles the inception of the war on terror and its global reach, with Part II.A.2 focusing on the Bush administration's decision to house suspected terrorists and Taliban fighters at Guantanamo Bay, Cuba. Part II.B discusses the constitutional dimensions of habeas corpus in the American system of government. In marking out these dimensions, Part II.B draws on the substance of the debates on the

12. *Al Maqaleh*, 605 F.3d at 97–98.

13. See *Al Maqaleh*, 604 F. Supp. 2d at 209–10. *But see id.* at 210 (explaining that the Government contested the petitioners' representations as to the location of capture).

14. See *infra* Part III.D for a discussion of how prisoner transportation has laid the grounds for the argument that habeas corpus jurisdiction is impractical.

15. See *infra* Part II.B.2 for a discussion of the evolution of the English writ of habeas corpus as a check on the royal prerogative or, in other words, executive power.

16. See *infra* Part II.B.3 for an examination of the role of habeas corpus in maintaining separation of powers and the check it places on executive detention power.

17. Commentators and scholars in favor of strong judicial oversight of executive detention received *Boumediene* positively. See generally Baher Azmy, *Executive Detention, Boumediene, and the New Common Law of Habeas*, 95 IOWA L. REV. 445 (2010); Gerald L. Neuman, *The Habeas Corpus Suspension Clause After Boumediene v. Bush*, 110 COLUM. L. REV. 537 (2010). On the other hand, some viewed the decision as heralding increased difficulty in fighting the war on terror effectively. See, e.g., *Boumediene v. Bush*, 553 U.S. 723, 827–28 (2008) (Scalia, J., dissenting) (pointing out what Justice Scalia perceives as “disastrous consequences” of allowing habeas corpus jurisdiction at Guantanamo Bay and predicting that the majority opinion would lead to American deaths); Fred K. Ford, *Keeping Boumediene Off the Battlefield: Examining Potential Implications of the Boumediene v. Bush Decision to the Conduct of United States Military Operations*, 30 PACE L. REV. 396, 415 (2010) (arguing that *Boumediene* ceded authority over the war on terror rightfully belonging to the citizenry and their elected officials to “unelected, politically unaccountable judges” (quoting *Boumediene*, 553 U.S. at 826 (Roberts, J., dissenting))); John Yoo, *The Supreme Court Goes to War*, WALL ST. J., June 17, 2008, at A23 (asserting that the *Boumediene* majority “ignored the Constitution's structure”).

topic at the Constitutional Convention of 1787 and surveys the pre-Revolutionary English history of the writ, the common touchstone for the Framers. Part II.C reviews several habeas challenges by Guantanamo Bay detainees and the Congressional response to those rulings. This leads into Part II.D, which discusses the Supreme Court's ruling in *Boumediene*, a surrebuttal of sorts to Congress's attempts to deny habeas corpus relief at Guantanamo Bay. Part II.E discusses *Al Maqaleh v. Gates*, involving the application of *Boumediene* to detainees held at Bagram Airbase in Afghanistan.

Part III.A discusses how *Al Maqaleh* was decided contrary to the expectations of both proponents and critics of the *Boumediene* decision. Part III.B follows with a discussion of the potential for diverging application of the *Boumediene* factors and how this divergence played out at the district court and circuit court levels in *Al Maqaleh*. In addressing these concerns, Part III.C contends that the site of detention and apprehension factors should be considered in tandem, so as to prevent the Executive from using geography to thwart the purpose of the writ. Part III.D argues further that the practical obstacles inherent in granting the writ should not be allowed to forestall access to the writ, suggesting instead that such obstacles be considered in determining what form habeas proceedings should assume. Additionally, Part III.E asserts that the length of a detainee's detention, both potential and realized, should be expressly included as a factor alongside those cataloged in *Boumediene*. Part III.F then applies the proposed approach to a hypothetical prisoner captured and detained in circumstances roughly paralleling those of the petitioners in *Al Maqaleh*.

II. OVERVIEW

A. 9/11, the War on Terror, and the Roots of the Detainee Problem

The terrorist attack on September 11, 2001 was the deadliest ever carried out on United States soil.¹⁸ The last of the four hijacked planes crashed in Pennsylvania around 10:02 a.m. that morning.¹⁹ By 2:40 p.m. that afternoon, Secretary of Defense Donald Rumsfeld had stated: "Need to move swiftly Near term target needs—go massive—sweep it all up, things related and not."²⁰ Jotted down by a policy official responsible for crisis planning, this quote, among others, has been used to attribute an early desire to attack Iraq to Secretary Rumsfeld and to the Bush administration as a whole.²¹ It also reflected the extent to which the administration perceived a necessity for acting swiftly to initiate a general "war on terror."²² The administration's response

18. NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT 311 (2004) [hereinafter 9/11 COMMISSION REPORT].

19. *Id.* at 14.

20. Julian Borger, *Blogger Bares Rumsfeld's Post 9/11 Orders*, THE GUARDIAN, Feb. 23, 2006, <http://www.guardian.co.uk/world/2006/feb/24/freedomofinformation.september11>.

21. *Id.*

22. See Address Before a Joint Session of the Congress on the United States Response to the Terrorist Attacks of September 11, 37 WEEKLY COMP. PRES. DOC. 1347, 1348–49 (Sept. 20, 2001) (stating that the "war on terror" would be waged against not only al Qaeda but also against any "terrorist group of global reach").

was not only aimed at an indefinite number of targets but also was acknowledged as indefinite in duration.²³

1. The Declaration of the War on Terror and the AUMF

In the weeks following the attacks, action matched words as American and NATO forces moved to topple al Qaeda's Taliban protectors from power in Afghanistan.²⁴ United States forces operated under the auspices of the Authorization for Use of Military Force (AUMF), which granted the President authority to use "all necessary and appropriate force" against those who were in any way involved in the attacks.²⁵ The AUMF assigns the President these powers not just as a punitive or retaliatory measure but also "to prevent any future acts of international terrorism against the United States by such nations, organizations or persons."²⁶

Coined Operation Enduring Freedom, the effort in Afghanistan was successful in removing the Taliban by December 2001.²⁷ But the war on terror, as President Bush had foreshadowed, was far from over, and the AUMF's authorization of force to prevent future acts of terrorism now became the main focus of the war's efforts.²⁸ In furtherance of this goal of prevention, American intelligence and Special Operations Forces began capturing suspected terrorists in Afghanistan and elsewhere around the globe.²⁹ These global operations, sometimes labeled "snatch and grab" missions, were necessitated by the global scope of al Qaeda's networks.³⁰

23. Address Before a Joint Session of the Congress on the State of the Union, 43 WEEKLY COMP. PRES. DOC. 57, 62 (Jan. 23, 2007) ("The war on terror we fight today is a generational struggle that will continue long after you and I have turned our duties over to others.")

24. Michael R. Gordon, *A Nation Challenged: Military Analysis; First of the Stinging Jabs*, N.Y. TIMES, Oct. 21, 2001, at A1.

25. Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 note).

26. *Id.* The effect of a such an expansive congressional grant of authority to the President is discussed in Justice Jackson's now famous concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-38 (1952) (Jackson, J., concurring). Justice Jackson attempted to untangle the knotty problem of delimiting presidential wartime powers by reference to the existence or absence of congressional authorization for the conduct in question. *Id.* The President's "authority is at its maximum" when acting "pursuant to an express or implied authorization of Congress." *Id.* at 635. On the other hand, the President is constrained to exercise only his own inherent powers when operating without congressional authorization, and "his power is at its lowest ebb" when acting in defiance of Congress. *Id.* at 637. Justice Jackson proffered these three general categories as a heuristic to guide courts in the assessment of presidential acts for constitutionality. *Id.* at 634-35.

27. See Alexandra Poolos, *Afghanistan: Seizure of Kabul Catches World by Surprise*, INS NEWS (Nov. 13, 2001), <http://www.insnews.org/world/focus/1101/kabul.world.reaction.report1.htm> (describing how the Taliban had retreated from Kabul after U.S. airstrikes).

28. See SEYMOUR M. HERSH, CHAIN OF COMMAND: THE ROAD FROM 9/11 TO ABU GHRAIB 128-45 (2009) (describing U.S. military efforts to attack the Taliban after their retreat from Kabul).

29. *Id.* at 16-17 (reporting that the Department of Defense was authorized to establish a "specially recruited clandestine team of Special Forces operatives and others who would defy diplomatic niceties and international law and snatch—or assassinate, if necessary—identified 'high value' al Qaeda operatives anywhere in the world").

30. See *id.* at 264-65 (discussing Secretary of Defense Donald Rumsfeld's strategy to deploy Special Operations Forces in a global manhunt to deal with prospective terrorist threats). For a primer on al Qaeda's global terror network, see generally 9/11 COMMISSION REPORT, *supra* note 18, at 47-70.

Though lacking explicit mention of detention, the AUMF has been held by the Supreme Court to, at the very least, authorize the detention of those who were “part of or supporting forces hostile to the United States or coalition partners in Afghanistan and who engaged in an armed conflict against the United States there.”³¹ This power has been implied from the AUMF’s authorization of the use of “necessary and appropriate force,” since “detention to prevent a combatant’s return to the battlefield is a fundamental incident of waging war.”³²

2. Guantanamo and the *Eisentrager* Rationale

In January 2002, twenty Taliban and al Qaeda members captured in Afghanistan arrived in Guantanamo Bay, Cuba.³³ Before that, Guantanamo’s most recent foray into the headlines had been its brief use as a camp for HIV-positive Haitian refugees, which had ended in 1993 after a federal court ruled that its operations were unconstitutional.³⁴ By mid-2003, a peak total of 680 detainees from all over the globe were being held at Guantanamo.³⁵ As of November 2010, 174 detainees remained.³⁶

The United States first came into possession of Guantanamo Bay in 1898 as an incident to the Spanish-American War.³⁷ The lease agreement with Cuba was reached in February of 1903, and was intended “[t]o enable the United States to maintain the independence of Cuba, and to protect the people thereof, as well as for its own defense.”³⁸ The base was to be used “as coaling or naval stations only, and for no other purpose.”³⁹ Although Cuba retained ultimate sovereignty over the land on which the base was located, the United States would enjoy “complete jurisdiction and control over” the base itself.⁴⁰ A subsequent treaty signed in 1934 gave the United States, but

31. *Hamdi v. Rumsfeld*, 542 U.S. 507, 516 (2004) (internal quotation marks omitted).

32. *Id.* at 519. The National Defense Authorization Act for Fiscal Year 2012 reaffirms the AUMF’s grant of authority for indefinite detention. National Defense Authorization Act for Fiscal Year 2012, H.R. 1540, 112th Cong. § 1021 (2011) (enacted). Covered persons who may be so detained include members of al Qaeda and the Taliban and “associated forces.” *Id.* § 1021(b). Covered persons may be detained for the duration of hostilities. *Id.* § 1021(c). President Obama’s signing statement also explicitly confirms the Secretary of Defense’s broad discretion to assess whether detainee status determination procedures meet the requirements of the Act. President Barack Obama, Statement by the President on H.R. 1540 (Dec. 31, 2011), available at <http://www.whitehouse.gov/the-press-office/2011/12/31/statement-president-hr-1540>.

33. *Guantanamo Bay Timeline*, WASH. POST, <http://projects.washingtonpost.com/guantanamo/timeline> (last visited Mar. 10, 2012).

34. *Haitian Ctrs. Council, Inc. v. Sale*, 823 F. Supp. 1028, 1041–42 (E.D.N.Y. 1993) (extending due process rights to Haitian refugees who had been “screened in” out of fear of HIV infection; due process rights were extended based on refugees’ detention by American personnel), *abrogated by Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155 (1993).

35. Ted Conover, *In the Land of Guantanamo*, N.Y. TIMES, June 29, 2003, § 6, at 40.

36. Carol J. Williams, *Guantanamo Military Procedures at a Standstill*, L.A. TIMES, Nov. 3, 2010, <http://articles.latimes.com/2010/nov/03/nation/la-na-gitmo-20101103>.

37. *A Historical Look at Guantanamo Bay and the Northeast Gate*, JOINT TASK FORCE GUANTANAMO, <http://www.jtfgtmo.southcom.mil/community/history.html> (last visited Mar. 10, 2012).

38. *Lease of Lands for Coaling and Naval Stations, U.S.-Cuba*, Feb. 23, 1903, T.S. No. 418.

39. *Id.* art. II.

40. *Id.* art. III.

not Cuba, the right to terminate the lease unilaterally at any point in the future.⁴¹ The leasehold was, and remains to this day, indefinite in duration.⁴²

The detention facility at Guantanamo was established in reliance on legal counsel advising that no federal courts could entertain habeas petitions by prisoners held there.⁴³ That advice, captured in a December 2001 memo emanating from the White House Office of Legal Counsel (OLC),⁴⁴ predicted that federal courts were likely to find themselves without jurisdiction over Guantanamo because the facility was beyond the sovereign territory of the United States.⁴⁵ This conception of habeas jurisdiction arose from the OLC's interpretation of a 1950 Supreme Court holding in *Johnson v. Eisentrager*,⁴⁶ which the OLC read to bar any such jurisdiction beyond U.S. sovereign territory.⁴⁷ The government's position was that since Guantanamo was also outside U.S. sovereign territory, any habeas petitions by detainees would be dealt with in the same way.⁴⁸

The Court in *Eisentrager* was faced with habeas petitions brought by twenty-one German nationals captured in China in the closing days of World War II.⁴⁹ The petitioners had been serving the German armed forces as members of civilian agencies in China and had gathered intelligence on American efforts for the Japanese "after surrender of Germany and before surrender of Japan."⁵⁰ Following Japan's surrender, the petitioners were taken into U.S. custody.⁵¹ After their conviction by a U.S. Military Commission in China, they were repatriated to Germany to serve their sentences in Landsberg Prison.⁵² The incarceration was under the direct supervision of an American commandant and U.S. forces, but ultimate authority rested with the Allied Forces (as was true of all occupied Germany).⁵³ Before this military tribunal, the prisoners were "formally accused of violating the laws of war and fully informed of particulars of these charges."⁵⁴ The convictions were reviewed and affirmed by a "military reviewing authority."⁵⁵

41. See Treaty Defining Relations with Cuba, U.S.-Cuba, art. III, May 29, 1934, 48 Stat. 1682 (stating that the lease will continue "[s]o long as the United States of America shall not abandon the . . . naval station").

42. See *id.* (not announcing any definite term for the lease arrangement).

43. Memorandum from Patrick F. Philbin & John C. Yoo, Deputy Assistant Attorneys Gen., Office of Legal Counsel, U.S. Dep't of Justice, to William J. Haynes, II, Gen. Counsel, U.S. Dep't of Def., Possible Habeas Jurisdiction over Aliens Held in Guantanamo Bay, Cuba 9 (Dec. 28, 2001) [hereinafter Philbin & Yoo Memo], available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/01.12.28.pdf>.

44. *Id.*

45. *Id.* at 3.

46. 339 U.S. 763 (1950).

47. Philbin & Yoo Memo, *supra* note 43, at 1-2.

48. See *id.* at 1.

49. *Eisentrager*, 339 U.S. at 765-66.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.* at 768.

54. *Id.* at 786.

55. *Id.* at 766.

The *Eisenrager* Court emphasized that, although American law generally treated aliens generously, nonresident enemy aliens did not have access to Article III courts, at least for the duration of hostilities.⁵⁶ When determining whether an alien can demand access to U.S. courts, some connection with the territorial jurisdiction of the United States must be established in order to arrive at an affirmative answer.⁵⁷ The Court also stressed that “the doors of [U.S.] courts have not been summarily closed upon these prisoners.”⁵⁸ Rather, the Germans were provided with counsel and were allowed to advance any argument available to them as to why they should not have been treated as nonresident enemy aliens.⁵⁹ Further, the Court fully considered those arguments as well as any that the Court saw as potentially bearing on the issues to be decided.⁶⁰

An essential predicate to understanding the *Eisenrager* decision is awareness of its reading of the habeas statute that was in effect in 1950.⁶¹ In *Ahrens v. Clark*,⁶² the Supreme Court held that a district court’s statutory jurisdiction to issue the writ ran only to the geographical limits of its district.⁶³ Additionally, it was the prisoner that had to be within the territorial jurisdiction of the district court.⁶⁴ Given that production of the prisoner was considered to be required by the statute, the Court found it unlikely that Congress had contemplated the logistical difficulties inherent in transporting prisoners from “remote sections.”⁶⁵ In *Ahrens*, the District Court for the District of Columbia was held without jurisdiction to issue the writ to the “remote” petitioners being held for deportation at Ellis Island.⁶⁶

B. *The Constitutional and Statutory Facets of the Writ*

1. The Constitutional Convention

The Constitution’s Suspension Clause prohibits Congress from suspending the writ of habeas “unless when in Cases of Rebellion or Invasion the public Safety may require it.”⁶⁷ In drafting the Suspension Clause, the Constitutional Convention debates centered almost entirely upon the means of its preservation and the barriers to its

56. *Id.* at 776 (citing *Bell v. Chapman*, 10 Johns. 183 (N.Y. Sup. Ct. 1813); *Jackson v. Decker*, 11 Johns. 418 (N.Y. Sup. Ct. 1814); *Clarke v. Morey*, 10 Johns. 69, 74–75 (N.Y. Sup. Ct. 1813)).

57. *Id.* at 771 (citing *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886)).

58. *Id.* at 780.

59. *Id.* at 780–81.

60. *Id.*

61. *See* 28 U.S.C. § 452 (1940) (providing that, in pertinent part, “The several justices of the Supreme Court and the several judges of the circuit courts of appeal and of the district courts, within their respective jurisdictions, shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of restraint of liberty”).

62. 335 U.S. 188 (1948).

63. *Ahrens*, 335 U.S. at 190.

64. *Id.* at 190–91 (citing *Walker v. Johnston*, 312 U.S. 275 (1941)).

65. *Id.* at 191.

66. *Id.* at 189.

67. U.S. CONST. art. I, § 9, cl. 2.

suspension.⁶⁸ As to the power of suspension, there were those who opposed granting such a power to any branch of the government on the ground that it created a danger of tyranny.⁶⁹ The Clause passed on a vote of seven to three, however, mostly in the language proposed by Pennsylvanian Governor Morris.⁷⁰

Absent at the Convention was any sign of disagreement over the scope or reach of the writ.⁷¹ This absence is conspicuous to modern readers and indicates that there was a generally accepted understanding of the writ's scope among the attendees of the Convention.⁷² Such a common understanding can only have arisen by way of the Framers' common experience with the writ under English law.⁷³ This was especially true in light of the mixed reception and uneven application of habeas corpus under the colonial governments.⁷⁴

2. English Common Law Roots

Arising from humble origins, the English writ of habeas corpus eventually came to serve as the procedural backbone of the Magna Carta's decree that "no free man shall be seized or imprisoned . . . except by the lawful judgment of his equals or by the law of the land."⁷⁵ It was in this capacity that it was deemed the "Great Writ."⁷⁶ When the Magna Carta was set down in 1215, however, the writ did not function as an "original" writ, creating jurisdiction for a court;⁷⁷ nor did it serve as a vehicle for enforcement of the Magna Carta's prohibition against arbitrary imprisonment.⁷⁸ During

68. Eric. M. Freedman, *The Suspension Clause in the Ratification Debates*, 44 *BUFF. L. REV.* 451, 461–65 (1996).

69. *See id.* at 456–57 (arguing that placing the power of suspension in the hands of the federal government would be "an engine of oppression"). One argument, advanced by Luther Martin of Maryland, along with others, was that the suspension power should reside with the States, rather than the central government. *Id.* at 456. Another argument, attributed to Mr. Rutledge of South Carolina, was that there was unlikely to ever be a need for suspension of the writ. *Id.* Both arguments were in the minority. *Id.* at 457.

70. *Id.* at 456.

71. *Id.* at 458.

72. *Id.* at 459–60.

73. *See* James Robertson, *2007 James McCormick Mitchell Lecture: Quo Vadis, Habeas Corpus?*, 55 *BUFF. L. REV.* 1063, 1071–73 (2008) (asserting that the founding generation, due to its shared history, had the full knowledge of habeas corpus's common law origins in England and incorporated that understanding into the Suspension Clause).

74. *See* LEONARD W. LEVY, *ORIGINS OF THE BILL OF RIGHTS*, 56–65 (1999) (detailing pre-constitutional habeas corpus in the thirteen original states). Although all of the states had imported the common law writ in judicial practice, only five states constitutionally guaranteed it, with an additional two states doing so by statute. *Id.* at 63–64.

75. *MAGNA CARTA*, c. 39 (1215). The phrase "law of the land" came to be understood as "due process of law" by the fourteenth century in England. Larry May, *Magna Carta, the Interstices of Procedure, and Guantanamo*, 42 *CASE W. RES. J. INT'L. L.* 91, 98–99 (2009).

76. *See* Robertson, *supra* note 73, at 1066–67 (discussing how it was not until more than a century after it was written that the Magna Carta became known as the Great Writ against arbitrary government imprisonment).

77. 3 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* *129–32.

78. Robertson, *supra* note 73, at 1067. It is a common misperception that habeas corpus was established by the Magna Carta, but such became accepted wisdom as early as the seventeenth century, fostered by the writ's association with individual liberty. LEVY, *supra* note 74, at 50.

this period, habeas corpus existed in a variety of forms that merely ordered the production of a prisoner for a particular reason.⁷⁹ The term “habeas corpus” itself translates roughly as “you have the body,” the phrase serving as a precursor to a request for the production of that body.⁸⁰

Ironically, this legal device, which became best known as a safeguard against executive excesses, originated as an expression of the royal prerogative of the King.⁸¹ Habeas corpus was designed as a conduit to transfer some sliver of the King’s authority to the members of the King’s Bench.⁸² This transfer equipped the jurists of the King’s Bench with a trump card in power struggles with the other courts of the realm.⁸³ As a component of the royal prerogative, this authority was viewed as “both within and beyond [the] law,” and was based, not in a conception of individual rights, but on the power of the King to control the conduct of his agents and to grant mercy upon his subjects.⁸⁴

The birth of *habeas corpus ad subjiciendum* in the early fourteenth century evolved to become the first form of the writ that required the prisoner’s jailers to state a reason for the detention.⁸⁵ Rather than requiring a petition initiated by one of the courts, *habeas corpus ad subjiciendum* provided the prisoner a means by which he himself could challenge the legality of his detention, even if that detention was at the behest of the King.⁸⁶ If the court was faced with a prisoner’s petition presenting a prima facie case of arbitrary imprisonment, continued detention was dependent on a royal officer producing a “return”—a document stating adequate reasons for the detention.⁸⁷ In the Star Chamber Act of 1641, Parliament resolved lingering doubts as to the scope of the writ by explicitly authorizing the courts to require such returns from jailers in order to maintain a prisoner’s detention, even when that detention was upon orders of the King.⁸⁸

Despite the gradual strengthening of the writ as a restraint on the royal prerogative, its operation was at times frustrated by various dilatory tactics.⁸⁹ One of

79. Marc D. Falkoff, *Back to Basics: Habeas Corpus Procedures and Long-Term Executive Detention*, 86 DENV. U. L. REV. 961, 966–67 (2009).

80. Robertson, *supra* note 73, at 1066.

81. See Colin William Masters, *On Proper Role of Federal Habeas Corpus in the War on Terrorism: An Argument from History*, 34 J. LEGIS. 190, 193 (2008) (noting that initially only the King could petition for a writ of habeas corpus, and later prisoners had to petition the Crown for a writ).

82. Paul D. Halliday & G. Edward White, *The Suspension Clause: English Text, Imperial Contexts, and American Implications*, 94 VA. L. REV. 575, 630 (2008).

83. Falkoff, *supra* note 79, at 967–68.

84. Halliday & White, *supra* note 82, at 601, 607.

85. ROBERT S. WALKER, *THE CONSTITUTIONAL AND LEGAL DEVELOPMENT OF HABEAS CORPUS AS THE WRIT OF LIBERTY* 20–21 (1960).

86. Helen A. Nutting, *The Most Wholesome Law—The Habeas Corpus Act of 1679*, 65 AM. HIST. REV. 527, 529–30 (1960).

87. WALKER, *supra* note 85, at 60–61.

88. 16 Car. 1, c. 10, § 8 (Eng.).

89. Nutting, *supra* note 86, at 529–31. Some of these tactics included mere delay on the part of the issuing judges, *id.* at 531–32, and referring petitions to the attorney general or the King’s Privy Council for approval before issuance. *Id.* at 530. Also, jailers would often fail to respond to the first or second writ, as there was no penalty for ignoring the first two issued. *Id.* Such actions could seriously delay review of the writ,

the more detrimental methods of accomplishing this delay was the transportation of prisoners beyond the reach of the courts.⁹⁰ This led Parliament (in the face of several dissolutions ordered by Charles II) to pass what has come to be known as the Habeas Corpus Act of 1679.⁹¹ The Act codified the writ as a supplement to the common law writ and streamlined procedures to eliminate delay to the extent possible.⁹² Most importantly, it prohibited the use of transportation to geographically remove a prisoner from the reach of the writ.⁹³ This overriding policy concern was reflected in the title of the statute as passed by Parliament: “An Act for the better securing the Liberty of the Subject and for Prevention of Imprisonments beyond the Seas.”⁹⁴

After the passage of the Act of 1679, habeas corpus became a matter of routine, with the evasive maneuvering that characterized its earlier history becoming something of an anachronism.⁹⁵ The writ had been solidified as a safeguard of liberty through the combined efforts at different times of the King, Parliament, and the courts. Any subject could invoke it, and it was not to be trifled with by the expediency of moving prisoners around. It was this robust conception of the writ that found itself imported across the Atlantic to the former American colonies and their Constitution in 1789.

3. Statutory Habeas and the American Understanding of the Writ

Although the Suspension Clause acts to restrain Congress from suspending the writ of habeas corpus except in prescribed circumstances, the Constitution does nothing to affirmatively provide for the existence of habeas. In *Ex parte Bollman*,⁹⁶ Chief Justice Marshall declared that the common law did not bestow upon the federal courts jurisdiction to grant the writ of habeas corpus, but rather such jurisdiction had to arise from an act of Congress.⁹⁷ Chief Justice Marshall argued that the requisite, jurisdiction-granting “written law” at the time could be found in the Judiciary Act of 1789,⁹⁸ but he did not elaborate on whether Congress was *obliged* to create such jurisdiction.⁹⁹ In *INS v. St. Cyr*,¹⁰⁰ Justice Stevens attempted to clarify this area of uncertainty by reading Marshall’s comments to mean that “the Clause was intended to preclude any possibility that ‘the privilege itself would be lost’ by either the inaction or the action of

as several weeks usually passed before subsequent writs were issued. *Id.* Even greater delay could ensue if the process carried on into a vacation, requiring the petitioner to wait until the next assizes. *Id.* Additionally, respondents who resorted to threatening the lives of issuing officials were not unknown. *Id.* at 531.

90. *Id.* at 531–32.

91. See 31 Car. 2, c. 2 (Eng.) (opening with a “Recital that Delays had been used by Sheriffs in making Returns of Writs of Habeas Corpus, &c.” that cataloged ills that Parliament intended Act to redress).

92. *Id.* § 1.

93. *Id.* § 12.

94. *Id.* § 1.

95. LEVY, *supra* note 74, at 54.

96. 8 U.S. (4 Cranch) 75 (1807).

97. *Bollman*, 8 U.S. (4 Cranch) at 93–94.

98. *Id.* at 94.

99. *Id.*

100. 533 U.S. 289 (2001).

Congress.”¹⁰¹ This would mean that Congress is bound by the Suspension Clause to provide a statutory basis for habeas, and is not free to exercise its discretion so as to decline to do so.¹⁰²

Regardless of whether such an obligation exists, Congress has consistently acted to provide a statutory basis for habeas corpus. As mentioned previously, the first jurisdiction-granting statute in American history, the Judiciary Act of 1789, did just that in its fourteenth section.¹⁰³ The 1867 Habeas Corpus Act built on this foundation in granting federal courts jurisdiction, “in addition to the authority already conferred by law,” to grant writs of habeas corpus in “all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States.”¹⁰⁴ Today’s habeas corpus statute¹⁰⁵ frames the federal courts’ jurisdiction in the negative, stating that the writ “shall not extend to a prisoner unless . . . [h]e is in custody in violation of the Constitution or laws or treaties of the United States.”¹⁰⁶

In order to protect individual liberty, habeas corpus serves as a guarantor of the separation of powers. The writ itself acts as an obvious check on the Executive.¹⁰⁷ The Suspension Clause also limits Congress’s ability to cut off access to the writ.¹⁰⁸ This Clause itself, however, is viewed by various scholars as operating in two different ways. One view sees the Clause as exclusively curtailing congressional power, as opposed to establishing an individual right.¹⁰⁹ By this view, the petitioner and his individual circumstances are irrelevant to the scope of the writ, and the limitation on congressional power is akin to the prohibition on bills of attainder and ex post facto laws.¹¹⁰ Under this view, the Clause is a “categorical limitation” on the power of Congress, and “any act in violation of the Suspension Clause is void.”¹¹¹ The

101. *St. Cyr*, 533 U.S. at 304 n.24 (quoting *Bollman*, 8 U.S. (4 Cranch) at 95) (noting that “the Founders ‘must have felt, with peculiar force, the obligation’ imposed by the Suspension Clause”).

102. *Id.*

103. Judiciary Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 73, 81–82 (providing, in pertinent part, “[t]hat all the before-mentioned courts of the United States, shall have power to issue writs of *scire facias*, *habeas corpus*, . . . and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law”).

104. Habeas Corpus Act of 1867, ch. 28, 14 Stat. 385, 385 (1867). The primary effect of this Act was to open federal courts to habeas petitions from state prisoners. Larry W. Yackle, *Form and Function in the Administration of Justice: The Bill of Rights and Federal Habeas Corpus*, 23 U. MICH. J.L. REFORM 685, 695–98 (1990).

105. 28 U.S.C. § 2241 (2006).

106. *Id.* § 2241(c)(3).

107. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 554–55 (2004) (Scalia, J., dissenting) (describing the protection provided in habeas corpus as being at “[t]he very core of liberty secured by our Anglo-Saxon system of separated powers,” which includes “freedom from indefinite imprisonment at the will of the Executive”); THE FEDERALIST NO. 84 (Alexander Hamilton) (“It is unthinkable that the Executive could render otherwise criminal grounds for detention noncriminal by disclaiming an intent to prosecute, or by asserting that it was incapacitating dangerous offenders rather than punishing wrongdoing.”).

108. See Freedman, *supra* note 68, at 468 (concluding that the Suspension Clause protects against congressional interference with federal and state courts’ ability to release prisoners through habeas corpus).

109. *Boumediene v. Bush*, 476 F.3d 981, 995–96 (D.C. Cir. 2007) (Rogers, J., dissenting).

110. *Id.* at 996–97.

111. *Id.* at 997 (citing *United States v. Lovett*, 328 U.S. 303, 315 (1946) (holding that bills of attainder are categorically prohibited by the Constitution, regardless of their form)).

alternative view is that the Clause is an affirmative grant of power to the government to foreclose exercise of the habeas privilege, with the availability of the writ inviolable absent a legitimate exercise of that power.¹¹² This view holds that jurisdiction over a habeas petition may exist even though the petitioner is not entitled to relief on the merits.¹¹³ Regardless of the differences between these two competing visions of habeas, they concur in their emphasis on the necessity of the writ to prevent the detention of prisoners upon executive whim.¹¹⁴

C. *Habeas Petitions by Detainees and the Congressional Response*

1. Challenges by Citizen Detainees

In 2004, the Supreme Court issued its ruling in *Hamdi v. Rumsfeld*,¹¹⁵ holding that, although the AUMF did authorize executive detention of enemy combatants,¹¹⁶ citizen-detainees were entitled to use habeas corpus as a procedural mechanism to obtain the due process necessary to justify their classification as such combatants.¹¹⁷ The Court held the AUMF authorized, as an “incident to war,” detention of Taliban fighters for the duration of hostilities against that group in Afghanistan, but not “indefinite detention.”¹¹⁸ The Court expressed concern that the “broad and malleable” nature of the war on terror does not lend itself to the concept of a firm end date and, thus, raises the specter of indefinite detention for those situated similarly to Hamdi.¹¹⁹ In *Hamdi*, the due process owed the petitioners overcame the government interest in protecting the wartime presidential prerogative,¹²⁰ and the petitioner was entitled to “notice of the factual basis for his classification, and a fair opportunity to rebut the Government’s factual assertions before a neutral decisionmaker.”¹²¹

The circumstances surrounding Hamdi’s capture in Afghanistan served as an important predicate to the Court’s ruling. Hamdi had fought against U.S. forces under the Taliban banner and had been captured on the battlefield, armed with a Kalishnoikov assault rifle.¹²² Even though such circumstances justified initial capture and detention under the AUMF, the Court insisted that, given Hamdi’s denials of allegiance to the Taliban, he was entitled to a meaningful fact-finding process before a court of law to

112. Stephen I. Vladeck, *The Suspension Clause as a Structural Right*, 62 U. MIAMI L. REV. 275, 302 (2008).

113. *Id.* at 302–03; *see also* Johnson v. Eisentrager, 339 U.S. 763, 792 (1950) (Black, J., dissenting) (citing Bell v. Hood, 327 U.S. 678, 682–83 (1946); *Ex parte* Kawato, 317 U.S. 69, 71 (1942)).

114. *See* Chad DeVeaux, *Rationalizing the Constitution: The Military Commissions Act and the Dubious Legacy of Ex Parte Quirin*, 42 AKRON L. REV. 13, 22–23 (2009) (discussing the need to prohibit executive and legislative branches from redefining separation of powers based on perceived emergencies).

115. 542 U.S. 507 (2004).

116. *Hamdi*, 542 U.S. at 516–18.

117. *Id.* at 533.

118. *Id.* at 518, 521.

119. *Id.* at 520.

120. *Id.* at 535.

121. *Id.* at 533.

122. *Id.* at 513.

assess the legitimacy of his enemy combatant status.¹²³ The notion of a “heavily circumscribed role for the courts” in the war-making context was rejected as an overly broad protection of the separation of powers.¹²⁴

Stepping outside of the Guantanamo context, the Supreme Court also ruled in *Munaf v. Geren*¹²⁵ that federal courts had jurisdiction under the habeas statute, 28 U.S.C. § 2241(c)(1), over such petitions filed by American citizens detained in Iraq.¹²⁶ The *Munaf* Court rejected the government’s arguments that habeas jurisdiction was precluded by the fact that the detaining American forces were operating as part of a multinational coalition.¹²⁷ The *Munaf* petitioners were U.S. citizens who had been detained as alleged insurgents by the Multinational Force–Iraq (MNF-I).¹²⁸ Noting that § 2241(c)(1) requires only that a person be held “in custody under or by color of the authority of the United States,”¹²⁹ Chief Justice Roberts upheld habeas jurisdiction arising from the fact that the detainees were in the “immediate physical custody” of American soldiers and that the multinational force itself was subordinate to a “unified American command.”¹³⁰

2. *Rasul*—Non-Citizen Detainees at Guantanamo

On the same day that the *Hamdi* ruling came down, the Supreme Court ruled on the habeas petitions of Shafiq Rasul, a Kuwaiti citizen, and thirteen other detainees (eleven Kuwaitis and two Australians) captured during fighting with the Taliban.¹³¹ The petitioners in *Rasul v. Bush*¹³² invoked the federal habeas corpus statute,¹³³ which grants the federal courts jurisdiction over prisoners held “in violation of the Constitution or laws or treaties of the United States.”¹³⁴ The government responded that the Executive was compelled by the circumstances to indefinitely detain the prisoners without legal process and that *Eisenstrager* controlled the outcome and foreclosed jurisdiction over the Guantanamo prisoners.¹³⁵ Any such jurisdiction, the argument

123. *Id.* at 533–34.

124. *Id.* at 535–36.

125. 553 U.S. 674, 680 (2008).

126. *Munaf*, 553 U.S. at 680.

127. *Id.* at 680, 686–688.

128. *Id.* at 681. The MNF-I consists of elements from twenty-six different nations, including the United States. *Id.* at 679. Operating under a United Nations mandate and at the request of the Iraqi government, it detains individuals suspected of “hostile or warlike acts in Iraq, pending investigation and prosecution in Iraqi courts under Iraqi law.” *Id.* at 674.

129. 28 U.S.C. § 2241(c)(1) (2006).

130. *Munaf*, 553 U.S. at 685 (quoting Brief for Federal Parties at 21, *Munaf v. Geren*, 553 U.S. 647 (2008) (Nos. 07-394, 06-1666), 2008 WL 205089, at *21) (internal quotation marks omitted).

131. *Rasul v. Bush*, 542 U.S. 466, 470–71 (2004).

132. 542 U.S. 466 (2004).

133. *Rasul*, 542 U.S. at 472.

134. 28 U.S.C. § 2241(c)(3).

135. Consolidated Brief for the Respondents at 13–14, 36, *Rasul v. Bush*, 542 U.S. 466 (2004) (No. 03-334); *Al Odah v. United States*, 552 U.S. 1307 (2008) (No. 03-343).

continued, would impermissibly violate separation of powers and intrude upon the Executive's discretion in conducting foreign and military affairs.¹³⁶

Writing for the majority, Justice Stevens disagreed that the Guantanamo detainees were sufficiently analogous to those in *Eisentrager*.¹³⁷ They were not enemy aliens in the same sense as the *Eisentrager* petitioners, they denied their combatant status, and they had not been charged with crimes of any sort or brought before a tribunal for such a purpose.¹³⁸ The Court went on to affirm that federal courts "have jurisdiction to determine the legality of the Executive's potentially indefinite detention of individuals who claim to be wholly innocent of wrongdoing."¹³⁹

Importantly, the opinion also reaffirmed that *Eisentrager* controlled only insofar as habeas petitioners relied on their constitutional entitlement to the writ.¹⁴⁰ *Braden v. 30th Judicial Circuit Court of Kentucky*¹⁴¹ had overruled *Ahrens* and disposed of the requirement of the prisoner's physical presence within the jurisdiction as an "invariable prerequisite" for district court jurisdiction over that prisoner's habeas petition.¹⁴² Thus, the "statutory predicate" for *Eisentrager* had been overruled and the Guantanamo petitioners need not argue that their entitlement to the writ was constitutionally mandated.¹⁴³ Relying on *Braden*, Justice Stevens decided *Rasul* on statutory grounds, holding that § 2241 provided statutory jurisdiction over habeas petitions emanating from Guantanamo.¹⁴⁴

3. Congress Responds to *Rasul*—The Detainee Treatment Act and the Military Commissions Act

Within a year of the decision, Congress responded, effectively overruling *Rasul* with the Detainee Treatment Act of 2005 (DTA).¹⁴⁵ Authored by Republican Senator Lindsey Graham of South Carolina, § 1005 of the DTA established Combatant Status Review Tribunals (CSRTs) to determine whether aliens could be properly deemed enemy combatants.¹⁴⁶ The CSRTs consisted of three commissioned officers and observed procedures established by the Secretary of Defense.¹⁴⁷ Before the CSRTs, the

136. *Id.* at 52–55.

137. *Rasul*, 542 U.S. at 476.

138. *Id.*

139. *Id.* at 485.

140. *Id.* at 476.

141. 410 U.S. 484 (1973).

142. *Braden*, 410 U.S. at 495, 499–500. See also *supra* notes 61–66 and accompanying text for a discussion of the habeas statute at the time of *Eisentrager* and its requirement that the petitioner be within the issuing court's jurisdiction.

143. *Rasul*, 542 U.S. at 478–79.

144. *Id.* at 479.

145. Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2680, 2739–42 (2005) (codified as amended in scattered sections of 10, 28, and 42 U.S.C.).

146. See *id.* § 1005(a), 10 U.S.C. § 801 note (2006) (directing the Secretary of Defense to promulgate procedures for the CSRTs within 180 days of the DTA's passage).

147. Memorandum from Paul Wolfowitz, Deputy Sec'y of Def., to the Sec'y of the Navy 1–3 (July 7, 2004), available at <http://www.defense.gov/news/Jul2004/d20040707review.pdf>.

rules of evidence did not hold sway¹⁴⁸ and the detainee was to be assisted by a military officer as a “personal representative.”¹⁴⁹

Under the DTA, the only review of CSRT determinations to be had was before the Court of Appeals for the District of Columbia Circuit.¹⁵⁰ That review was strictly limited to:

(i) whether the status determination of the [CSRT] with regard to such alien was consistent with the standards and procedures specified by the Secretary of Defense for [CSRTs] (including the requirement that the conclusion of the Tribunal be supported by a preponderance of the evidence and allowing a rebuttable presumption in favor of the Government’s evidence); and

(ii) to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to make the determination is consistent with the Constitution and laws of the United States.¹⁵¹

Thus, the DTA effectively stripped all federal courts, including the Court of Appeals for the D.C. Circuit, of any jurisdiction to review the substantive basis of a Guantanamo prisoner’s detention and relegated them to procedural inquiries.

The legislative cover provided by the DTA did not survive its initial challenge, brought by none other than Osama bin Laden’s chauffeur in *Hamdan v. Rumsfeld*.¹⁵² Salim Ahmed Hamdan had been determined by a CSRT to be an enemy combatant affiliated with al Qaeda and was faced with imminent trial before a military commission convened under the authority of President Bush.¹⁵³ The Court denied that the AUMF, the DTA, or the President’s Article II powers (or the three acting in concert) empowered the President to establish military commissions for the trying of offenses unrelated to violations of the laws of war.¹⁵⁴ In so ruling, the Court emphasized the constitutionally mandated division of labor between the Executive and Congress in military affairs, asserting that the President could not convene military commissions of the sort at issue absent explicit congressional authorization.¹⁵⁵

That congressional authorization was not long in coming, as the Military Commissions Act of 2006 (MCA)¹⁵⁶ was passed within less than four months of the *Hamdan* decision.¹⁵⁷ The MCA included many key proposals responding to *Hamdan*, which were presented by the President to the Senate.¹⁵⁸ The MCA amended § 2241(e)

148. *Id.* at 3.

149. *Id.* at 1.

150. Detainee Treatment Act of 2005 § 1005(e)(2)(A), 10 U.S.C. § 801 note.

151. *Id.* § 1005(e)(2)(C), 10 U.S.C. § 801 note.

152. 548 U.S. 557 (2006).

153. *Hamdan v. Rumsfeld*, 415 F.3d 33, 35–36 (D.C. Cir. 2005).

154. *Hamdan*, 548 U.S. at 594–95.

155. *Id.* at 612.

156. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006) (codified in scattered sections of 10, 18, 28, and 42 U.S.C.).

157. HOWARD BALL, BUSH, THE DETAINEES, AND THE CONSTITUTION: THE BATTLE OVER PRESIDENTIAL POWER IN THE WAR ON TERROR 184 (2007).

158. *Id.*

to strip all federal courts of any jurisdiction to entertain habeas petitions by aliens detained as enemy combatants or “awaiting such determination” by CSRTs.¹⁵⁹ This applied to any aliens detained as suspected enemy combatants since September 11, 2001 and was not limited by its terms to those at Guantanamo.¹⁶⁰ An amendment proposed by Republican Senator Arlen Specter to maintain habeas rights for all noncitizens detained by the United States was defeated 51–48.¹⁶¹

In *al-Marri v. Wright*,¹⁶² the Fourth Circuit held that a resident alien seized inside the United States on charges of affiliating with al Qaeda was entitled, unlike Mr. Hamdi, to the full panoply of “normal due process protections available to all within this country.”¹⁶³ Al-Marri was a Qatari citizen alleged to have trained with al Qaeda in Afghanistan before coming to the United States as a sleeper agent.¹⁶⁴ The Fourth Circuit ruled that indefinite military detention of al-Marri was inappropriate, as he was still a “civilian” and not an “enemy alien.”¹⁶⁵ Additionally, the AUMF was read to prohibit classification of civilians such as al-Marri as an “enemy combatant”;¹⁶⁶ nor was Section 7 of the MCA effective to foreclose habeas to petitioners inside the United States.¹⁶⁷ Underlying the court’s decision was a concern that the circumstances of al-Marri’s arrest were materially different than those surrounding the capture of Hamdi, in that they gave rise to a greater threat of arbitrary detention.¹⁶⁸

Congress and the White House had been stymied by *al-Marri* in their joint and several efforts to foreclose all habeas rights to petitioners detained by the United States. At the time that the MCA was passed, hundreds of habeas petitions had been filed by Guantanamo detainees.¹⁶⁹ Whether those petitions were reached by the Suspension Clause of the Constitution, however, remained a question. By eliminating any statutory jurisdiction over those petitions, the MCA had forced the Supreme Court into a constitutional corner.

159. Military Commissions Act of 2006 § 7(a), 28 U.S.C. § 2241(e) (2006).

160. *Id.* § 7(b), 28 U.S.C. § 2241 note.

161. Charles Babington & Jonathan Weisman, *Senate Approves Detainee Bill Backed by Bush*, WASH. POST, Sept. 29, 2006, at A01.

162. 487 F.3d 160 (4th Cir. 2007), *vacated en banc sub nom.* *al-Marri v. Pucciarelli*, 534 F.3d 213 (4th Cir. 2008), *vacated as moot sub nom.* *al-Marri v. Spagone*, 129 S. Ct. 1545 (2009).

163. *al-Marri v. Pucciarelli*, 534 F.3d 213, 273 (4th Cir. 2008).

164. *al-Marri*, 487 F.3d 160 at 164–165.

165. *Id.* at 192 (defining enemy aliens as “subject[s] of a foreign state at war with the United States” (internal quotation marks omitted) (quoting *Eisentrager*, 339 U.S. at 769 n.2)).

166. *Id.* at 188; *see also id.* at 186 (stating that “merely engaging in unlawful behavior does not make one an enemy combatant”).

167. *Id.* at 173.

168. *Id.* at 183 (“Al-Marri is not alleged to have been part of a Taliban unit, not alleged to have stood alongside the Taliban or the armed forces of any other enemy nation, not alleged to have even been on the battlefield during the war in Afghanistan, not alleged to have been in Afghanistan during the armed conflict there, and not alleged to have engaged in combat with United States forces anywhere in the world.”).

169. *See BALL*, *supra* note 157, at 141 (stating that by 2005, over 180 habeas actions were pending in U.S. federal courts).

D. *The Constitutional Writ and the Boumediene Decision*

1. The Supreme Court Takes up the Constitutional Gauntlet—*Boumediene v. Bush*

In *Boumediene v. Bush*,¹⁷⁰ the Court held that the Suspension Clause did indeed reach to noncitizen detainees held by the United States at Guantanamo Bay and that the MCA operated as an unconstitutional suspension of the writ as applied to those detainees.¹⁷¹ This holding repudiated the government's position that noncitizens detained by the United States outside its sovereign territory were bereft of constitutional rights, including the right to petition for a writ of habeas corpus.¹⁷²

From the outset, Justice Kennedy, writing for the majority, insisted that the Suspension Clause must be interpreted in light of the fact that it predated the Bill of Rights and thus possessed a "centrality" to the system devised by the Framers for the protection of individual liberties.¹⁷³ Justice Kennedy traced the "broad historical narrative of the writ and its function,"¹⁷⁴ concluding that it operated in England as a guarantor of separation of powers.¹⁷⁵ That separation was achieved by insuring that the King, as well as his subjects, was subservient to the law.¹⁷⁶

Although he discerned the broad function of the writ under English common law, Justice Kennedy was less successful in gleaning from the pre-Revolutionary sources any definitive answer as to the writ's geographic reach or its availability to foreign nationals.¹⁷⁷ Recognizing the inadequacy of the historical record in determining the exact reach of the writ,¹⁷⁸ the Court nonetheless rejected a de jure sovereignty test that would require the United States to possess plenary, unfettered jurisdiction.¹⁷⁹ In coming to this conclusion, the Court relied on the so-called *Insular Cases*, which addressed the application of the Constitution to U.S. territories that had not yet achieved statehood.¹⁸⁰ These cases, read together, developed the doctrine of territorial incorporation, which

170. 553 U.S. 723 (2008).

171. *Boumediene*, 553 U.S. at 733.

172. *Id.* at 739.

173. *Id.* The relevant act required that the prisoner be produced within a specified number of days of the filing of the writ, depending on the distance from the court. Habeas Corpus Act of 1867, ch. 28, 14 Stat. 385, 386 (current version at 28 U.S.C. § 2241 (2006)). It also codified the requirement of a return stating adequate grounds for detention, with release as the remedy in the absence of such a satisfactory return. *Id.* It also provided for a scale of fines for jailers acting in defiance of the Act. *Id.*

174. *Boumediene*, 553 U.S. at 746.

175. *Id.* at 742–43 (citing *Loving v. United States*, 517 U.S. 748, 756 (1996)) ("[e]ven before the birth of this country, separation of powers was known to be a defense against tyranny" (alteration in original)).

176. *Id.* at 741. Implicit in Justice Kennedy's reference to the King being beholden to the writ is the analogy of the King in pre-Revolutionary England to the Executive in the American system of government. *Id.*

177. *Id.* at 752.

178. *Id.* at 748.

179. *See id.* at 765 (denying that the lack of formal sovereignty renders the Constitution inapplicable by asserting that "[o]ur basic charter cannot be contracted away like [that]").

180. *Id.* at 756–57 (citing *Dorr v. United States*, 195 U.S. 138 (1904); *Hawaii v. Mankichi*, 190 U.S. 197 (1903); *De Lima v. Bidwell*, 182 U.S. 1 (1901); *Dooley v. United States*, 182 U.S. 222 (1901); *Armstrong v. Dooley v. United States*, 182 U.S. 243 (1901); *Downes v. Bidwell*, 182 U.S. 244 (1901)).

holds that the Constitution applies fully to incorporated territories destined for statehood.¹⁸¹ On the other hand, the doctrine also holds that the force of the Constitution in “unincorporated territories” is dependent on the circumstances of each case and the difficulties inherent therein.¹⁸²

Accepting this common-law, pragmatic approach to constitutional extraterritoriality, Justice Kennedy latched onto the most analogous precedent available: that which was provided by the facts of *Eisentrager*.¹⁸³ Drawing from the discussion of practical considerations in *Eisentrager*, the *Boumediene* opinion announced a set of factors that would be pertinent in determining the extraterritorial availability of the writ to noncitizens: “(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.”¹⁸⁴

The application of these factors to the petitioners started with the acknowledgment that, although the petitioners were indeed aliens, their status as enemy combatants was contested.¹⁸⁵ The CSRTs that designated them as such were held to be inferior to the process that the prisoners in *Eisentrager* were privy to.¹⁸⁶ Thus, the CSRTs, as established under the DTA, were held to be inadequate substitutes for habeas corpus.¹⁸⁷ Having rejected a de jure sovereignty test, Justice Kennedy found that, by the terms of its leasehold, the United States possessed de facto sovereignty over Guantanamo by virtue of its complete control and jurisdiction over the facility.¹⁸⁸ The practical obstacles inherent in extending the writ to prisoners held at Guantanamo were found to be far less onerous than those which would have been necessary for such an extension to Landsberg Prison in 1940s Germany.¹⁸⁹ The holistic analysis of the enumerated factors led the Court to conclude that the Suspension Clause “has full effect at Guantanamo Bay.”¹⁹⁰ Building upon this conclusion, the Court held that Section 7 of the MCA, as applied to the Guantanamo detainees, was unconstitutional, in that it suspended habeas corpus in a manner inconsistent with the Suspension Clause and without providing an adequate substitute.¹⁹¹

181. *Id.* at 757 (citing *Dorr v. United States*, 195 U.S. 138, 143 (1904)).

182. *Id.* at 757–58 (“[T]he real issue in the *Insular Cases* was not whether the Constitution extended to the Philippines or Porto Rico when we went there, but which of its provisions were applicable by way of limitation upon the exercise of executive and legislative power in dealing with new conditions and requirements.” (quoting *Balzac v. Porto Rico*, 258 U.S. 298, 312 (1922))).

183. *Id.* at 762.

184. *Id.* at 766.

185. *Id.*

186. *Id.* at 767.

187. *Id.*

188. *See id.* at 768–69 (“In every practical sense Guantanamo is not abroad; it is within the constant jurisdiction of the United States.” (citing *Rasul v. Bush*, 542 U.S. 466, 480, 487 (2004) (Kennedy, J., concurring))).

189. *Id.* at 770.

190. *Id.* at 771.

191. *Id.*

There is now no question that the Suspension Clause applies to detainees, citizens¹⁹² or otherwise,¹⁹³ who dispute their combatant status and who are held under a minimum threshold of U.S. control and jurisdiction. Congressional action to limit the reach of the Clause has been unsuccessful, at least regarding those detainees held at Guantanamo Bay.¹⁹⁴ Since the 2008 ruling in *Boumediene*, fifty-seven Guantanamo detainees have filed habeas petitions with federal courts.¹⁹⁵ Of the fifty-seven petitions sought before August 2011, thirty-seven have been granted, with twenty-three of those detainees whose petitions were granted still awaiting release.¹⁹⁶

E. The Movement of Detainees—and the Suspension Clause Question—to Bagram

1. The Transition from Guantanamo to Bagram

Many, if not most, of the suspected terrorists eventually held at Guantanamo passed through Bagram Theater Internment Facility in Afghanistan.¹⁹⁷ Guantanamo's detainee population has declined since its mid-2003 peak of 680 to 174 today.¹⁹⁸ At the same time, Bagram's detainee population has more than doubled since 2004, reaching around 750 by 2009.¹⁹⁹ Among the 750 are thirty-two detainees that were transferred from Guantanamo.²⁰⁰ The dwindling of transfers to Guantanamo chronologically corresponded to the burgeoning of Bagram's use as a detention facility.²⁰¹

Bagram Airbase is located approximately forty miles north of Kabul, and was captured by U.S. forces in late 2001.²⁰² Currently, U.S. possession of the facility legally rests on the Accommodation Consignment Agreement for Lands and Facilities at Bagram Airfield ("the Agreement"), dated September 28, 2006.²⁰³ The Agreement

192. See *supra* Part II.C.1 for a discussion of the citizen detainee cases.

193. See *supra* Parts II.C.2 and II.C.3 for a discussion of the noncitizen detainee cases.

194. See *supra* Part II.C.3 for a discussion of the legislation purporting to strip habeas jurisdiction in enemy combatant cases and the Supreme Court's rulings on its constitutionality.

195. *Guantanamo Habeas Scorecard*, CTR. FOR CONSTITUTIONAL RIGHTS, <http://www.ccrjustice.org/files/2011-02-03%20Habeas%20SCORECARD%20Website%20Version.pdf> (last updated Feb. 9, 2011).

196. *Id.*

197. *USA: Out of Sight, Out of Mind, Out of Court? The Right of Bagram Detainees to Judicial Review*, AMNESTY INT'L, 2 (Feb. 18, 2009), <http://www.amnesty.org/en/library/asset/AMR51/021/2009/en/00a5e86e-7c42-4117-ab55-d20eb7c9f344/amr510212009en.pdf>.

198. *Id.*; see also Williams, *supra* note 36 (reporting that a significant number of detainees at Guantanamo have yet to be released).

199. Alissa J. Rubin & Sangar Rahimi, *In Shift, U.S. Military Names 645 Detainees Held at Key Afghanistan Base*, N.Y. TIMES, Jan. 17, 2010, at A6.

200. Andrew Gumbel, *Bagram Detention Centre Now Twice the Size of Guantanamo*, THE INDEPENDENT, Jan. 8, 2008, <http://www.independent.co.uk/news/world/asia/bagram-detention-centre-now-twice-the-size-of-guantanamo-768803.html>.

201. *Id.*

202. Declaration of Charles A. Tennison at 3, Exhibit 1 to Respondents' Motion to Dismiss Petition for Writ of Habeas Corpus, *Al Maqaleh v. Gates*, 604 F. Supp. 2d 205 (D.D.C. 2009) (No. 1:08-cv-00952 (JDB)).

203. Accommodation Consignment Agreement for Lands and Facilities at Bagram Airfield, U.S.-Afg., Sept. 26, 2002 (attached as Exhibit A, Declaration of Charles A. Tennison at 11, Exhibit 1 to Respondents' Motion to Dismiss Petition for Writ of Habeas Corpus, *Al Maqaleh v. Gates*, 604 F. Supp. 2d 205 (D.D.C. 2009) (No. 1:08-cv-00952 (JDB))).

grants use of the base to the United States “without rental or any other consideration”²⁰⁴ and allows the U.S. to make whatever alterations to the premises that it deems necessary.²⁰⁵ Like the Guantanamo lease, the United States retains control over termination of the Agreement, and for its duration,²⁰⁶ “shall have exclusive, peaceable, [and] undisturbed . . . possession of the Premises . . . without any interruption whatsoever by the host nation or its agents.”²⁰⁷ The Agreement essentially gives the United States the same scope of control and jurisdiction over Bagram as that which it has over Guantanamo Bay.²⁰⁸

The detainees at Bagram are held within a complex known as the Bagram Theater Internment Facility.²⁰⁹ For the first eight years of its use, detainees were housed in a variety of arrangements, including razor wire pens,²¹⁰ wire cages accommodating up to fifteen individuals, and, occasionally, enclosed cells.²¹¹ Complaints of human rights violations have been raised regarding detainee treatment and conditions at Bagram,²¹² including the deaths of two inmates in December 2002.²¹³ The United States plans to

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

208. *Compare id.* (“The host nation hereby consents to the United States to have and to hold for the exclusive use of the United States Forces land, facilities, and appurtenances [sic] currently owned by . . . the host nation . . .”), *with* Lease of Lands for Coaling and Naval Stations, *supra* note 38 (providing that “under the terms of this agreement the United States shall exercise complete jurisdiction and control over and within said areas”).

209. Joint Brief for Petitioners at 4, *Al Maqaleh v. Gates*, 605 F.3d 84 (D.C. Cir. 2010) (Nos. 09-5265, 09-5266, 09-5277).

210. Tim Golden & Eric Schmitt, *A Growing Afghan Prison Rivals Bleak Guantanamo*, N.Y. TIMES, Feb. 26, 2006, § 1, at 11.

211. *Bagram: US Base in Afghanistan*, BBC NEWS, June 24, 2009, http://news.bbc.co.uk/2/hi/south_asia/4672491.stm.

212. *See generally* Golden & Schmitt, *supra* note 210 (summarizing complaints about Bagram, which have been focused primarily on overcrowding, inadequate resources due to flawed planning, and physical and mental abuse of detainees).

213. ALBERT T. CHURCH III, U.S. DEP’T OF DEF., REVIEW OF DEPARTMENT OF DEFENSE DETENTION OPERATIONS AND DETAINEE INTERROGATION TECHNIQUES 235 (2005), available at http://www.aclu.org/files/images/torture/asset_upload_file293_38710.pdf. The reported “abusive” behavior included the use of stress positions (for example, handcuffing the detainee’s hands behind his back and hanging him thereby from the ceiling, or forcing the detainee to hold heavy objects above his head for extended periods of time), sleep deprivation, beating, kicking, and “compliance blows” delivered to the detainees’ legs. *Id.* at 235. The behavior was severe and widespread enough to result in a recommendation of charges against twenty-eight soldiers at Bagram. *Id.* The Church Report was completed in March 2005, documenting an investigation into U.S. treatment of detainees headed by then Navy Staff Director Vice Admiral Albert T. Church. *See Pentagon Releases Whitewash Report on Detainee Abuse*, AM. CIVIL LIBERTIES UNION (July 3, 2006), <http://www.aclu.org/national-security/pentagon-releases-whitewash-report-detainee-abuse>.

The previously classified portions examining the two deaths discussed above were obtained via a 2009 Freedom of Information Act request by the American Civil Liberties Union. *Unredacted Church Report Documents (Previously Classified)*, AM. CIVIL LIBERTIES UNION (Feb. 11, 2009), http://www.aclu.org/human-rights_national-security/unredacted-church-report-documents-previously-classified; *see also* Josh Rogin, *Karzai’s Goals in Washington*, FOREIGN POLICY (May 10, 2010, 3:02 PM), <http://thecable.foreignpolicy.com/p>

build a new prison facility, costing at least \$60 million and possessing room for up to 1,100 detainees.²¹⁴

2. *Al Maqaleh*—Bagram Becomes Center Stage in the Detainee Controversy

In early 2009, the initial challenge to indefinite detention at Bagram came in front of the District Court for the District of Columbia. In *Al Maqaleh v. Gates*,²¹⁵ Judge Bates ruled that Section 7 of the MCA operated as an unconstitutional suspension of habeas corpus as it pertained to non-Afghan detainees held at Bagram.²¹⁶ The petitioners in *Al Maqaleh* were two Yemeni citizens, one Tunisian citizen, and one Afghan citizen, all of whom alleged that they were captured outside of Afghanistan before being moved to Bagram by the United States.²¹⁷ The district court viewed *Boumediene* as controlling, and construed that case as a rejection of Section 7 of the MCA as unconstitutional only “as applied.”²¹⁸ Since Section 7 had not been rejected as unconstitutional on its face, Judge Bates resorted to an application of the *Boumediene* factors to determine its constitutionality as applied to the Bagram petitioners.²¹⁹ After a “functional . . . detainee-by-detainee” analysis,²²⁰ Judge Bates ruled that the Suspension Clause protected the three non-Afghan detainees, but not the detainee who was a citizen of Afghanistan.²²¹

In applying the *Boumediene* factors, the district court first grouped citizenship, combatant status, and site of apprehension together as factors in which the petitioners were “situated no differently than the detainees in *Boumediene*.”²²² The court did concede that there was a meaningful distinction between those detainees captured inside Afghanistan prior to detention at Bagram and those captured in other countries.²²³ The court next turned to the “site of detention” factor and found U.S. control over Bagram somewhat less complete than that enjoyed at Guantanamo.²²⁴ The

osts/2010/05/10/karzais_goals_in_washington (relating concerns raised by Afghan President Hamid Karzai as to U.S. detention policies at Bagram and elsewhere in Afghanistan).

214. *Bagram: US Base in Afghanistan*, *supra* note 211. Currently, the Obama administration is considering repatriation of all non-Afghan prisoners to their home countries. Significantly, the administration has hinted that, in any event, it will retain a certain portion of the prisoners. The administration cites the potential for future terrorist activity and uncertain security in their home countries as reasons for this. Peter Finn & Julie Taylor, *Administration Looking Into Repatriating Non-Afghan Detainees at U.S.-run Prison*, WASH. POST, Jan. 23, 2012, available at http://www.washingtonpost.com/world/national-security/administrati-on-looking-into-repatriating-non-afghan-detainees-at-us-run-prison/2012/01/23/gIQAzsvsLQ_story.html.

215. 604 F. Supp. 2d 205 (D.D.C. 2009).

216. *Al Maqaleh*, 604 F. Supp. 2d at 235.

217. *Id.* at 209–10.

218. *Id.* at 213.

219. *Id.* at 214–15.

220. *Id.* at 209.

221. *Id.* at 235.

222. *Id.* at 217–18.

223. *Id.* at 220 (arguing that shutting off prisoners who had been rendered into a war zone from another country from habeas “resurrects the same specter of limitless Executive power the Supreme Court sought to guard against in *Boumediene*”).

224. *Id.* at 224.

difference, however, was considered less than material, as the United States still exercised a high degree of “objective” control over the Bagram detention facility.²²⁵

The Court of Appeals for the D.C. Circuit reversed the D.C. district court, even though it applied the same precedent to the facts in question.²²⁶ The court of appeals, in applying the *Boumediene* test, found that both the citizenship and status of the petitioners were materially equivalent to those of the *Boumediene* petitioners.²²⁷ In doing so, the court found that the lack of U.S. citizenship did not necessarily weigh against the petitioners.²²⁸ The process afforded the petitioners by the Unlawful Enemy Combatant Review Board²²⁹ employed at Bagram was ruled inferior to that enjoyed by the petitioners in both *Boumediene* and *Eisentrager*.²³⁰ After weighing the first three *Boumediene* factors, the court opined that Al Maqaleh and his fellow petitioners had “made a strong argument that the right to habeas relief and the Suspension Clause apply in Bagram as in Guantanamo.”²³¹

Turning to the sites of detention and apprehension, the court treated them as a single factor and found that they “weigh[ed] heavily in favor of the United States.”²³² The focus of the analysis here devolved upon the perceived differences between Guantanamo and Bagram, emphasizing what the court saw as a lessened degree of U.S. control over the latter.²³³ Although declining to distinguish the leases under which the two facilities were held, the court instead focused on the duration of the U.S. presence at Guantanamo and the lack of a hostile host country at Bagram.²³⁴ In the eyes of the court, the United States did not possess any greater de facto sovereignty over Bagram in 2010 than it did over Landsberg Prison in the days following the close of World War II.²³⁵

It was the third factor, the obstacles inherent in extending the writ to Bagram, that the court found to be “overwhelmingly in favor of the position of the United States.”²³⁶ Bagram’s location inside Afghanistan put it in a theater of active hostilities, making it far more like the post-World War II Germany of *Eisentrager* than the Guantanamo of *Boumediene*.²³⁷ The court seized on language in *Boumediene* that conceded that “if the detention facility were located in an active theater of war, arguments that issuing the

225. *Id.* (arguing that “the objective degree of control the United States has at Bagram resembles U.S. control at Guantanamo more closely than U.S. control at Landsberg”).

226. *Al Maqaleh v. Gates*, 605 F.3d 84, 99 (D.C. Cir. 2010).

227. *Id.* at 95–96.

228. *Id.* at 96.

229. The Unlawful Enemy Combatant Review Board (UECRB) is the Bagram version of the CSRTs. *Id.* Typical UECRB proceedings afford even less rights and protections to detainees in the determination of their status than their CSRT counterparts. *Id.*

230. *Id.*

231. *Id.*

232. *Id.*

233. *Id.* at 97.

234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.*

writ would be ‘impractical or anomalous’ would have more weight.”²³⁸ The court concluded that the absence of de facto sovereignty over the site of detention precluded habeas jurisdiction and operation of the Suspension Clause itself.²³⁹

In closing, the court expressed fidelity to the “rationale of *Eisentrager*” that Article III courts should not have jurisdiction where it would involve the “fettering” of field commanders or the diversion of resources from a war effort.²⁴⁰ Finally, the court denied the existence of any evidence of an effort to “turn off the Constitution” by transporting Al Maqaleh and the other petitioners into an active war zone.²⁴¹ Left open was the question of whether such evidence of executive manipulation, if established, would be relevant as an addendum to the factors enunciated in *Boumediene*.²⁴² Unlike the district court, the court of appeals did not address the length of detention or its open-ended nature.

Although the Court of Appeals denied the petitioners a rehearing on new evidence, it did so without prejudice, which allowed the petitioners to attempt to file amended petitions with the district court.²⁴³ On February 15, 2011, Judge Bates of the D.C. district court granted a joint motion by Al Maqaleh and his fellow petitioners requesting permission to file an amended habeas petition.²⁴⁴ The petitioners claimed the existence of several lines of new evidence, some of it bearing on future plans for the Bagram detainee operation and some tending to show that the government had indeed moved detainees so as to render them beyond the reach of habeas.²⁴⁵ Judge Bates was not convinced that all of the evidence was relevant to the pertinent considerations and expressed “some doubts” as to its capacity for changing the outcome under the *Boumediene* framework.²⁴⁶ Nonetheless, Judge Bates granted the joint motion, preferring to allow the issues to be fully ventilated and decided in the context of a motion to dismiss, to be brought subsequently by the government.²⁴⁷

III. DISCUSSION

Given the central role of habeas in the American system of liberty and separation of powers, the executive branch should not be able to determine the accessibility of habeas for a noncitizen detainee by merely shunting that detainee off into an active war zone.²⁴⁸ This renders the writ dependent upon the whim of the Executive and

238. *Id.* at 98 (quoting *Boumediene v. Bush*, 553 U.S. 723, 770 (2008)) (misquote in original).

239. *Id.*

240. *Id.*

241. *Id.* at 99.

242. *Id.* at 98.

243. *Al Maqaleh v. Gates*, No. 06-1669, at 2 (D.D.C. Feb. 15, 2011) (granting motion to file amended habeas petition) (citing *Al Maqaleh v. Gates*, No. 09-5265 (D.C. Cir. July 23, 2010) (denying motion for rehearing on new evidence without prejudice)).

244. *Al Maqaleh*, No. 06-1669, at 4 (granting motion to file amended habeas petition).

245. *Id.* at 2.

246. *Id.* at 3–4.

247. *Id.*

248. See *supra* Part II.E.2 for a discussion of *Al Maqaleh* and its holding that federal courts do not possess habeas jurisdiction over the Bagram detention facility, largely due to its location in Afghanistan, an active combat zone.

eviscerates any notion of accountability that had arisen after the decisions in *Boumediene* and the other Guantanamo detainee cases.²⁴⁹ This state of affairs is directly attributable to the loosely woven, multifactor test employed in *Boumediene*, which allowed for executive manipulation of habeas corpus by geographically shuttling detainees who, regardless of citizenship, would have been reached by the writ in a different location. Although providing a non-exhaustive list of three factors, composed of six subfactors, to be considered in determining whether a detainee may petition a court for habeas corpus, the *Boumediene* opinion did not give even a rough intimation of how those factors should interact, what weight should be accorded each factor, or how they should be evaluated.²⁵⁰

A better approach would be one that provided additional guidance, tailored to the nature of the conflicts from which executive detention cases arise. First, the site of apprehension and detention factors should turn on whether or not the detainee was captured on a conventional battlefield, in combat against U.S. or allied forces.²⁵¹ Second, courts should require that the government make a substantial showing that habeas jurisdiction is “impracticable” due to the obstacles involved, in the sense that they render proceedings essentially impossible.²⁵² Such obstacles should be considered only when they are not a product of the government’s choice of detention site; otherwise, those practical obstacles created by the Executive’s decision should be used to shape the nature and scope of the habeas proceedings.²⁵³ Finally, the length of a detainee’s detention prior to his petition for habeas and the prospects of that detention becoming indefinite should reside alongside the other three *Boumediene* factors.²⁵⁴ In proposing these refinements of the *Boumediene* test, it is not necessary to jettison the test as a whole. The factors enumerated in *Boumediene* are all appropriate for consideration in determining the reach of the Suspension Clause, and the proposals announced in the discussion are merely suggestive of a methodology for applying those factors.

This discussion begins by discussing the potential for diverging application of the *Boumediene* factors.²⁵⁵ It uses the two *Al Maqaleh* rulings to illustrate how the test can lead to different conclusions that, although resulting from identical facts, both appear to be well reasoned in light of the *Boumediene* opinion.²⁵⁶ Next, the discussion lays out

249. See *supra* Part II.D.1 for a discussion of *Boumediene* and Parts II.B and II.C for a review of habeas doctrine and other war on terror detainee cases.

250. See *Boumediene v. Bush*, 553 U.S. 723, 766 (2008) (enumerating the factors and subfactors, but declining to provide additional direction for their application).

251. *Boumediene*, 553 U.S. at 768–69. See *infra* Part III.C, explaining how this approach would better protect habeas from executive manipulation by transportation.

252. *Boumediene*, 553 U.S. at 770. See *infra* Part III.D for an analysis of what “impracticable and anomalous” should mean in the context of the *Boumediene* test.

253. See *infra* Part III.D.4, suggesting modifications that would shape habeas proceedings by taking into account legitimate practical obstacles.

254. See *infra* Part III.E, arguing that the length of a prisoner’s detention prior to the time of his petition, as well as the potential for indefinite detention, should be considered as part of the *Boumediene* framework.

255. See *infra* Part III.B, analyzing the differences in application of the *Boumediene* factors up to this point.

256. See *infra* notes 285–94 and accompanying text for a comparison of the application of the *Boumediene* factors in the two *Al Maqaleh* cases.

the grounds for the three proposals mentioned above, removing some, if not all, of the uncertainty inherent in such a nondirective, multifactor test.²⁵⁷ In order to accommodate legitimate national security interests as well as practical realities, the discussion also proposes possible modifications to habeas proceedings for war on terror detainees held in challenging foreign locales.²⁵⁸ Finally, the discussion closes with an application of the proposed, refined *Boumediene* test to a hypothetical factual scenario.²⁵⁹

A. *Boumediene Limited to its Facts, Contrary to Expectations*

The Supreme Court's ruling in *Boumediene* was hailed by some observers as a blow well struck for the maintenance of the Great Writ as a check on the expansive war on terror. One commentator, Baher Amzy, stated that *Boumediene* had "elevated the judiciary to a preeminent role in reviewing military detention operations"²⁶⁰ by "rejecting for the first time in history the collaborative judgment of the political branches exercised in connection with military operations."²⁶¹ One commentator praised the methodology employed by the Court, extolling its use of a "modern-style balancing" approach which ensured that the "mandate of the Suspension Clause does go beyond the floor of 1789."²⁶²

On the other hand, *Boumediene* inspired quite another response from those who believe that the current war on terror requires a freer hand for the Executive with which to operate.²⁶³ For an approximate encapsulation of these critiques, one need look no further than the vehement dissents of the *Boumediene* minority.²⁶⁴ Chief Justice Roberts's dissent focused on his argument that the DTA "adequately protects any constitutional rights aliens captured abroad and detained as enemy combatants may enjoy"²⁶⁵ and was the "most generous set of procedural protections ever afforded" such aliens.²⁶⁶ As such, Chief Justice Roberts argued that there should be no consideration of constitutional issues prior to a detainee's exhaustion of the DTA's procedures.²⁶⁷

257. See *infra* Part III.C for a discussion of the appropriate relationship between the site of detention and site of apprehension factors. See *infra* Part III.D for an analysis of the appropriate role of practical obstacles to habeas jurisdiction in the *Boumediene* test. Finally, see *infra* Part III.E for an argument that the length of detention, both potential and realized, should be a mandatory factor in the *Boumediene* test.

258. See *infra* Part III.D.4 for an overview of potential modifications to habeas proceedings that would further this accommodation.

259. See *infra* Part III.F for the application of the proposed methodology to a hypothetical scenario.

260. Amzy, *supra* note 17, at 449.

261. *Id.* at 448.

262. Neuman, *supra* note 17, at 544–45 (emphasis omitted).

263. See, e.g., Ford, *supra* note 17, at 415 (arguing that *Boumediene* ceded authority over the war on terror rightfully belonging to the citizenry and their elected officials to "unelected, politically unaccountable judges" (quoting *Boumediene v. Bush*, 553 U.S. 723, 826 (2008) (Roberts, C.J., dissenting)); Yoo, *supra* note 17 ("The *Boumediene* five . . . ignored the Constitution's structure, which grants all war decisions to the president and Congress.")).

264. See *Boumediene v. Bush*, 553 U.S. 723, 801–26 (2008) (Roberts, C.J., dissenting); *id.* at 826–50 (Scalia, J., dissenting).

265. *Id.* at 802–03 (Roberts, C.J., dissenting).

266. *Id.* at 801.

267. *Id.* at 804.

Justice Scalia's dissent reached further than that of the Chief Justice, stating without equivocation that the history of the writ indicated that it "does not, and never has, run in favor of aliens abroad."²⁶⁸ Before laying out his historical and precedential arguments as to the reach of the writ under English common law, Justice Scalia first felt compelled to detail what he perceived to be "the disastrous consequences of what the Court ha[d] done."²⁶⁹ Scalia's dissent struck a reproachful tone, warning that the ruling "will almost certainly cause more Americans to be killed."²⁷⁰ Arguing that the majority's functional approach was not susceptible to clear limitation, Justice Scalia did not hesitate to accuse the majority of harboring an "ultimate, unexpressed goal . . . to preserve the power to review the confinement of enemy prisoners held by the Executive anywhere in the world."²⁷¹

The initial application of *Boumediene* beyond the confines of Guantanamo has shown that both the supporters and critics overestimated the ruling's reach.²⁷² The *Boumediene* approach's capacity for maintaining judicial oversight of the detention of prisoners captured away from the battlefield may well find itself confined to Guantanamo as securely as any detainee in any prison. Justice Kennedy's common-law, functional test was thorough in detailing the considerations that enter into determining the scope of habeas,²⁷³ but it did not provide any guidance for future courts as to how those factors should be weighted against or how they relate to each other.²⁷⁴ In the absence of such guidance, this contextual, fact-intensive approach opens the door to consequentialist results that undermine the Suspension Clause as a safeguard of separation of powers and allows the Executive to take advantage of practical obstacles that it itself has created. This is not a mere potentiality; rather, it is the very scenario which played out in the D.C. Circuit's *Al Maqaleh* ruling.²⁷⁵

B. *The Methodology of Boumediene and its Potential for Diverging Application*

Justice Kennedy's failure to provide any guidance for how the factors he enumerated in *Boumediene* should relate to one another and whether they should be accorded equal weight has led to divergent results by later courts. In three opportunities for use, the factors announced in *Boumediene* were applied in three distinct ways.²⁷⁶ None of these three dissimilar arrangements are demonstrably superior; they are merely explicated here to point out that their differences could lead to inconsistent results in

268. *Id.* at 827 (Scalia, J., dissenting).

269. *Id.*

270. *Id.* at 828.

271. *Id.* at 843.

272. *See, e.g., Al Maqaleh v. Gates*, 605 F.3d 84, 99 (D.C. Cir. 2010) (holding that the Suspension Clause did not reach detainees at Bagram).

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

274. *See id.* at 766–71.

275. *See Al Maqaleh*, 605 F. 3d at 97–99 (relying primarily on the practical obstacles inherent to Bagram in reaching its ruling that habeas relief was unavailable for detainees there).

276. *Compare Boumediene*, 553 U.S. at 766 (announcing the three factors derived from *Eisentrager's* six), with *Al Maqaleh*, 605 F.3d at 95–99 (addressing the *Boumediene* subfactors individually and in turn), and *Al Maqaleh v. Gates*, 604 F. Supp. 2d 205, 215 (D.D.C. 2009) (subdividing *Boumediene's* three factors into six "for the sake of analysis").

like cases. Given the potential impact of these types of decisions on the important matters of separation of powers and individual liberty, this divergence should be avoided to the extent possible.

In the *Boumediene* opinion itself, Justice Kennedy enumerated “at least three factors . . . relevant in determining the reach of the Suspension Clause.”²⁷⁷ Two of the explicit factors Justice Kennedy laid out, however, contained what appeared to be subfactors.²⁷⁸ Within his first factor, Justice Kennedy listed both “citizenship and status of the detainee” and “the adequacy of the process through which that status determination was made.”²⁷⁹ Similarly, Justice Kennedy’s second factor included both “the nature of the sites where apprehension took place” and “the nature of the sites where . . . detention took place.”²⁸⁰ When using these factors to analyze the facts at hand, however, Justice Kennedy proceeded to treat each subfactor in turn, largely without reference to one another. For example, after acknowledging the obvious fact that the petitioners were not U.S. citizens, the discussion turned abruptly to the contested status of the detainees.²⁸¹ More importantly, the Court was inconsistent in its treatment of the “sites of apprehension and detention” factor. Initially, the two sites were asserted to be “technically outside the sovereign territory of the United States,” without differentiating the two.²⁸² The rest of the discussion of this single factor, however, addressed itself entirely to a discussion of the site of detention.²⁸³ No further mention was made of the sites of apprehension of the detainees, nor was its relation to their detention at Guantanamo addressed.²⁸⁴

The muddled framework announced in *Boumediene* carries with it the potential for widely diverging applications, a potential borne out in subsequent cases. In *Al Maqaleh v. Gates*,²⁸⁵ the district court applied the framework by lumping together the three factors—citizenship, status, and site of apprehension—in which it found the petitioners “situated no differently than the detainees in *Boumediene*.”²⁸⁶ This evidenced a reading of *Boumediene* that departed, at least superficially, from the approach taken in that case.²⁸⁷ The constituent subfactors had been peeled apart and were being treated singly. The district court then proceeded to treat the site of detention,²⁸⁸ the adequacy of process used in determining the detainees’ status,²⁸⁹ and

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

278. *Id.*

279. *Id.*

280. *Id.*

281. *Id.* at 766–67.

282. *Id.* at 768.

283. *Id.* at 768–69.

284. *Id.*

285. 604 F. Supp. 2d 205 (D.D.C. 2009).

286. *Al Maqaleh*, 604 F. Supp. 2d at 217–18. Tellingly, the district court pointed out the lack of guidance provided in *Boumediene* as to the significance of these three factors or the relation between them, if any. *Id.* at 218.

287. Compare *id.* at 217–18 (treating the subfactors individually), with *Boumediene*, 553 U.S. at 766 (grouping the subfactors into three larger factors).

288. See *Al Maqaleh*, 604 F. Supp. at 221–26 (concluding that the United States “has a high objective degree of control” at Bagram, although not of such tenure as that at Guantanamo).

the practical obstacles inherent in granting the writ,²⁹⁰ singly and in isolation from one another. The district court closed its analysis by merely reiterating its findings as to each factor and ruled that the non-Afghan petitioners were within the reach of the Suspension Clause.²⁹¹

In reversing the district court, the D.C. Circuit took a different course in its application of the *Boumediene* factors. Although nominally employing the grouping of factors used by Justice Kennedy in *Boumediene*, the court proceeded to analyze each of the constituent subfactors on its own terms, without discussing them in relation to one another.²⁹² The site of apprehension factor was virtually ignored, with primary emphasis on the site of detention.²⁹³ At no point did the court discuss the relation of the two sites to one another or the distance separating the two.²⁹⁴

C. *The Executive Switches the Constitution Off*

The war on terror has resulted in suspects being captured in a wide variety of settings. Some have been captured on the battlefield, weapon in hand, by conventional forces.²⁹⁵ Others have been captured in what can be described as only a “civilian” setting.²⁹⁶ This is inevitable, given the global nature of the war and the nature of terrorist networks. In order for habeas corpus to fulfill its historical mandate, however, it is imperative that the government not be allowed to switch the writ off by transporting those prisoners captured in a civilian setting into active war zones.²⁹⁷

1. Site of Apprehension / Site of Detention

In *Boumediene*, after announcing that the sites of apprehension and detention were to be treated as a single factor, Justice Kennedy failed to discuss how these two subfactors were related to one another, if at all.²⁹⁸ A better approach would have been to discuss the importance of whether a nexus existed between the sites—in other words,

289. See *id.* at 226–27 (concluding that the Bagram UECRB process provided less protection than did the CSRTs that were ruled inadequate in *Boumediene*, rendering the “adequacy of process” factor strongly in favor of extension of the Suspension Clause).

290. See *id.* at 227–31 (arguing that bald assertions of impracticality due to location in an active theater of war are insufficient to preclude extension of the Suspension Clause, especially when detainees are situated there, because Executive has chosen to place them there).

291. *Id.* at 231–32.

292. See *Al Maqaleh v. Gates*, 605 F.3d 84, 95–97 (D.C. Cir. 2010) (discussing each of the *Boumediene* factors). The D.C. Circuit found that the citizenship and status factors in their application to the petitioners in question were identical to those in *Boumediene*. *Id.* at 96. In treating the “adequacy of process” factor singly, the court ruled that it also was favorable to *Al Maqaleh* and his fellow petitioners. *Id.*

293. *Id.* at 96–97.

294. *Id.*

295. See *supra* Part II.C.1 for a discussion of *Hamdi*, in which the petitioner was captured in such circumstances.

296. See *infra* Part III.C.1 for examples of the various circumstances in which detainees have been captured.

297. See *infra* Part III.C.2 for a discussion of the historical extension of the writ to persons coming into contact with the agents of the Executive.

298. *Boumediene v. Bush*, 553 U.S. 723, 768–69 (2008).

were the petitioners detained *at a site relatively close, or logically related to the place where they were captured?*

The war on terror is, admittedly, quite different from any other war in which the United States has found itself entangled historically. In order to preempt those who wish to commit acts of terrorism against the United States or its allies, it has become necessary to capture individuals in circumstances that are a far cry from those encountered on the typical battlefield. A brief review of the circumstances of the captures of the *Al Maqaleh* petitioners may be helpful in illustrating the extent of this departure. Amin Al-Bakri, a forty-year-old businessman dealing in precious stones and shrimp, was abducted by U.S. agents while on a business trip to Bangkok, Thailand in December 2002.²⁹⁹ Redha Al-Najar, the forty-four-year-old Tunisian citizen whose story was introduced in Part I,³⁰⁰ was abducted by “Urdu and French-speaking men . . . from his home . . . in front of his wife and child” in May 2002.³⁰¹ Mr. Al-Najar’s home is in Karachi, Pakistan.³⁰² Finally, Fadi Al-Maqaleh, a twenty-seven-year-old Yemeni citizen, was captured outside of Afghanistan as well prior to his rendition to Bagram by U.S. forces.³⁰³ Not one of these three men was captured while engaged in armed conflict with U.S. armed forces, nor were any of them captured inside Afghanistan, a nation that has concededly been in a state of war since 2001.

Prisoners captured while at home with their families in nations untouched by war, or while in a hotel on a business trip, do not typically possess the same indicia of enemy combatant status as those captured while in combat.³⁰⁴ For this reason, habeas corpus is essential as a means of challenging the detention of such prisoners. In the absence of habeas, the possibility for arbitrary detention, based upon false pretenses, is limitless. Mistaken intelligence, or outright subterfuge on the part of intelligence sources, is all too great a danger when there is no check on the ability to detain based on that intelligence.³⁰⁵ In cases such as these, the enemy combatant status of the detainees is disputed and the detainees cannot be summarily deemed “enemy aliens.” This distinguishes them from the *Eisentrager* petitioners, whose affiliation with the armed forces of a conventional enemy in a conventional war was undisputed.³⁰⁶ The distinction is especially relevant when viewed in light of the inadequacy and

299. Joint Brief for Petitioners-Appellees at 2–3, *Al Maqaleh v. Gates*, 605 F.3d 84 (D.C. Cir. 2010) (Nos. 09-5265, 09-5266, 09-5277).

300. See *supra* notes 1–9 and accompanying text for the initial mention of Al-Najar.

301. Joint Brief for Petitioners-Appellees, *supra* note 299, at 3.

302. *Id.*

303. *Id.* at 2.

304. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 526–27 (2004) (explaining that individuals captured while residing in countries where combat operations take place is not concession of being captured in a war zone or falling under the definition of enemy combatant).

305. See *infra* notes 309–12 and accompanying text for a discussion of potential mistakes in the detention of suspects in the war on terror.

306. *Boumediene v. Bush*, 553 U.S. 723, 766 (2008); *Rasul v. Bush*, 542 U.S. 466, 476 (2003).

susceptibility to error of the review processes in use at detention centers like Guantanamo³⁰⁷ and Bagram.³⁰⁸

The dangers of misidentification and wrongful detention were highlighted in a sworn statement rendered by Colonel Lawrence B. Wilkerson (Retired) in *Hicks v. Bush*.³⁰⁹ Colonel Wilkerson, a senior official in the State Department from 2001 to 2005, made his statement in support of Adel Hamad, a Sudanese citizen captured in Pakistan by U.S. and Pakistani forces and later imprisoned in both Bagram and Guantanamo.³¹⁰ According to Colonel Wilkerson, his access to both unclassified and classified information led him to believe that “many of the prisoners detained at Guantanamo had been taken into custody without regard to whether they were truly enemy combatants, or . . . whether many of them were enemies at all.”³¹¹ Another problem cited by Colonel Wilkerson was U.S. reliance on foreign nationals to capture many of the prisoners, resulting in a high likelihood that “some of the Guantanamo detainees had been turned in to U.S. forces in order to settle local scores, for tribal reasons, or just as a method of making money.”³¹²

2. Why the *Boumediene* Approach is Inadequate to Preserving Habeas Corpus as a Safeguard of Liberty and Separation of Powers

As a necessary corollary to habeas’s role as a restraint on executive power, the writ itself must be insulated from manipulation by the Executive.³¹³ In our system of constitutional checks and balances, it is, and must remain, the province of the courts to say “what the law is,”³¹⁴ and, consequently, what the reach of the Suspension Clause is. Historically, one of the most common tactics used to place prisoners beyond the reach of the courts has been extraterritorial rendition.³¹⁵ The English Habeas Corpus Act of 1679 was passed to shore up the writ in response to attempts at evasion by placing

307. See *Boumediene*, 553 U.S. at 767 (ruling that the Guantanamo detainees’ lack of counsel and inability to effectively rebut evidence brought against them prevented the provided procedure from serving as a habeas substitute).

308. *Al Maqaleh v. Gates*, 605 F.3d 84, 96 (D.C. Cir. 2010) (agreeing with the district court’s finding that Bagram tribunals provided “even less protection to the rights of detainees in the determination of status than was the case” in Guantanamo).

309. Declaration of Col. Lawrence B. Wilkerson (Ret.), *Hicks v. Bush*, 452 F. Supp. 2d 88 (D.D.C. 2006) (No. 05-1009).

310. *Id.* at 1–2.

311. *Id.* at 4 (“There was no meaningful way to determine whether they were terrorists, Taliban, or simply innocent civilians picked up on a very confused battlefield *or in the territory of another state such as Pakistan.*” (emphasis added)).

312. *Id.* (“I recall conversations with serving military officers at the time, who told me that many detainees were turned over for the wrong reasons, *particularly for bounties and other incentives.*” (emphasis added)).

313. See *Boumediene v. Bush*, 553 U.S. 723, 765–66 (2008) (noting that the determination of the scope of habeas “must not be subject to manipulation by those whose power it is designed to restrain”); DeVeaux, *supra* note 114, at 22–23 (noting that “[e]xigency cannot empower Congress or the President to reallocate this constitutional prerogative” of the Judiciary to “conduct[] criminal adjudications”).

314. *Marbury v. Madison*, 5 U.S. 137 (1 Cranch), 177 (1803).

315. See *supra* notes 89–90 and accompanying text for a discussion of the English practice of transporting prisoners beyond the reach of the writ.

prisoners on islands and other remote locations.³¹⁶ U.S. courts have also refused to allow executive detention to arbitrarily remove prisoners from the territorial reach of the Suspension Clause.³¹⁷ This evasion was enabled by the D.C. Circuit's application of *Boumediene* in *Al Maqaleh*, which allowed the government to move prisoners to war zones, rather than to locations where Article III courts are open. The government was then able to capitalize on its own decision by claiming that the practical obstacles inherent in such a war zone prevent the Suspension Clause's operation therein. This is precisely what Justice Kennedy termed "the power to switch the Constitution on or off at will."³¹⁸ The D.C. Circuit's decision in *Al Maqaleh* imports the kind of bright-line methodology that was disavowed in *Boumediene* by allowing the government to erect a barrier around the Bagram facility through which detainees may enter from anywhere on the globe, but which the writ may not.

Although the *Boumediene* Court found the English history of the writ "inconclusive" as to its geographic reach,³¹⁹ the historical record furnishes evidence that this focus on the locus of the detention may be misplaced. Professors Halliday and White, using the seventeenth-century lawyer Matthew Hale as a guide, argue that habeas corpus was part of the class of writs that related directly to the king's prerogatives, the force of which depended on the king's relation to his subjects.³²⁰ As such, the writ of habeas corpus became available in a particular territory even prior to the introduction of English property law.³²¹ The touchstone for the availability of the writ, Halliday and White contend, was the "subjecthood" of the prisoner to the king.³²² Subjecthood, in turn, arose from mere presence within the kingdom or contact with one of the king's "franchises."³²³ All prisons being "franchises," the king had the royal authority to inspect all imprisonments conducted under his auspices.³²⁴ This "test," predicated on the level of contact between the imprisoned and the king's officers, lines up neatly with the *Munaf* Court's emphasis on the petitioner being held in "immediate physical custody" of American forces.³²⁵

316. See *supra* notes 91–94 and accompanying text for a discussion of the Habeas Corpus Act of 1679 and its purposes. See also Amzy, *supra* note 17, at 471–72 (discussing the historical purpose of the Habeas Corpus Act of 1679 and urging that it "remains relevant today when considering the proper role of the judicial and executive branches").

317. See *Boumediene*, 553 U.S. at 765 (stating that the Constitution restricts the powers of the United States, even when it acts outside its borders); *Rasul v. Bush*, 542 U.S. 466, 479 (2004) (recognizing that cases involving habeas petitioners held overseas do not present a jurisdictional obstacle); *Ex parte Mitsuye Endo*, 323 U.S. 283, 307 (1944) ("That objective may be in no way impaired or defeated by the removal of the prisoner from the territorial jurisdiction of the District Court.").

318. *Boumediene*, 553 U.S. at 765.

319. *Id.* at 752.

320. Halliday & White, *supra* note 82, at 604–06.

321. *Id.* at 640–41.

322. *Id.* at 604–06.

323. *Id.* at 606–07.

324. *Id.* at 643–44 ("[T]he writ's strength arose less from its concern with the rights of prisoners than with the wrongs of jailers, the wrongs committed by someone commissioned to act in the king's name." (internal quotation marks omitted)).

325. *Munaf v. Geren*, 553 U.S. 674, 685–86 (2008).

To be sure, the authority to direct active military operations rests decisively with the executive branch, specifically in the person of the President acting as Commander-in-Chief.³²⁶ Habeas jurisdiction has been held foreclosed where such jurisdiction would seriously impede effective control over legitimate, authorized military operations.³²⁷ The congressional aegis of the AUMF does not explicitly limit the President's powers to the conflict in Afghanistan, and has been used as an authorization for the wider global war on terror.³²⁸ In its broadest interpretation, the AUMF has been read to convert the entire globe into a battlefield, so long as the operations in question target terrorism.³²⁹ It is conceded that the AUMF permits U.S. forces to operate globally in order to apprehend terrorist suspects. This is not equivalent, however, to authorization of indefinite, unchallenged detention of those suspects once they are captured.³³⁰ Employing the *Youngstown* framework,³³¹ the President's detention of terrorist suspects after capture far from any battlefield should be viewed as existing in the "zone of twilight" that reflects concurrent executive and legislative authority.³³² The writ should be viewed as a means of curbing executive excesses that may step out of the "zone of twilight" and into a zone of overreach. Indeed, the writ was served in seventeenth-century England on the "military keepers of castles,"³³³ who often were serving as custodians of men alleged to have plotted against the existence of the tenuous, post-Restoration monarchy.³³⁴

D. *The Practical Obstacles to Habeas Corpus*

Extending habeas's reach to U.S. facilities overseas necessarily involves a number of practical obstacles. Be that as it may, the writ has historically been characterized as flexible and adaptive.³³⁵ In deciding whether the writ reaches a particular locale, the burden should rest on the government to show that habeas proceedings would be

326. U.S. CONST. art. II, § 2, cl. 1.

327. See *Johnson v. Eisentrager*, 339 U.S. 763, 779 (1950) ("It would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts . . .").

328. Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 note) (stating the justification for the resolution as allowing the President to "prevent any future acts of international terrorism against the United States by such nations, organizations or persons").

329. Brief for Special Forces Ass'n et. al. as Amici Curiae Supporting Appellants at 16, *Al Maqaleh v. Gates*, 605 F.3d 84 (D.C. Cir. 2010) (Nos. 09-5265, 09-5266, 09-5267).

330. See *Al-Marri v. Wright*, 487 F.3d 160, 183 (4th Cir. 2008) (citing *Hamdi v. Rumsfeld*, 542 U.S. 507, 516 (2004); *Padilla v. Hanft*, 423 F.3d 386, 391 (4th Cir. 2005)) (arguing that the AUMF authorizes executive detention of enemy combatants only for those individuals "(1) who affiliated with and fought on behalf of Taliban government forces, (2) against the armed forces of the United States and its allies, (3) on the battlefield in Afghanistan").

331. See *supra* note 26 for a discussion of the *Youngstown* tripartite framework for analyzing executive action in light of congressional legislative activity.

332. *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

333. Nutting, *supra* note 86, at 537-38.

334. *Id.* at 536-37.

335. See *infra* Part III.D.4 for a discussion of the Supreme Court's recognition of the writ as such.

impossible without severe disruption to military operations.³³⁶ In the absence of such a showing, the habeas proceedings may be altered to minimize disruptions, so long as the basic purpose of the writ is fulfilled.³³⁷ Mere claims of inconvenience or general allegations of added cost should not suffice to satisfy the government's burden.

1. "Impracticable and Anomalous"—*Boumediene*'s Confusing Lead

The *Boumediene* decision flatly denied that the government had put forward any "credible arguments that the military mission . . . would be compromised if habeas corpus courts had jurisdiction to hear the detainees' claims," given the "plenary control the United States assert[ed] over the base."³³⁸ The Court's subsequent treatment of the potential obstacles to granting habeas jurisdiction extraterritorially, however, did not discuss what, if any, level of disruption to those military operations was acceptable.³³⁹ The discussion was limited to a comparison of the circumstances in *Eisentrager* with conditions on the ground at Guantanamo.³⁴⁰ This may well be viewed as in keeping with the Court's common-law view of habeas jurisdiction. The U.S. facility at Guantanamo Bay, on the other hand, possesses a singular historical pedigree that distinguishes it from other facilities over which the United States exercises a similar degree of control.³⁴¹ It must be admitted that the circumstances in these two instances, both at Landsberg Prison in 1950³⁴² and at Guantanamo in 2008,³⁴³ are highly unusual and, as such, of limited precedential value in future cases.

Although declining in *Boumediene* to explain what practical obstacles may be deemed as blocking habeas jurisdiction, Justice Kennedy did not hesitate to state in qualifying dicta that "if the detention facility were located in an active theater of war, arguments that issuing the writ would be 'impracticable or anomalous' would have more weight."³⁴⁴ It is natural that the Court was reticent to rule more broadly than necessary in laying down a rule for detention facilities,³⁴⁵ but this dicta is curiously placed, given its extraneous relation to the *Boumediene* case. It was certainly written with knowledge of the burgeoning detention facilities in Iraq and Afghanistan. Not much of a predictive leap is necessary to appreciate the potential for this dicta to be seized upon as a rationale for using those facilities as a shelter from habeas corpus proceedings.³⁴⁶

336. See *infra* Part III.D.3 for a suggested standard to be used in making this determination.

337. See *infra* Part III.D.4 for a discussion of possible modifications that would mitigate disruption of military operations while preserving the "habeas bare minimum."

338. *Boumediene v. Bush*, 553 U.S. 723, 727, 769 (2008).

339. *Id.* at 770.

340. *Id.*

341. *Id.* at 768–69.

342. *Johnson v. Eisentrager*, 339 U.S. 763, 766 (1950).

343. *Boumediene*, 553 U.S. at 768–69.

344. *Id.* at 770 (quoting *Reid v. Covert*, 354 U.S. 1, 74 (1957) (Harlan, J., concurring)).

345. *Id.*

346. See *Al Maqaleh v. Gates*, 605 F.3d 84, 98 (D.C. Cir. 2010) (expressly referring to this dicta from *Boumediene* to support the proposition that Bagram was less amenable to habeas jurisdiction than Guantanamo).

2. The Reality of Practical Obstacles at Bagram

Boumediene's vague standard as to precisely what kind of practical obstacles would render issuance of the writ "impracticable or anomalous"³⁴⁷ led to quite divergent treatment of this factor by the district court and the D.C. Circuit in *Al Maqaleh*. Whereas the district court used nine pages of its opinion in analyzing the practical obstacles that may bear on such an inquiry,³⁴⁸ the D.C. Circuit expended a total of three pages in its discussion of the subject.³⁴⁹ In its analysis, the D.C. Circuit asserted that, as Afghanistan was still a nation at war, the facility at Bagram was more closely analogous to Landsberg than to Guantanamo.³⁵⁰ There was no further discussion of what impact habeas proceedings would have on military operations at Bagram or vice versa.³⁵¹ In addition to the conclusory assertion that military operations would be impeded, the court also speculated that granting habeas to Bagram detainees could be disruptive of the U.S. relationship with the host nation, Afghanistan.³⁵² This speculation was in direct contradiction to the reality that Afghan President Hamid Karzai had himself expressed concern over the detention policies at Bagram and elsewhere within his country.³⁵³ President Karzai has also stated that Afghanistan's desire is that all non-Afghan detainees held at Bagram be moved out of Afghanistan prior to any handover of authority to the Afghans.³⁵⁴ If anything, strengthening the review procedures for detentions inside Afghanistan would placate President Karzai, given his stated preference that all detention of foreigners on Afghan soil come to an end.³⁵⁵

3. *Munaf* and the Other Detainee Cases on Practical Obstacles

Justice Kennedy's assertion that habeas proceedings may be more "impracticable or anomalous" in a war zone and the ensuing treatment of the issue by the D.C. Circuit in *Al Maqaleh* are in tension with the Supreme Court's holding that habeas jurisdiction existed in *Munaf v. Geren*.³⁵⁶ That case involved detainees that were captured and held by American forces inside the active Iraqi war zone.³⁵⁷ There was no mention, however, of practical obstacles making habeas jurisdiction impracticable or anomalous.³⁵⁸ Rather, the touchstone for the Court's analysis was whether the detainees were "held overseas in the immediate 'physical custody' of American soldiers who

347. *Boumediene*, 553 U.S. at 770.

348. *Al Maqaleh v. Gates*, 604 F. Supp. 2d 205, 221–26, 227–31 (D.D.C. 2009).

349. *Al Maqaleh*, 605 F.3d at 96–99.

350. *Id.* at 97–98.

351. *Id.*

352. *Id.* at 98–99.

353. Rogin, *supra* note 213.

354. *Id.*

355. *Id.* Under President Karzai, Afghanistan had agreed to assume control of the Bagram detention facility as early as 2010, but no specific timetable has been established. *Id.* While under Afghan control, it is unlikely that non-Afghan prisoners would be held at Bagram any longer. *Id.*

356. 553 U.S. 674, 685–86 (2008).

357. *Munaf*, 553 U.S. at 679–80.

358. *Id.*

answer only to an American chain of command.”³⁵⁹ What mattered was that the detainees were held by American soldiers whose conduct was controlled by “the President and the Pentagon, the Secretary of Defense, and the American commanders.”³⁶⁰ Not only did Chief Justice Roberts find that habeas jurisdiction existed, he reached the merits of the petitioners’ cases.³⁶¹

In *Munaf*, Chief Justice Roberts asserted that the opinion and its holdings dealt only with cases involving U.S. citizens.³⁶² *Rasul*³⁶³ and English precedent,³⁶⁴ however, establish that citizenship is not dispositive of entitlement to the writ. Although *Munaf* may not play the role of controlling precedent in noncitizen detainee cases, it may serve as persuasive authority that can inform the analysis of similar issues in those noncitizen cases. The complete absence of any concern for how the habeas proceedings would detrimentally affect military operations makes it clear that the location of a detainee within an active combat zone does not, in and of itself, create practical obstacles to such proceedings sufficient to render them “impracticable.”³⁶⁵ The *Munaf* Court saw fit to find jurisdiction and to rule on the merits, all without even the hint of a need to alter the proceedings or to accommodate the military in any significant way.³⁶⁶

In trying to divine a standard for the level of practical obstacles necessary to cut off habeas jurisdiction, the most promising candidate is *Boumediene*’s “impracticable and anomalous” language, discussed above.³⁶⁷ The plain meaning of “impracticable” is, in pertinent part, “incapable of being performed or accomplished by the means employed or at command.”³⁶⁸ “Anomalous,” meanwhile, is defined as “inconsistent with or deviating from what is usual, normal, or expected.”³⁶⁹ These two terms point in different directions—the “impracticable” standard would seem to indicate that habeas proceedings need to be essentially foreclosed by the practical obstacles, whereas the “anomalous” standard would mean that no habeas jurisdiction can exist whenever the

359. *Id.* at 685 (quoting Brief for Federal Parties at 21, *Munaf v. Geren*, 553 U.S. 674 (2008) (No. 07-394)) (internal quotation marks omitted).

360. *Id.* at 686 (quoting Transcript of Oral Argument at 15, *Munaf v. Geren*, 553 U.S. 674 (2008) (No. 06-1666)).

361. *See id.* at 691 (finding “[o]ur authority to address the merits of the habeas petitioners’ claims is clear”).

362. *Id.* at 685 n.2.

363. *Rasul v. Bush*, 542 U.S. 466, 484 (2004) (explaining that “nothing in *Eisentrager* or any of our other cases categorically excludes aliens detained in military custody outside the United States from the ‘privilege of litigation’ in U.S. courts” (internal quotation marks omitted)).

364. *See Boumediene v. Bush*, 553 U.S. 723, 747 (2008) (citing *Case of Three Spanish Sailors*, (1779) 96 Eng. Rep. 775 (K.B.); 2 Black. W. 1324; *Rex v. Schiever*, (1759) 97 Eng. Rep. 551 (K.B.); 2 Burr. 765; *Case of Du Castro*, (1697) 92 Eng. Rep. 816 (K.B.); Fort. 195) (discussing English cases in which alien petitioners were granted hearings to determine entitlement to writ of habeas corpus).

365. *See generally Munaf*, 553 U.S. 674 (declining to discuss the impact on military operations in Iraq that habeas jurisdiction over petitioners would create).

366. *Id.* at 705.

367. *See supra* Part III.D.1 for a discussion of *Boumediene*’s “impracticable and anomalous” language.

368. *Impracticable Definition*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/impracticable> (last visited Mar. 10, 2012).

369. *Anomalous Definition*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/anomalous> (last visited Mar. 10, 2012).

proceedings would be in any way unusual. The better way to understand the standard is to focus on the “impracticable” end of the spectrum, especially since the Supreme Court has repeatedly made it clear that habeas is an adaptive writ, which allows for substantial modification of the proceedings.³⁷⁰ Also, given the singular circumstances surrounding *Boumediene*, and the fact that habeas jurisdiction was found in that case, it is unclear as to how “anomalous” habeas jurisdiction needs to be before it is no longer constitutionally required.

4. A Better Approach and the Habeas Bare Minimum

In cases where the Executive’s choice of the detention site has created practical obstacles to habeas jurisdiction, those obstacles should be used as a consideration in shaping the nature of the proceedings, not as a bar to jurisdiction. As the Court in *Boumediene* noted, “common-law habeas corpus was, above all, an adaptable remedy,” the shape of which “changed depending upon the circumstances.”³⁷¹ This flexibility and adaptability is precisely what makes habeas corpus an effective remedy for dealing with thorny questions arising from the nature of the war on terror and its implications for national security and the attendant separation-of-powers issues. The precise configuration of habeas proceedings in such a locale as Bagram is beyond the ken of this Comment, but some explication of their general shape may be useful in allaying doubts as to the viability of the approach suggested.

The Court in *Boumediene* discussed some of the bare minimum requirements that would render a congressionally created habeas substitute “adequate.”³⁷² The Court understood habeas to provide a prisoner with, at the least, “a meaningful opportunity to demonstrate that he is being held pursuant to ‘the erroneous application or interpretation’ of relevant law.”³⁷³ Additionally, the Court held that the scope of the habeas proceedings and the depth of its inquiry are to be inversely relative to the level of process afforded by the tribunal passing the sentence.³⁷⁴ Where the detention is directed by executive order, rather than by criminal conviction in a court of record, “the need for habeas corpus is more urgent” and the court must be able “to conduct a

370. See *infra* Part III.D.4 for a discussion of various ways in which habeas proceedings could be modified in challenging environments, while still maintaining its effectiveness as a check on executive overreach.

371. *Boumediene v. Bush*, 553 U.S. 723, 779 (2008).

372. *Id.* at 779.

373. *Id.* (quoting *INS v. St. Cyr*, 533 U.S. 289, 302 (2001)).

374. *Id.* at 782. In tying the scope of habeas proceedings to the “rigor of any earlier proceedings,” the Court alludes to the balancing test for due process announced in *Mathews v. Eldridge*. *Id.* at 781 (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)). The *Mathews* calculus weighs the risk of erroneous detention against the estimated value of any additional procedural safeguards. *Mathews*, 424 U.S. at 334–35. Justice Kennedy was careful, however, to note that in cases of executive detention, due to the lack of prior judicial proceedings, “more may be required” than merely ensuring the right of the petitioner to challenge the lawfulness of the detention and the power of the court to order release. *Boumediene*, 553 U.S. at 779; see also *Hamdi v. Rumsfeld*, 542 U.S. 507, 528–29 (2004) (plurality opinion) (arguing that the *Mathews* calculus is the appropriate test to balance government interests against the liberty interests of Guantanamo detainees). *But see* Falkoff, *supra* note 79, at 995–96 (calling into question the *Hamdi* plurality’s reliance on the *Mathews*’ test as controlling precedent because “*Mathews* was an administrative law case concerning social security benefits rather than liberty interests”).

meaningful review of both the cause for detention and the Executive's power to detain."³⁷⁵ Additionally, any conjecture as to the eventual shape of habeas proceedings in a given locale must be undertaken in light of the fact that those proceedings would be largely informed by the discretion of the district court judge.³⁷⁶ As noted in *Boumediene*, the writ's flexibility can be used by a district court in balancing the detainee's interests against any national security concerns arising from the proceeding.³⁷⁷

District court judges will be required to conduct evidentiary hearings as to any disputed material facts.³⁷⁸ The possibility of disputed facts is likely to be high in detainee cases, as there will have been no real judicial proceedings beforehand.³⁷⁹ Some discovery will in many, if not most, cases be necessary in order to make the writ effective.³⁸⁰ In those cases where it is necessary, the courts should exercise their discretion to limit the petitioner's right to discovery insofar as it is required to protect vital national security interests.³⁸¹ Such restrictions should occur only when the government has made a "substantial showing" that circumstances require them.³⁸² Similarly, national security interests could dictate that, in certain cases, a judge should use his discretion to admit certain types of hearsay.³⁸³ This discretion should be utilized with an eye toward the apparent reliability and probative value of the hearsay.³⁸⁴ Finally, there may be situations in which it is appropriate for the government to enjoy the benefit of a rebuttable presumption as to its determination of enemy combatant status.³⁸⁵ Whether this is so should only be determined after a close look at the procedures by which the government reached its determination and the likelihood of error inherent therein.³⁸⁶

375. *Boumediene*, 553 U.S. at 783.

376. *See id.* at 796 (declining to address access-to-counsel and evidentiary rules in detainee habeas proceedings, although positing that district courts are competent to balance relevant interests, including national security).

377. *Id.*

378. *See Harris v. Nelson*, 394 U.S. 286, 291 (1969) (citing *Townsend v. Sain*, 372 U.S. 293, 313 (1963); *Brown v. Allen*, 344 U.S. 443, 464 n.19 (1953)) (holding that, not only may the court order hearing in such circumstances, but it must do so); *Stewart v. Overholser*, 186 F.2d 339, 342 (D.C. Cir. 1950) (asserting that such evidentiary hearings are "a chief purpose of the habeas corpus procedure").

379. Falkoff, *supra* note 79, at 1007.

380. *See Boumediene*, 553 U.S. at 786 (ruling that the opportunity for Guantanamo detainees to supplement the evidentiary record is constitutionally required).

381. Falkoff, *supra* note 79, at 1009.

382. *Id.* at 1010.

383. *Id.* at 1014.

384. *Id.* at 1015; *see also Hamdi v. Rumsfeld*, 542 U.S. 507, 533–34 (2004) ("Hearsay . . . may need to be accepted as the most reliable available evidence from the Government in such a proceeding."); *cf. Al-Marri v. Pucciarelli*, 534 F.3d 213, 264–65 (4th Cir. 2008) (Traxler, J., concurring) (*per curiam*) (arguing that *Hamdi* did no more than allow for occasional admission of hearsay and did not establish a blanket rule permitting its admission).

385. *See Hamdi*, 542 U.S. at 534 ("[O]nce the Government puts forth credible evidence that the habeas petitioner meets the enemy-combatant criteria, the onus could shift to the petitioner to rebut that evidence with more persuasive evidence that he falls outside the criteria.")

386. *See id.* (arguing that the process employed should "sufficiently address the 'risk of an erroneous deprivation' of a detainee's liberty interest while eliminating certain procedures that have questionable

In its thorough discussion of the practical obstacles to habeas in *Al Maqaleh*, the district court noted that “[p]ractical difficulties of gathering evidence and managing the habeas process are mitigated by technological advances.”³⁸⁷ Videoconferencing has been used at Bagram since early 2008 to allow Afghan detainees to contact their families.³⁸⁸ Such videoconferencing would be valuable, both in facilitating in-court appearances and in allowing detainees to have access to effective counsel.³⁸⁹ In fact, such technology has been in use at Guantanamo for precisely those purposes since 2009.³⁹⁰ This technology has also been used for purposes of access to counsel inside Iraq, which is certainly a war zone itself.³⁹¹

E. Length of Detention as a Factor for Consideration

Although all six of the *Boumediene* subfactors are relevant in determining whether the Suspension Clause reaches detainees captured away from any conventional battlefield, they are not the *only* relevant factors. In order to prevent the species of executive detention most dangerous to liberty, the length of a prisoner’s detention should be accorded the same significance as the other factors enumerated in *Boumediene*. Justice Kennedy was correct to include discussion of this topic in *Boumediene*.³⁹² Although declaring that, in the case before him, “the costs of delay can no longer be borne by those who are held in custody,” Justice Kennedy did not take the additional step of enshrining it among the factors that he extracted from *Eisenrager*.³⁹³ Nonetheless, the district court in *Al Maqaleh* properly considered the length of time that the petitioners had spent in U.S. custody.³⁹⁴ In doing so, Judge Bates was acting within the bounds of *Boumediene*, as the list of factors announced in that case was expressly described as being non-exhaustive, leaving open the possibility that other factors may be considered in future cases.³⁹⁵ In yet another example of the *Boumediene* test leading to divergent applications, however, the D.C. Circuit declined to discuss the factor at all.³⁹⁶

additional value in light of the burden on the Government” (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976))).

387. *Al Maqaleh v. Gates*, 604 F. Supp. 2d 205, 230 (D.D.C. 2009).

388. Joint Brief for Petitioners-Appellees at 37, *Al Maqaleh v. Gates*, 605 F.3d 84 (D.C. Cir. 2010) (Nos. 09-5265, 09-5266, 09-5277).

389. *Id.* at 37–39.

390. *Id.* at 37 n.18 (citing *Persons Detained By the US in Relation to Armed Conflict and the Fight Against Terrorism—The Role of the ICRC*, INT’L COMM’N OF THE RED CROSS (Sept. 9, 2011), <http://www.icrc.org/eng/resources/documents/misc/united-states-detention.htm?>).

391. *Id.* at 38–39.

392. See *Boumediene v. Bush*, 553 U.S. 723, 794 (2008) (noting that the petitioners in the case had been detained without judicial oversight for six years).

393. *Id.* at 795.

394. See *Al Maqaleh v. Gates*, 604 F. Supp. 2d 205, 228–29 (D.D.C. 2009) (noting that the petitioners had all been captured more than six years prior to the district court’s ruling).

395. See *Boumediene*, 553 U.S. at 766 (“[A]t least three factors are relevant in determining the reach of the Suspension Clause” (emphasis added)).

396. See *Al Maqaleh v. Gates*, 605 F.3d 84, 95–99 (D.C. Cir. 2010) (applying the *Boumediene* factors without reference to length of detention).

By ignoring the length of a detainee's imprisonment in U.S. custody, the courts also ignore the most pernicious hallmark of unrestrained executive detention— indefinite detention, its length neither connected to any definitive assignment of culpability, nor susceptible to challenge for lack of such an assignment. This has long been recognized by legal scholars,³⁹⁷ and was one of the driving forces in the maturation of habeas corpus as a protection against that danger.³⁹⁸ The Habeas Corpus Act of 1679 required that, in the case of prisoners charged with felony or high treason, “imprisonment without indictment or trial . . . would not exceed approximately three to six months.”³⁹⁹

The specter of arbitrary and indefinite imprisonment is especially alarming when viewed in light of the operations conducted by U.S. forces in furtherance of the war on terror. Two successive White House administrations have acknowledged that the conflict is not amenable to an “end date,” much less one in the foreseeable future.⁴⁰⁰ One could argue that the war on terror, so named, is really a war against a tactic, rather than a traditional enemy. This tactic has been in use dating back to ancient times,⁴⁰¹ with only the means changing; and it is no more likely to “end” than is the War on Drugs declared almost forty years ago.⁴⁰² This reality was addressed by the *Hamdi* Court, which observed that “the national security underpinnings of the ‘war on terror,’ although crucially important, are broad and malleable.”⁴⁰³ Given that detention of enemy combatants is permissible under the laws of war for the duration of the conflict,⁴⁰⁴ the Court admitted that a prisoner, detained on grounds broader than those

397. See 1 BLACKSTONE, *supra* note 77, at *136 (“Confinement of the person, by secretly hurrying him to [jail], where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore a more dangerous engine of arbitrary government.”); *Hamdi v. Rumsfeld*, 542 U.S. 507, 556 (2004) (Scalia, J., dissenting) (“It is unthinkable that the Executive could render otherwise criminal grounds for detention noncriminal merely by disclaiming an intent to prosecute, or by asserting that it was incapacitating dangerous offenders rather than punishing wrongdoing.”).

398. See Nutting, *supra* note 86, at 542 (summarizing the provisions of the Habeas Corpus Act of 1679 relating to the elimination of undue delay, including the requirement that the writ be responded to by the custodian within three days); see also *id.* at 537–38 (discussing various ministerial transgressions and systemic problems that created delays).

399. *Hamdi*, 542 U.S. at 557–58 (Scalia, J., dissenting) (citing Habeas Corpus Act of 1679, 31 Car. 2, ch. 2, §§ 3, 7).

400. See *supra* note 23 for President Bush's statements describing the war on terror as multi-generational.

401. One of the earliest examples of terror used as a political weapon can be found in the Peloponnesian War, waged between Sparta and Athens in ancient Greece from 431–405 B.C.E. See generally VICTOR DAVIS HANSON, *A WAR LIKE NO OTHER: HOW THE ATHENIANS AND SPARTANS FOUGHT THE PELOPONNESIAN WAR* 89–90 (2005) (discussing the advent of asymmetrical warfare in the Peloponnesian War directly targeting civilians). A particularly poignant illustration of this evolution in Greek warfare is provided by the fate of Corcyra, where over 1,000 citizens were executed during civil unrest between supporters of Sparta and Athens. *Id.* at 106–09; THE LANDMARK THUCYDIDES: A COMPREHENSIVE GUIDE TO THE PELOPONNESIAN WAR 248–50 (Robert B. Strassler ed., 1996).

402. President Nixon was the first to employ this language, officially declaring the War on Drugs in June 1971. *Timeline: America's War on Drugs*, NAT'L PUB. RADIO (Apr. 2, 2007), <http://www.npr.org/templates/story/story.php?storyId=9252490>.

403. *Hamdi*, 542 U.S. at 520.

404. *Id.* (citing Geneva Convention (III) Relative to the Treatment of Prisoners of War, art. 118, Aug. 12, 1949, 6 U.S.T. 3316, 3406).

relating to the conflict against the Taliban in Afghanistan, may be very well be detained “for the rest of his life.”⁴⁰⁵ The Court pointed out, however, that Hamdi was being held as a Taliban fighter who had engaged in combat with U.S. armed forces as part of the conflict in Afghanistan authorized by the AUMF.⁴⁰⁶ Thus, the potential duration of Hamdi’s detention was limited to the length of that particular conflict.⁴⁰⁷

The possibilities discussed as mere abstractions in *Hamdi* are a stark reality facing the petitioners in *Al Maqaleh* and others similarly situated. All of the *Al Maqaleh* petitioners have been imprisoned since 2002, with Fadi Al-Maqaleh himself having spent over a quarter of his life in U.S. custody.⁴⁰⁸ None of the petitioners were detained in connection with the conflict against the Taliban in Afghanistan,⁴⁰⁹ and none will benefit from the cessation of those hostilities, be it tomorrow or years from now. Treating the length of detention as a factor in consideration of the petition would allow a court to check the most egregious overreach by the Executive. Habeas relief need not be made available immediately after detention; the Executive has been held to enjoy a reasonable period of time before habeas jurisdiction springs into being.⁴¹⁰ This period of time can be used to collect intelligence from the detainee or to make arrangements that will limit the impact that habeas proceedings will have on military operations.

F. How the Proposed Approach Would Operate in the Case of Nonbattlefield Captures

In order to see how the various moving parts of the proposed approach may interact, it will be useful to consider a hypothetical example. This exercise focuses on an individual captured by the United States in a factual context similar to those in *Al Maqaleh*—in a country that cannot be said to be at war with the United States and in a circumstance that cannot be described as combat-related. Let us suppose this hypothetical prisoner was captured at his residence and there is no contention that he resisted his capture or was part of combat operations against the armed forces of the United States. Following his capture, the prisoner was detained at Bagram Airbase and has been held there for three years.

When a noncitizen suspect is arrested in connection with the war on terror, the first question to be asked should be whether that capture can be considered as having occurred on a conventional battlefield. An example of a capture occurring on a conventional battlefield is presented by the facts of *Hamdi*.⁴¹¹ Petitioner Hamdi was captured while armed with an AK-47 and was alleged to have engaged U.S. combat forces in Afghanistan as part of the Taliban resistance.⁴¹² In the context of the United States’ efforts to confront and defeat terrorists, this is as close to a paradigmatic

405. *Id.*

406. *Id.* at 521.

407. *Id.*

408. Joint Brief for Petitioners-Appellees at 1–4, *Al Maqaleh v. Gates*, 605 F.3d 84 (D.C. Cir. 2010) (Nos. 09-5265, 09-5266, 09-5277).

409. *Id.*

410. *Boumediene v. Bush*, 553 U.S. 723, 795 (2008).

411. *Hamdi*, 542 U.S. at 513.

412. *Id.*

battlefield as one is likely to find. Although Hamdi's U.S. citizenship and incarceration at Guantanamo combined to grant the Court jurisdiction to entertain his habeas petition,⁴¹³ such should not be the case for a noncitizen detainee who is being held reasonably close to the site of capture. If the prisoner was captured on a conventional battlefield, or there exists a rational connection between the loci of capture and detention, the government should be permitted to argue that the practical obstacles to habeas jurisdiction are too great. This approach accords due deference to the Executive's war making powers and allows for prisoners of war to be treated as such.

The judiciary's role, however, should be viewed as enhanced when the government transports our hypothetical prisoner *into* an active combat zone, such as Bagram. When the prisoner, such as the one in our hypothetical, is captured in what can only be described as "civilian" circumstances, any such transportation should be viewed with suspicion. To do otherwise ignores the advantage that accrues to the government through such a move, as well as the historical use of such obstacles to frustrate the legitimate exercise of the writ. The court of appeals in *Al Maqaleh* acknowledged that such evasive intent may be considered as an analytical factor, but only in a case where overt evidence of such intent was plainly present.⁴¹⁴ The likelihood of such evidence becoming part of the record in any judicial proceeding, however, is practically non-existent, whether or not evasion was the objective of the move. This is especially true given the circumscribed ability of a detainee in Bagram to conduct meaningful discovery relating to the governmental detention policy and its underlying rationale. Although it is true that the *Al Maqaleh* petitioners have been granted the opportunity to offer new evidence on this point,⁴¹⁵ this is not a burden that should be borne by such petitioners, who will in most circumstances be without meaningful access to such evidence. In fact, it is difficult to conceive of a scenario in which anything other than circumstantial evidence of manipulative intent would present itself to a petitioner in discovery. Indeed, in granting leave to the *Al Maqaleh* petitioners to amend their habeas petition, Judge Bates took the unusual step of expressing doubts that the new evidence will change the ruling on their petition.⁴¹⁶

Because of the government's decision to detain the prisoner at Bagram, allowing him to petition for a writ of habeas corpus will involve more logistical difficulties than would be the case were he to be appearing in person before a district court in, say, Washington, D.C. Although precluded from arguing that these difficulties pose an absolute bar to habeas jurisdiction, the government remains able to argue that certain procedural modifications are in order in light of legitimate concerns of national security or pragmatism. As discussed in Part III.D.4, technological innovations are available to

413. *Id.* at 533.

414. *Al Maqaleh v. Gates*, 605 F.3d 84, 98–99 (D.C. Cir. 2010); *see also* *Kiyemba v. Obama*, 561 F.3d 509, 516 n.7 (D.C. Cir. 2009) ("In view of the Government's sworn declarations, and of the detainees' failure to present anything that contradicts them, we have no reason to think the transfer process may be a ruse—and a fraud on the court—designed to maintain control over the detainees beyond the reach of the writ.").

415. *Al Maqaleh v. Gates*, No. 06-1669, slip op. at 4 (D.D.C. Feb. 15, 2011).

416. *See id.* at 3 ("To be sure, not all of the evidence petitioners characterize as 'new' really represents any change of relevance with respect to the government's handling of detainees in Bagram."); *id.* at 4 (stating that "the Court has some doubts about the consequence of the additional evidence under [the *Boumediene*] framework").

address concerns of a practical nature and have been so used at Bagram for purposes other than habeas review, as well as at Guantanamo.⁴¹⁷ National security concerns may be addressed through modest changes to evidentiary standards and procedures, so long as the court preserves the habeas bare minimum of a meaningful opportunity for the prisoner to dispute the lawfulness of his detention.⁴¹⁸

Finally, our hypothetical prisoner has been held for three years, and a court considering entertaining his habeas petition should take this factor into account. As stated previously, the government is certainly entitled to a reasonable period of time for the purpose of intelligence gathering in the interests of national security.⁴¹⁹ There comes a time, however, when such purposes no longer justify detention without review. This Comment hesitates to lay down any proposal for a bright-line rule as to just how long that time may be, but the *Al Maqaleh* petitioners' detentions, lasting several years each, have certainly crossed that line. The passing of several years surely degrades the intelligence value of a detainee to the point that it no longer outweighs the interest in precluding indefinite detention of that detainee without any meaningful review.

IV. CONCLUSION

By all appearances, the United States will be enmeshed in the struggle against global terror networks for the foreseeable future. The need to effectively deal with these shadowy dangers remains as pressing as it was on September 12, 2001. The means of dealing with those dangers will remain largely within the discretion of the executive branch, with collaboration and input from Congress. This ongoing necessity, however, also gives rise to the judiciary's obligation to ensure that the discretion enjoyed by the two political branches will be exercised within the boundaries set by the Constitution. The Suspension Clause exists as the primary constitutional guide for the setting of those boundaries, a time-tested navigational device for uncharted waters.

*Boumediene v. Bush*⁴²⁰ contributed significantly to the preservation of those boundaries for many prisoners of the war on terror, specifically those incarcerated at Guantanamo Bay.⁴²¹ *Boumediene* left unfinished, however, the task of providing guidance for future cases arising in different places. The sites of the prisoner's apprehension and subsequent detention should be considered in tandem to prevent transportation for purposes of evading habeas.⁴²² When the prisoner has been transported into an active war zone where combat missions continue, the government should not be able to profit from that transportation in its efforts to forestall habeas

417. See *supra* notes 388–91 and accompanying text for a brief discussion of the use of video-conferencing technology at Bagram and Guantanamo.

418. See *supra* notes 372–86 and accompanying text for a discussion outlining the standard for the habeas “bare minimum” or substitutes adequate to stand in its place.

419. *Boumediene v. Bush*, 553 U.S. 723, 795 (2008).

420. 553 U.S. 723 (2008).

421. See *supra* Part II.D for a discussion of the effect of the *Boumediene* decision for Guantanamo detainees.

422. See *supra* Part III.C for a discussion of how these factors should be analyzed in tandem so as to protect habeas corpus from historically prominent methods of manipulation.

proceedings.⁴²³ The practical obstacles that impede habeas jurisdiction should be considered in shaping the habeas proceedings only when those obstacles are not the product of the government's decision to move the prisoner.⁴²⁴ Finally, the length of the prisoner's detention up to that point should be considered, along with the potential for that detention to become indefinite.⁴²⁵ These adjustments do not effect a rejection of *Boumediene*, but rather a fine tuning of its rubric.

The war on terror was thrust upon the nation by its enemies and the events of September 11, 2001; and one will find little support for rejecting its call to arms. The nature of this war, however, has revealed a widening chasm between the conventional wars of the past and the emerging realities of today's unconventional conflicts. That chasm now threatens to swallow up a measure of the constitutional ideals of separation of powers and individual liberty. In order for those ideals to survive the war on terror intact, their protection cannot be left entirely to those whom we also burden with the duty of keeping the nation secure. Such a burden, freighted with the competing concerns of liberty and security, is far too great for any one branch to bear on its own. The judiciary must stand ready to shoulder its share of the burden of protecting liberty and the separation of powers commanded by the Constitution. Habeas corpus is the appropriate vehicle for the courts to do just that. The proposed adjustments to the *Boumediene* framework are a way to preserve the writ in that capacity.

423. See *supra* Part III.C.2 for a discussion of how such transportation undermines habeas corpus as a meaningful check on executive detention.

424. See *supra* Part III.D for an argument that practical obstacles to habeas jurisdiction should not be accorded full weight when created by the government itself. Part III.D also proposes that the burden on the government to prove that habeas is "impractical" should extend beyond bald assertions of such impracticality.

425. See *supra* Part III.E for a discussion of this factor.

