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Bringing Comfort to the Enemy: The Past, Present, and Future of Habeas Corpus Petitions in Light of the Formalistic Application of Boumediene

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Bringing Comfort to the Enemy?: The Past, Present, and Future of Habeas Corpus Petitions in Light of the Formalistic Application of *Boumediene*

E. Carlisle Overbey†

Such trials would hamper the war effort and bring aid and comfort to the enemy. They would diminish the prestige of our commanders, not only with enemies but with wavering neutrals. 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 and divert his efforts and attention from the military offensive abroad to the legal defensive at home. Nor is it unlikely that the result of such enemy litigiousness would be a conflict between judicial and military opinion highly comforting to enemies of the United States.[1]

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1. Johnson v. Eisentrager, 339 U.S. 763, 779 (1950).

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Introduction

In *Johnson v. Eisentrager*, decided in 1950, the Court worried about the extraterritorial application of the right to petition for habeas corpus.[2] Yet, since then, technology and thinking have evolved such that the Court has begun to reconsider its approach.[3] Starting in 2004, the Supreme Court considered a line of cases leading up to its 2008 decision in *Boumediene v. Bush*, which applied the Suspension Clause outside of the *de jure* sovereign territory of the United States.[4] In *Hamdi v. Rumsfeld*, the Court held that the executive branch had the power to detain enemy combatants under the Authorization for the Use of Military Force (AUMF).[5] Next, in *Rasul v. Bush*, the Court allowed the extension of the writ of habeas corpus to detainees held at Guantanamo Bay.[6] In *Hamdan v. Rumsfeld*, an alien-detainee held at Guantanamo Bay challenged the trial of enemy combatants through military commissions, and the court held that the military commissions as structured were inconsistent with the Uniform Code of Military Justice (UCMJ).[7] Finally, in *Boumediene v. Bush*, the Court held that the Suspension Clause of the Constitution applied to Guantanamo Bay, thus rendering attempts by Congress and the Executive Branch to limit the applicability of the writ of habeas corpus to the base unconstitutional unless they conformed to the stringent requirements of the Suspension Clause.[8] This decision allowed enemy combatants held at Guantanamo Bay to petition U.S. courts for habeas corpus.[9]

Since the passage of *Boumediene*, the lower federal courts have received petitions asking the Court to extend the writ beyond the confines

2. *Id.*
3. *See, e.g.*, Boumediene v. Bush, 553 U.S. 723 (2008); Hamdan v. Rumsfeld, 548 U.S. 557 (2006); Rasul v. Bush, 542 U.S. 466 (2004); Hamdi v. Rumsfeld, 542 U.S. 507 (2004).
4. *Id.* at 798.
5. *Hamdi*, 542 U.S. at 509.
6. *Rasul*, 542 U.S. at 484.
7. *Hamdan*, 548 U.S. at 634.
8. *Boumediene*, 553 U.S. at 793.
9. *Id.*

of Guantanamo Bay. Recently, in 2009, the District Court for the District of Columbia dismissed a petition for habeas corpus in *Wazir v. Gates*.[10] Because the petitioner was an Afghan citizen, and the court was concerned with the potential conflicts with the Afghan government over the trial of an Afghan citizen in U.S. courts, the court refused to permit the petition to be heard.[11] After the District of Columbia District Court in *Al Maqaleh v. Gates* (*Al Maqaleh I*) initially held that Bagram detainees could petition for habeas corpus, the District of Columbia Circuit Court of Appeals in *Al Maqaleh v. Gates* (*Al Maqaleh II*) refused to extend the Suspension Clause to detainees held at Bagram Airfield in Afghanistan, ordering that the petitions should be dismissed in 2010.[12] After a hearing in July 2012, the District Court dismissed the petitions in *Al Maqaleh v. Gates* (*Al Maqaleh III*), finding that new evidence did not undermine the D.C. Circuit Court's decision. [13] In October of 2012, the District Court for the District of Columbia dismissed a petition of a Pakistani citizen held at Bagram Airfield in *Hamidullah v. Obama*.[14] Hamidullah argued that he was fourteen at the time he was captured; however, the court found that Hamidullah had not sufficiently proven that habeas corpus protections for juveniles "[are] somewhat more robust than the concomitant right among adults."[15] Finally, in *Amanatullah v. Obama*, the District Court for the District of Columbia held that a Pakistani citizen detained at Bagram did not have the right to petition the court for habeas corpus relief despite his arguments that conditions at Bagram had changed since the court considered *Al Maqaleh III*.[16]

This Note argues that the current regime for habeas corpus petitions is flawed because the test laid out by the Court in *Boumediene* has been applied formalistically, ignoring its functional roots in the early detainee cases. Further, this Note argues that other factors may become relevant to the analysis beyond the three factors enumerated by the Supreme Court in *Boumediene*. Given the complicated nature of the problem, and the individualized situations of the defendants, the courts should use a more functionalist approach when enemy detainees under unique or altered conditions petition the court for the writ of habeas corpus, which would be more in line with the earlier habeas precedent and avoid the pitfalls associated with formalistic rules. For example, because the courts have applied the *Boumediene* factors formalistically, the United States government has the incentive to continue to transfer detainees away from locations where the writ has been extended.

This Note will first examine the background of habeas corpus in America, through recent case law denying the extension of the writ of

10. Wazir v. Gates, 629 F. Supp. 2d 63, 63 (D.D.C. 2009).
11. *Id.* (citing Al Maqaleh v. Gates (*Al Maqaleh I*), 604 F. Supp. 2d 205, 229 (D.D.C. 2009)).
12. Al Maqaleh v. Gates (*Al Maqaleh II*), 605 F.3d 84, 87 (D.C. Cir. 2010).
13. Al Maqaleh v. Gates (*Al Maqaleh III*), 899 F. Supp. 2d 10, 13 (D.D.C. 2012).
14. Hamidullah v. Obama, 899 F. Supp. 2d 3 (D.D.C. 2012).
15. *Id.* at 7.
16. Amanatullah v. Obama, 904 F. Supp. 2d 45 (D.D.C. 2012).

habeas corpus to enemy detainees held on Bagram Airfield in Afghanistan. Second, it will examine whether the current habeas corpus regime is desirable by parsing out the problems with the D.C. Circuit Court's reasoning in the recent case of *Al Maqaleh II*. Third, this Note will examine other factors, in addition to the *Boumediene* factors, that may become relevant to the future of habeas corpus jurisprudence, including executive manipulation, conflicts with host governments, the United States' withdrawal from Afghanistan, and the age of the enemy combatants.

I. Background

A. The Historical Right to Habeas Corpus

Imported from English Common Law, the writ of habeas corpus prevents the government from detaining individuals indefinitely without showing cause.[17] The right to petition for habeas corpus in American jurisprudence comes from the Suspension Clause of the Constitution, which states, "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the Public Safety may require it."[18] The writ of habeas corpus, known to the Founders as the Great Writ, was included in the Constitution because it was crucial to the Founders' vision for separation of powers, especially with concerns that the various branches of government would trample the protections of the writ in emergency circumstances.[19] To preserve the separation of powers, the language of the Suspension Clause allows the courts to review arbitrary imprisonments.[20] Furthermore, owing to its importance to the Founding Fathers, the writ was included in the Judiciary Act of 1789 in addition to its inclusion in the Constitution.[21] In its modern form, habeas

17. *See* JUDITH FARBEY & R.J. SHARPE, THE LAW OF HABEAS CORPUS 16-17 (Oxford Univ. Press, 3d ed. 2011) (discussing the Habeas Corpus Act of 1679, which marks the beginning of modern habeas jurisprudence in Common Law).

18. U.S. CONST. art. I, § 9, cl. 2. For a discussion of the English origins of habeas corpus, *see* FARBEY & SHARPE, *supra* note 17.

19. Baher Azmy, *Executive Detention, Boumediene, and the New Common Law of Habeas*, 95 IOWA L. REV. 445, 461-62 (2010) (citing Boumediene v. Bush, 553 U.S. 723, 739-44 (2008)).

20. *Id.* at 462.

21. Judiciary Act of 1789, ch. 20, 1 Stat. 73 § 14, ("That writs of *habeas corpus* shall in no case extend to prisoners in gaol, unless where they are in custody, under or by colour of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify."). For a Founding Father's views on Habeas Corpus, *see* THOMAS JEFFERSON, *First Inaugural Address (Mar. 4, 1801)*, *in* 33 THE PAPERS OF THOMAS JEFFERSON 148 (Barbara B. Odberg & J. Jefferson Looney, eds. Univ. of Virginia Press, 2008), *available at* http://rotunda.upress.virginia.edu/founders/TSJN-01-33-02-0116-0004 (enumerating the principles, including habeas corpus, that "form the bright constellation, which has gone before us and guided our steps through an age of revolution and reformation. The wisdom of our sages, and blood of our heroes have been devoted to their attainment:—they should be the creed of our political faith; the text of civic instruction, the touchstone by which to try the services of those we trust; and should we wander from them in moments of error or of alarm, let us hasten to retrace our steps, and to regain the road which alone leads to peace, liberty and safety.").

petitions are limited to a small category of individuals.[22]

B. Habeas Corpus and Enemy Combatants

Before September 11, 2001, habeas law was primarily limited to criminal law and immigration cases; however, after the attacks, Congress passed the AUMF.[23] This joint resolution allowed the President to use "necessary and appropriate force" against those involved in the September 11th attacks and those who would "harbor" the individuals involved.[24] Under this resolution, President George W. Bush authorized the indefinite detention of enemy combatants at Guantanamo Bay.[25]

1. *The Path to* Boumediene v. Bush

It was not long before President Bush's indefinite detention authorization was challenged in the courts. In this first line of cases, including *Hamdi v. Bush*, *Rasul v. Bush*, and *Hamdan v. Bush*, the Court was careful to emphasize that the Executive Branch was not entitled to unfettered discretion to detain enemy combatants, despite the wartime conditions.[26] However, the Court has been more deferential to the Executive when an act of Congress supported the action.[27] Applying a functionalist approach, the Court has created a consistent line of cases that limits the discretion of the Executive Branch.[28]

In *Hamdi v. Bush*, the Court held that Congress, through the AUMF, authorized the detention of enemy combatants.[29] The Act allows the President to employ "all necessary and appropriate force" against those involved in the September 11, 2001 attacks on the United States. [30] Because Hamdi was an American citizen, the Court also noted that a citizen-detainee was entitled to "a factual basis for his classification," and a "fair opportunity to rebut the Government's factual assertions before a neutral decision maker."[31] Though deferential to the Executive, the Court factored in the Congressional support for the Executive's power and was careful to pre-

22. 28 U.S.C. § 2241(c)(1)-(5) (2008). Habeas corpus petitions are only available to those who are in custody of the United States.

23. Ashley E. Siegel, Note, *Some Holds Barred: Extending Executive Detention Habeas Law Beyond Guantanamo Bay*, 92 B.U. L. REV. 1405, 1409 (2012).

24. Authorization for the Use of Military Force, Pub. L. No. 107-40 § 2(a), 115 Stat. 224 (codified in 50 U.S.C. § 1541 (2006)).

25. Military Order—Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, § 2(a)(1), 37 Weekly Comp. Pres. Doc. 1665, 1666 (Nov. 13, 2001) (authorizing the indefinite detention of terrorists without trials, instead authorizing the use of military commissions); News Briefing, Donald Rumsfeld, U.S. Sec'y of Defense (Dec. 27, 2001), *available at* http://www.defense.gov/transcripts/transcript.aspx/?transcriptid=2696 (indicating that these enemy combatants would be held at Guantanamo Bay).

26. Azmy, *supra* note 19, at 452.

27. *Id.* at 453-54.

28. *Id.* at 452.

29. Hamdi v. Rumsfeld, 542 U.S. 507, 517 (2004).

30. *Id.* at 518.

31. *Id.* at 533.

serve the citizen-detainee's rights to an opportunity to be heard.[32]

Rasul v. Bush was the first case to hold that Guantanamo Bay detainees could petition United States courts under 18 U.S.C. § 2241 for habeas corpus relief.[33] The Court found that Guantanamo Bay was *de facto* U.S. territory, because the U.S. had "complete jurisdiction and control" over the area.[34] However, the Court was not clear as to whether the right to petition for habeas corpus relief was exclusive to the specific conditions of Guantanamo Bay, or if the decision was meant to reach beyond Guantanamo Bay to places where the United States had less control.[35] Justice Scalia, in his dissent, worried that this would mean the right to petition for habeas corpus relief would extend to the "four corners of the earth."[36]

Finally, in *Hamdan v. Rumsfeld*, an alien-detainee held at Guantanamo Bay challenged President Bush's November 2001 Executive Order concerning the trial of enemy combatants through military commissions.[37] Hamdan, a Yemeni national, was captured in Afghanistan and then detained at Guantanamo Bay.[38] The Court held that the military commissions authorized by the AUMF were inconsistent with the Uniform Code of Military Justice (UCMJ) because the procedures of the military commissions were not consistent with those required for formal courts-martial.[39] Because the President did not have the authorization from Congress, the Court was less deferential to the Executive Branch than it had been in other decisions. In his concurrence, Justice Steven Breyer suggested that the Executive Branch return and get Congressional authority for the military commissions.[40]

2. *A Functionalist View in* Boumediene v. Bush

Following the advice of Justice Breyer, President Bush returned to Congress for authorization to create military commissions for enemy combatants. Congress authorized these commissions in the Military Commissions Act of 2006 (MCA), expressly providing for the procedural variances from the UCMJ. Attempting to remedy the separation of power defects found by the Court in *Hamdan*, the MCA attempted to statutorily remove access to the writ of habeas corpus.[41]

The MCA created a new scheme for review of the enemy combatant designation, whereby the Combatant Status Review Tribunal (CSRT), would determine whether an alien was appropriately classified as an enemy combatant. This decision would then be reviewable exclusively by

32. Azmy, *supra* note 19, at 460.
33. Rasul v. Bush, 542 U.S. 466, 484 (2004).
34. *Id.* at 480.
35. *Id.*; *see* Azmy, *supra* note 19, at 456 (noting that the opinion does not define the geographical boundaries of its decision).
36. *Rasul*, 542 U.S. at 498 (Scalia, J., dissenting).
37. *See* Azmy, *supra* note 19, at 457.
38. Hamdan v. Rumsfeld, 548 U.S. 557, 566 (2006).
39. *Id.* at 594, 620-23.
40. *Id.* at 636 (Breyer, J., concurring).
41. Siegel, *supra* note 23, at 1413.

the District of Columbia Circuit Court of Appeals.[42] The CSRT would hold non-adversarial proceedings to determine if the Department of Defense's determination that an individual should be detained was accurate.[43] The Court of Appeals could only review whether the determination of the CSRT's decision was "consistent with the standards and procedures specified by the Secretary of Defense"; or whether the procedures were constitutional and consistent with the laws of the United States to "the extent that the Constitution and laws of the United States are applicable."[44]

For the first time in the history of wartime Court decisions, in *Boumediene* the Court held a statute with both Congressional and Executive support—the MCA—unconstitutional.[45] In *Boumediene*, concerned that the Executive might try to manipulate any bright-line rules, the Court employed a functionalist approach to determine whether the habeas right still reached Guantanamo Bay after the enactment of the MCA. The detainees claimed that the removal of the privilege of habeas corpus through the Detainee Treatment Act of 2005 (DTA) and the MCA was unconstitutional because the privilege could not be removed unless through the Suspension Clause of the Constitution.[46]

a. The Historical Reach of the Writ

In order to determine the geographic extent of the writ of habeas corpus, Justice Anthony Kennedy explored the scope of the common law writ as it stood in 1789.[47] Although not dispositive, at the urging of the petitioners the Court also considered English common law precedent allowing aliens to petition for habeas corpus relief.[48] Further, petitioners argued that their position at Guantanamo Bay was analogous to territories where the writ ran outside of England, namely the Channel Islands and India.[49] However, the Court distinguished these two "exempt jurisdictions," asserting that they were under the Crown's control, and some authority states that these jurisdictions were considered part of the sovereign territory of Britain.[50] Furthermore, there was a court sitting in Calcutta, whereas there is no federal court that currently sits in Guantanamo

42. Military Commissions Act of 2006, Pub. L. 109-366, 120 Stat. 2600 (2006), §§ 948d(c), 950d(d) (codified as 10 U.S.C. 948a note) (explaining the scheme revived by the Military Court Act of 2006 after its nullification in *Hamdan*).

43. Azmy, *supra* note 19, at 459-60 (citing Memorandum from Paul Wolfowitz, Deputy Sec'y of Def., to the Sec'y of the Navy, Order Establishing Combatant Status Review Tribunal 1 (July 7, 2004), *available at* http://www.defenselink.mil/news/Jul2004/d20040707review.pdf).

44. Military Commissions Act § 950g(c).

45. Azmy, *supra* note 19, at 460.

46. Siegel, *supra* note 23, at 1414.

47. Boumediene v. Bush, 553 U.S. 723, 746-52 (2008).

48. *Id.* at 747 (citing Case of Three Spanish Sailors, 2 Black. W. 1324, 96 Eng. Rep. 775 (C. P. 1779); Sommersett's Case, 20 How. St. Tr. 1, 80-82 (1772); King v. Schiever, 2 Burr. 765, 97 Eng. Rep. 551 (K. B. 1759); Du Castro's Case, Fort. 195, 92 Eng. Rep. 816 (K. B. 1697)).

49. *Id.* at 748.

50. *Id.*

Bay.[51]

On the other side, the Government argued that Guantanamo was more like Scotland and Hanover, which were not part of England, but were under the control of the English monarch.[52] The writ did not extend over these territories, despite the monarch's control in his capacities as the King of Scotland and Elector of Hanover.[53] However, Justice Kennedy attributed this to prudential concerns, rather than to an inability of the courts to apply the writ to these territories.[54] Because Scotland maintained its own laws and court system after its unification with Britain, it could have been problematic for English courts to apply the writ in the territory, as it could have led to inconsistent judgments in competent courts and difficulty in enforcement.[55] Justice Kennedy, however, noted that neither of these potential embarrassments would extend to Guantanamo, as there was not another competent court system for the naval base there, and an order from a United States Court would not likely be disobeyed by the military.[56] Despite the extensive common law history of the writ, Justice Kennedy asserted that unclear precedent would not bind the Court, because Guantanamo was a unique location, and terrorism was a unique problem.[57]

Additionally, the sovereignty of Guantanamo presented unique considerations. Guantanamo is not part of the United States, as Cuba maintains "ultimate sovereignty" over the area, while the United States has *de facto* control.[58] The Court did not dispute the Government's assertions concerning the sovereignty of Guantanamo; however, the Court did consider the extent to which the United States objectively controlled the territory.[59] In finding that *de jure* control was not required for the writ to extend to a territory, the Court refused to defer to the Government's position, despite the congruent support of the Executive and Legislative Branches.

b. Functionalist Approach in Precedent

Because the common law history was inconclusive, the Court considered various precedents to support its conclusion that the Suspension Clause applied to Guantanamo, and its functionalist approach.[60] In the Insular Cases, heard between 1901 and 1905, the Court held that the Constitution applied to territories that were not States, but recognized that there were intrinsic difficulties in adopting this approach.[61] The Court held that the Constitution applied in full to incorporated territories, but

51. *Id.* at 748-49.
52. *Id.* at 749.
53. Boumediene v. Bush, 553 U.S. 723, 749 (2008).
54. *Id.*
55. *Id.* at 749-50.
56. *Id.* at 751.
57. *Id.*
58. *Id.* at 753.
59. *Id.* at 753-54 (2008).
60. Azmy, *supra* note 19, at 464.
61. *Boumediene* 553 U.S. at 757 (2008).

only in part to unincorporated territories.[62] The Court used a flexible approach to Constitutional applicability in territories throughout the Insular Cases, which would inform its approach in *Boumediene*; where it sought to use "its power sparingly and where it would be most needed."[63]

Kennedy also considered *Reid v. Covert*, heard in 1957 by the Supreme Court, in which military spouses were charged and tried before military commissions abroad for crimes committed abroad.[64] Because they were not military members, they argued that they were entitled to a jury trial.[65] The Court determined in *Reid* that the "specific circumstances of each particular case" were important for determining the territorial reach of the Constitution, implicating a functionalist approach.[66] The American citizenship of the defendants was critical to the holding that the Fifth and Sixth Amendment applied abroad, with each of the Justices noting the additional importance of practical considerations.[67]

The final precedent considered by the Court, *Johnson v. Eisentrager*, decided in 1950, was also decided on practical considerations.[68] In *Eisentrager*, the Court considered the habeas petitions of several enemy aliens who were convicted of violating the laws of war and detained at Landsberg Prison in Germany.[69] Concerned with the practical problems of requiring the government to bring the prisoners into court for a habeas corpus proceeding, the Court balanced these considerations with the requirements of the Constitution.[70] Citing the "allocation of shipping space, guarding personnel, billeting and rations"[71] and that it would be detrimental to the commanders "prestige . . . at a sensitive time", the Court refused to allow the prisoners to bring habeas petitions.[72] The Court in *Eisentrager* stated that the prisoners "at no relevant time were within any territory over which the United States is sovereign, and [that] the scenes of their offense, their capture, their trial and their punishment were all beyond the territorial jurisdiction of any court of the United States."[73] However, the Court in *Boumediene* reasoned that this did not require the Court to apply a formalistic approach that hinged purely on *de jure* sovereignty.[74]

From this precedent, the Court extracted a line of reasoning that was consistent throughout the Insular Cases, *Reid*, and *Eisentrager*: the applicability of the Constitution in extraterritorial cases hinges on a functional analysis rather than a formal one.[75] Applying this approach to *Boumediene*,

62. *Id.* at 757-58 (citing Dorr v. United States, 195 U.S. 138, 143 (1904)).
63. *Id.* at 759.
64. Reid v. Covert, 354 U.S. 1, 15-16 (1957).
65. *Id.*
66. *Id.* at 54.
67. *Boumediene*, 553 U.S. at 760.
68. Johnson v. Eisentrager, 339 U.S. 763, 778-79 (1950).
69. *Id.* at 766.
70. *Boumediene*, 553 U.S. at 762.
71. *Eisentrager*, 339 U.S. at 779.
72. *Boumediene*, 553 U.S. at 762.
73. *Eisentrager*, 339 U.S. at 778.
74. *Boumediene*, 553 U.S. at 763.
75. *Id.* at 764.

the Court refused to take the Government's position that *de jure* sovereignty created a bright-line rule for the extraterritorial application of the Suspension Clause. [76]

c. Separation of Powers

Furthermore, the Court in *Boumediene* was concerned that the *de jure* requirement for Constitutional application would tempt the Government to create areas where the law did not apply, at least to non-citizens.[77] In 1898, Spain ceded Cuba to the United States at the end of the Spanish-American War, and the United States maintained *de jure* sovereignty over Cuba until 1902.[78] In 1903, the United States entered into a lease giving Cuba "ultimate sovereignty" over Guantanamo Bay, but allowing the United States to exercise the same absolute power over the territory that it had held since the end of the Spanish-American War.[79] If the Government could replicate this arrangement in other regions of the world, the Government would be able to create havens where the Constitution would not apply.[80]

The Court reasoned that the Constitution cannot be "contracted away" in that manner, and that allowing such an arrangement would permit the political branches of government to determine what the law is and where it applies.[81] Concerned that the applicability of the Suspension Clause would be "subject to manipulation by those whose power it is designed to restrain," the Court noted that separation of powers concerns weighed against a formalist approach.[82]

d. The *Boumediene* Factors

In taking a functionalist approach, the Court enumerated several factors to weigh when considering whether the Suspension Clause should apply to Guantanamo Bay.[83] The Court in *Boumediene* adapted three factors from the practical concerns outlined in *Eisentrager*, and held that at a minimum these three factors were relevant to the determination of Constitutional applicability of the Suspension Clause to Guantanamo Bay: "(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."[84]

In *Eisentrager*, the detainees were not American citizens, and did not contest that they were enemy aliens.[85] However, in *Boumediene*, the detain-

76. *Id.* at 764-65.
77. *Id.* at 765.
78. *Id.* at 764.
79. *Id.* at 765.
80. *Id.*
81. *Id.*
82. *Id.* at 766.
83. *Id.* at 766-71.
84. *Id.* at 766.
85. Johnson v. Eisentrager, 339 U.S. 763, 765 (1950).

ees, though still not American citizens, did claim that they were not enemy combatants.[86] Through the Combatant Status Review Tribunals (CSRT) proceedings, the court noted that the detainees had some process to determine their status, but also stated that unlike the prisoners in *Eisentrager*, these detainees had not yet been tried before formal military commissions.[87] Holding that the procedures afforded to the *Boumediene* detainees fell short of those that would eliminate the need for habeas corpus review, the Court noted that the detainees were not charged with specific crimes, represented by counsel or even an advocate, allowed to introduce evidence that was not "reasonably available", and were not able to effectively rebut the government's evidence against them without the aid of counsel.[88]

Like the prisoners in *Eisentrager*, the *Boumediene* detainees were not held or apprehended inside the sovereign territory of the United States.[89] However, the Court noted several important distinctions that weighed in favor of the applicability of the Suspension Clause. Unlike Landsberg Prison in 1950, Guantanamo is under the absolute and indefinite control of the United States.[90] Landsberg Prison was instead under the combined jurisdiction of the Allied Forces, and hence, the other forces scrutinized the United States' actions in the prison.[91] Further, the Allies did not intend to occupy Germany for an extended period, nor did they intend to completely replace the already-existing German infrastructure.[92] Because Guantanamo Bay has been consistently held by the United States, the *Boumediene* Court found that the second factor weighed in favor of extending habeas corpus rights to detainees at Guantanamo.[93]

The Court found that the final factor, the practical obstacles inherent in resolving the prisoner's entitlement to the writ, also weighed in favor of the detainees.[94] Despite recognizing that habeas corpus proceedings would necessarily require funds and the diversion of some military personnel, the Court found that these factors were not dispositive.[95] Additionally, the habeas corpus proceedings would not compromise the military mission at Guantanamo.[96] The Court distinguished *Eisentrager* by noting that the military mission in Germany was responsible for occupying a huge territory with eighteen million people after the end of the war.[97] The military, stationed in Germany, "[i]n addition to supervising massive reconstruction and aid efforts[,] . . . faced potential security threats from a defeated enemy."[98] Unlike the military presence in post-war Germany, the military

86. *Boumediene*, 553 U.S. at 766.
87. *Id.* at 765-66.
88. *Id.* at 767.
89. *Id.* at 768.
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.* at 768-69.
94. *Id.* at 769.
95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.*

stationed at Guantanamo occupies only forty-five square miles of land and water and is not in an active theater of war.[99] Finally, the Court noted that adjudicating habeas petitions in Guantanamo would not cause conflicts with the host government.[100]

With all three factors weighing in favor of extending habeas corpus rights to detainees, the Court held that the Suspension Clause applied to Guantanamo Bay. Thus, if Congress wished to remove habeas corpus rights from those detainees, they would have to do so under the terms of the Suspension Clause, and only "in cases of rebellion or invasion . . . [when] the public safety may require it."[101]

3. *Rigid Misapplication of* Boumediene *in* Al Maqaleh II

a. History of Detention of Enemy Combatants at Bagram Air Base

As of 2009, Bagram Airfield, located forty miles outside of Kabul in Afghanistan,[102] held more than six hundred prisoners.[103] Additionally, the site is a base for American forces, along with North Atlantic Treaty Organization (NATO) International Security Assistance Forces (ISAF), which constitute the coalition forces in the region.[104] The United States military has controlled Bagram Airfield since the invasion of Afghanistan in 2001.[105] Soon after taking over the base, the military converted airplane hangars into detention facilities, which would ultimately be known as the Bagram Theater Internment Facility (BTIF).[106] The BTIF is under the exclusive control of the U.S. military.[107] In 2006, the U.S. and Afghanistan signed a lease agreement granting the U.S. the "exclusive, peaceable, undisturbed and uninterrupted" use of the land.[108] Though Afghanistan is still the "host" nation, the lease agreement allows the United States use of the airfield until the U.S. or its successors determine that the base is no longer needed.[109]

b. Petitioners

Four defendants originally petitioned for writs of habeas corpus in *Al Maqaleh I*.[110] The District Court deferred and ultimately dismissed the complaint of an Afghan citizen detainee because of sovereignty concerns

99. *Id.* at 770.
100. *Id.*
101. U.S. CONST. art. 1, § 9, cl. 2.
102. Azmy, *supra* note 19, at 483.
103. Marc D. Falkoff & Robert Knowles, *Bagram,* Boumediene, *and Limited Government*, 59 DEPAUL L. REV. 851, 857 (2010).
104. Azmy, *supra* note 19, at 483.
105. Falkoff & Knowles, *supra* note 103, at 856.
106. *Id.*
107. *See id.*
108. Accommodation Consignment Agreement for Lands and Facilities at Bagram Airfield, U.S.-Afg., Sept. 28, 2006, *available at* http://washingtonindependent.com/wp-content/uploads/2009/01/miller-declaration1.pdf. (attached as Exhibit 1 to Declaration of Colonel Rose M. Miller, Ruzatullah v. Rumsfeld, No. 06-CV-01707 (D.D.C. 2006)).
109. *Id.*
110. *Al Maqaleh I*, 604 F. Supp. 2d 205, 207 (D.D.C. 2009).

and practical concerns that this would cause conflict with the Afghan government. [111] Haji Wazir, the Afghan citizen, was captured in Dubai in 2002.[112] After denying the government's motion to dismiss on the other three cases, the District Court certified these cases for interlocutory appeal.[113] The Circuit Court reviewed the cases of Fadi Al-Maqaleh, a Yemeni citizen allegedly held since 2003 whose site of capture is unclear,[114] Redha Al-Najar, a Tunisian citizen allegedly captured in Pakistan in 2002, and Amin Al-Bakri, a Yemeni citizen allegedly captured in Thailand in 2002.[115]

c. *Boumediene* Factors

The court in *Al Maqaleh II* examined the three *Boumediene* factors to determine whether the Suspension Clause applied to Bagram Airfield. The court first considered "the citizenship and status of the detainee and the adequacy of the process through which that status determination was made."[116] Though the court determined that citizenship was important to determining the constitutional rights of persons, the alien citizenship of the petitioners in this case did not weigh against the petitioners, because their citizenship did not differ from the petitioners in *Boumediene*.[117] Despite their standing as enemy aliens, the court found that this factor weighed in favor of extending the writ to Bagram detainees.[118]

Further, the court found that the process afforded to the Bagram detainees was less than the CSRT proceeding provided to Guantanamo detainees.[119] The *Al Maqaleh I* petitioners' status was determined by an "Unlawful Enemy Combatant Review Board" (UECRB), which afforded fewer protections than a CSRT proceeding.[120] Though the exact details of UECRB procedures have not been disclosed, the detainees in this case were only entitled to the "general basis of [their] detention," and were only allowed to make a written statement in response to the allegations.[121] Finding these procedures even less protective of detainee rights than those in *Boumediene*, the court held that the first factor weighed heavily towards extending the writ to the Bagram detainees.[122]

111. *Id.* at 230-31, *overruled on other grounds by Al Maqaleh II*, 605 F.3d 84 (D.C. Cir. 2010); Wazir v. Gates, 629 F.Supp. 2d 63, 64 (D.D.C. 2009).
112. *Al Maqaleh I*, 604 F. Supp. 2d at 209.
113. *Al Maqaleh II*, 605 F.3d at 87.
114. Although Al-Maqaleh claimed he was captured outside of Afghanistan, Colonel James W. Gray, the Commander of Detention Operations, asserted that Al-Maqaleh was captured in Zabul, Afghanistan. *Id.*
115. *Id.*
116. *Id.* at 94 (quoting Boumediene v. Bush, 553 U.S. 723, 766 (2008)).
117. *Id.* at 95-96.
118. *Id.* at 96.
119. *Id.*
120. *Id.* at 96.
121. While the case was pending in front of the Circuit Court, the Obama administration implemented enhanced protocol for the UECRB which allowed the prisoners to appear before the board; however, lawyers are still not allowed to participate in the hearings. Falkoff & Knowles, *supra* note 103, at 862.
122. *Al Maqaleh II*, 605 F.3d at 96.

The second *Boumediene* factor, "the nature of the sites where apprehension and then detention took place," on the other hand, weighed heavily in favor of the United States. [123] Like the petitioners in *Boumediene* (and in *Eisentrager*), the *Al Maqaleh II* petitioners were apprehended abroad.[124] The nature of the site where detention took place weighed favorably towards the Government's position because of the significant distinctions between the leasehold on Guantanamo Bay and Bagram Airfield.[125] Additionally, because the United States has maintained control over Guantanamo for over a century and there is no evidence that the United States intends its presence at Bagram to be permanent, the court held that there was no de facto sovereignty over Bagram, unlike the United States' de facto sovereignty over Guantanamo Bay.[126] Furthermore, because the United States has maintained Guantanamo in the face of a hostile government, whereas the Afghan government is not hostile to the United States, the court held that the site of detention weighed heavily in favor of denying the extension of the writ to Bagram detainees.[127]

Finally, the court held that the third factor, "the practical obstacles inherent in resolving the prisoner's entitlement to the writ," weighed heavily in favor of the position of the United States.[128] Because Afghanistan was an active theater of war, the court held that the case was more like *Eisentrager* than *Boumediene* and was ultimately a stronger case for denying the writ than the case in *Eisentrager*.[129] Though World War II had ended by the time the petitioners in *Eisentrager* brought their habeas corpus petition, the United States and the Allied forces were rebuilding Germany and still faced threats from the defeated enemies.[130] The Court was "concerned about judicial interference with the military's efforts . . . ."[131] In Afghanistan, the court held that the threats were even greater because Bagram Airfield is in an active theater of war.[132] Weighing all of these factors, the court held that the second and third factors outweighed the first factor, and ultimately did not extend the Suspension Clause to Bagram Airfield.[133]

II. Analysis

A. Is the Current Regime Desirable?

Though *Al Maqaleh II* left open the possibility of additional factors, the court still used a formalistic approach in applying the *Boumediene* factors

123. *Id.* (quoting Boumediene v. Bush, 553 U.S. 723, 766 (2008)).
124. *Id.*
125. *Id.* at 97.
126. *Id.*
127. *Id.*
128. *Id.* (quoting *Boumediene*, 553 U.S. at 766).
129. *Id.*
130. *Id.* (quoting *Boumediene*, 553 U.S. at 784).
131. *Id.* (quoting *id.*).
132. *Id.*
133. *Id.* at 99.

that seems contrary to the overall theme of the detention precedent.[134] The precedent supports the idea that the habeas corpus problem requires a functionalist approach, yet the current regime is rigid in its application of the *Boumediene* factors. This Note argues that a continued formalistic application of the factors is not desirable, particularly as the situation in Afghanistan evolves and the United States pulls back on its involvement.

1. The Government's Interest in a Formalistic Approach

The government has an interest in seeing courts apply the formalistic approach the D.C. Circuit Court used in *Al Maqaleh II* by applying the *Boumediene* factors. With this approach, the government is able to keep the detainees outside of the reach of the writ of habeas corpus, without the threat of review of their actions in court. If the analysis is limited to the *Boumediene* factors, only something as extreme as an end to the War Against Terror would likely change the outcome of habeas corpus petition cases before the courts, and the government would likely be willing to release detainees after the end of the war in order to comply with international laws of war. The status of the site of detention is not likely to change in a way that would make the factor weigh towards allowing detainees to petition for the writ. The fact that the Afghan Government is becoming increasingly hostile to the United States' control of the prison is more likely to weigh in favor of the United States than the detainees because it makes the United States' position more tenuous.[135] Many of the detainees have been handed over to the Afghan government and would then be even further outside the reach of habeas corpus rights in American courts.[136] If courts continue to apply the *Boumediene* factors in a formalistic manner, the government will not have much trouble keeping Bagram detainees and other enemy combatant petitioners from having the right to petition for habeas corpus relief and will effectively be able to decide where the Constitution applies.

2. Separation of Powers

While the government's position is that the courts should defer to the Executive on matters of war-making powers, the writ of habeas corpus was intended to protect against unbridled power accumulated by an executive in times of war.[137] In *Boumediene*, the Court stated that the writ of habeas corpus was fundamental to the framers, because it meant "that the King, too, was subject to the law."[138] The writ was intended as a judicial check on the power of the Executive to detain individuals indefinitely in times of war.[139]

134. *Id.* at 95-99.
135. *See* Rob Nordland, *Issues Linger as Afghans Take Control of a Prison*, N.Y. TIMES, Sept. 11, 2012, at A5.
136. *Id.*
137. Azmy, *supra* note 19, at 461.
138. Boumediene v. Bush, 553 U.S. 723, 741 (2008).
139. INS v. St. Cyr, 533 U.S. 289, 301 (2001).

But a formalistic application of the *Boumediene* factors subverts the concerns that led to the inclusion of the writ in the Constitution. As discussed further below, the formalist approach leaves open the possibility that the Executive will manipulate the system and make decisions on where to detain individuals in order to avoid court intervention. The Supreme Court in *Boumediene* expressed its concern with this in stating, "[o]ur basic charter cannot be contracted away like this."[140] The current regime essentially encourages the government to do just that. Since the Supreme Court handed down the *Boumediene* decision, transfers to Guantanamo Bay have abruptly halted.[141]

3. Al Maqaleh I: *Was the Outcome in* Al Maqaleh II *and* III *Certain?*

When Judge Bates of the D.C. District Court first applied the *Boumediene* factors in *Al Maqaleh I* he initially reached a different result, indicating that the outcome in *Al Maqaleh II* was neither certain nor mandated by the result of *Boumediene.* It was only upon review by the D.C. Circuit, and remand to the D.C. District Court, that the *Boumediene* factors were applied rigidly and formalistically. The court divided the three *Boumediene* factors into six factors to analyze the petitioners case in *Al Maqaleh I*: "(1) the citizenship of the detainee; (2) the status of the detainee; (3) the adequacy of the process through which the status determination was made; (4) the nature of the site of apprehension; (5) the nature of the site of detention; and (6) the practical obstacles inherent in resolving the petitioner's entitlement to the writ."[142] Refusing to apply a wholesale approach to all Bagram detainees, Judge Bates wrote, "[t]he Supreme Court repeatedly eschewed bright-line rules, favoring instead an assessment of 'objective factors and practical concerns.'"[143] The D.C. District Court also highlighted a seventh factor that informed the *Boumediene* analysis: "the length of a petitioner's detention without adequate review."[144]

The court found that the petitioners were situated identically to the petitioners in *Boumediene* regarding three of the factors: the citizenship of the detainee (none of the petitioners were U.S. citizens); status of the detainee (all contested their determination as "enemy combatants"); and site of apprehension (all petitioners were apprehended outside of the U.S. sovereign territory).[145] The fact that none of the petitioners were American citizens weighed against extending the writ to the petitioners.[146] Additionally, the court found that the status of the detainees as "enemy combatants" weighed neither for nor against the extension of the writ.[147] Finally, the court found that the site of apprehension could be relevant, though the

140. *Boumediene*, 553 U.S. at 765.
141. Falkoff & Knowles, *supra* note 103, at 856.
142. *Al Maqaleh I*, 604 F. Supp. 2d 205, 215 (D.D.C. 2009).
143. *Id.*
144. *Id.* at 216.
145. *Id.* at 217-18.
146. *Id.* at 218-19.
147. *Id.* at 219-20.

court distinguished between Bagram detainees captured in Afghanistan and those captured outside of Afghanistan but detained at Bagram.[148] The court found that under the holding of *Boumediene*, particularly the concern with executive manipulation of any bright-line rules, there was a difference between those detainees who were captured in a theater of war and detained there and those detainees captured far from the battlefield and then brought into an active theater of war.[149] In this case, the court held that this factor cut in favor of the detainees, because they were all apprehended outside of Afghanistan.[150]

For the next three factors, the court found that an analysis substantially different from the *Boumediene* analysis applied.[151] Firstly, the court found that the site of detention revolved around the "objective degree of control" that the United States exercised over Bagram Airbase.[152] Finding that the United States exercised a high "objective degree of control," and that the allies at Landsberg prison in the *Eisentrager* case served as an actual check on U.S. forces, while that was not the case at Bagram, the court held that "[o]n the Guantanamo-Landsberg spectrum, then, 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."[153] However, the court also found that "[a]s to the duration of the U.S. presence, . . . Bagram appears to be closer to Landsberg than Guantanamo—the United States has been at Bagram for less than a decade and has disavowed any intention of a permanent presence there."[154] Ultimately, the court concluded that as to the site of detention, the factor did not weigh as strongly towards the petitioners as it did at Bagram, but that the United States still "has a high objective degree of control at Bagram."[155]

Secondly, the court examined the adequacy of the process to determine the status of the detainees as enemy combatants.[156] The court found that the UECRB reviews of detainees at Bagram was less thorough than the CSRT proceedings used for the Guantanamo detainees.[157] The court found that since the inadequacy of the CSRT proceedings weighed in favor of the petitioners in *Boumediene*, the greater inadequacies of the UECRB weighed even more strongly in favor of the *Al Maqaleh I* petitioners.[158]

Thirdly, the court considered the practical obstacles inherent in extending the Suspension Clause to Bagram.[159] In *Boumediene*, the Court focused on whether extending habeas corpus to Guantanamo would com-

148. *Id.* at 220.
149. *Id.* at 220-21.
150. *Id.* at 221.
151. *Id.*
152. *Id.*
153. *Id.* at 224.
154. *Id.* at 225.
155. *Id.* at 225-26.
156. *Id.* at 226-27.
157. *Id.* at 226.
158. *Id.* at 227.
159. *Id.* at 227-31.

promise active military missions or if it would cause friction with the host government, finding that these considerations weighed in favor of extending the writ to the petitioners.[160] At Bagram, the practical difficulties in providing habeas review to detainees are elevated because it is located in an active war zone.[161] However, given the United States' control over Bagram and advances in technology, these barriers are less than those that confronted the military at Landsberg prison.[162] For example, the court cited video-conferencing capabilities that could negate the need for in-court appearances.[163] Additionally, the court found that pulling witnesses from the battlefield was not an issue because all of the petitioners were captured outside of Afghanistan, and the difficulties in providing attorneys were not dispositive.[164] The court held that the practical obstacles inherent in extending the Suspension Clause to Bagram were "not so onerous, so fraught with danger, or so likely to cause friction with the Afghan government as to warrant depriving them of the protections of the Great Writ."[165]

Balancing all of the factors outlined above, the court in *Al Maqaleh I* found that the Suspension Clause did extend to Bagram Airbase and that the MCA § 7(a), which stripped the court of the jurisdiction to hear the petitions, was unconstitutional.[166] Finding that the Bagram detainees were in many senses identical to the detainees held at Guantanamo Bay, the court held that "there [was] a very close historical precedent—*Boumediene* itself, which compel[led the] outcome."[167] Additionally, the court found that Congress had not provided an adequate substitute for habeas review, as the process provided to Bagram detainees was even less than that provided to Guantanamo detainees, and even those CSRT proceedings did not adequately substitute for habeas review.[168]

Prior to the decision, scholars predicted that the writ would extend to the prisoners at Bagram.[169] Finding, as the court would, that the UECRB procedures were even more deficient than the CSRT procedures used at Guantanamo, Professors Falkoff and Knowles concurred with Judge Bates in *Al Maqaleh I*—that the factor of the procedures used weighed in favor of the petitioners—though they cautioned against putting too much weight on this factor.[170] They would have this factor, along with the next factor, the site of capture and site of detention, only be relevant insofar as it reveals

160. *Id.* at 227-28.
161. *Id.* at 228.
162. *Id.*
163. *Id.*
164. *Id.* at 228-29.
165. *Id.* at 231.
166. *Id.* at 235. This applied only to three of the petitioners: al Maqaleh, al Bakri, and al-Najar. The fourth petitioner, Haji Wazir, had his petition dismissed because he was an Afghan citizen and because of concern over possible "friction with the Afghan government." *Id.* at 229
167. *Id.* at 232.
168. *Id.*
169. Falkoff & Knowles, *supra* note 103, at 887.
170. *Id.* at 889-90.

whether the government has exceeded the limitations on war-making that the Constitution authorizes.[171] Falkoff and Knowles also found the next factor, the site of capture and the site of detention, to weigh in favor of the petitioners.[172] They stated, "[I]t is reasonable to conclude that the government is not acting within its authority when it seeks to deny access to the courts to a detainee who was taken into custody outside of a war zone and was subsequently brought into the war zone by the government."[173] Finally, they examined the practical difficulties in extending the writ to Bagram through a comparison of Bagram and Guantanamo Bay.[174] Finding, as Judge Bates did in *Al Maqaleh I*, that the degree of U.S. control over Bagram was relevant, these scholars agreed that the practical obstacles could be overcome, especially because many of the detainees had been brought into the active war zone. [175] As they eloquently concluded, "[A]s detentions lengthen, procedural protections are abandoned, the location of the prisons becomes more secure, and access to the courts is made more practicable, it becomes increasingly impossible to contend that the government's refusal to allow access to the courts is reasonably related to its constitutional authority to wage war."[176]

B. Future of Habeas Corpus Jurisprudence: Additional Factors May Become Relevant

Additional factors could become relevant in the analysis of whether to extend habeas corpus rights to petitioners from Bagram or other similarly situated detainees. *Boumediene*, in its language, left open this possibility when the Court stated, "*at least three factors* are relevant in determining the reach of the Suspension Clause . . . ."[177] Further, the D.C. Circuit Court left open the possibility in *Al Maqaleh II* that other factors might result in a change of position for petitioners from Bagram.[178]

1. *Manipulation Principle*

In *Al Maqaleh II*, the D.C. Circuit Court addressed, but dismissed, the petitioners' claims that the U.S. Government was "evad[ing] judicial review of Executive detention decisions by transferring detainees into active conflict zones, thereby granting the Executive the power to switch the Constitution on or off at will."[179] The court stated that this was neither relevant to the case nor to the second and third factors in *Boumediene*.[180] However, there is some compelling evidence to the contrary, and, additionally, it was

171. *Id.* at 890.
172. *Id.*
173. *Id.* (emphasis omitted).
174. *Id.* at 892-94.
175. *Id.* at 893.
176. *Id.* at 893-94.
177. Boumediene v. Bush, 553 U.S. 723, 766 (2008) (emphasis added).
178. *Al Maqaleh III*, Nos. 06-1669, 08-1307, 08-2143, 2012 WL 5077483, at *1 (D.D.C. Oct. 19, 2012).
179. *Al Maqaleh II*, 605 F.3d 84, 98 (D.C. Cir. 2010).
180. *Id.*

a concern that the Court worried about in *Boumediene*.[181] There, the Supreme Court stated unequivocally, "The test for determining the scope of this provision must not be subject to manipulation by those whose power it is designed to restrain."[182]

In 2004, when it became more apparent that enemy combatants at Guantanamo Bay would be allowed to petition U.S. Courts for the writ of habeas corpus, transfers of detainees from Afghanistan and other locations to Guantanamo largely stopped.[183] Currently, there are approximately 3,000 people detained at Bagram, whereas there are about 170 detained at Guantanamo Bay.[184] Between early 2004, when the population of Bagram was 100, and 2012, the population increased thirtyfold.[185]

If a petitioner were able to convince the court of the relevance of this information, even if it were not relevant to the second and third factors in *Boumediene*, as the court in *Al Maqaleh II* stated, it might constitute a factor in its own right. Certainly, a desire to prevent detainees from being able to petition for habeas corpus is not a legitimate interest in itself. Additionally, this was a concern for the Court in *Boumediene*. The Court stated that a bright line rule might become manipulable and worried that this would allow the government to effectively decide where the law applied.[186] Further, Chief Judge Sentelle of the D.C. Circuit also explicitly recognized the danger of allowing an executive to move detainees captured abroad into active warzones to prevent them from having access to judicial review in *Al Maqaleh II*.[187] These policy concerns seem applicable to a functional analysis of whether the writ should extend to enemy detainees held outside of Guantanamo. An interest in ensuring that the Executive not undermine separation of powers through detaining enemy combatants just outside the reach of habeas corpus would weigh in favor of extending the writ to enemy combatants held at Bagram Airbase.

2. *Conflicts with "Host Governments"*

Judge Bates, in *Al Maqaleh I*, discussed thoroughly how conflicts with host governments would affect the analysis of the *Boumediene* factors. One of the petitioners, Wazir, was an Afghan citizen, which complicated matters.[188] According to the Tennison Declaration that Judge Bates cited in *Al Maqaleh I*, "[P]ursuant to a diplomatic arrangement reached with the gov-

181. *Boumediene*, 553 U.S. at 765-66.
182. *Id.*
183. Falkoff & Knowles, *supra* note 103, at 856.
184. *Bagram Detention Center (Afghanistan)*, Times Topics, N.Y. TIMES, *available at* http://topics.nytimes.com/top/reference/timestopics/subjects/b/bagram_air_base_afghanistan/index.html?8qa (last visited Dec. 9, 2012).
185. Tim Golden, *Foiling U.S. Plan, Prison Expands in Afghanistan*, N.Y. TIMES, Jan. 7, 2008, at A1.
186. *Boumediene*, 553 U.S. at 765-66.
187. *Al Maqaleh II*, 605 F.3d. 84, 98-99 (D.C. Cir. 2010). But the Chief Judge claimed that the executive would have had to foresee the outcome of *Boumediene* to "turn off the Constitution." *Id.* at 99.
188. *Al Maqaleh I*, 604 F. Supp. 2d 205, 230 (D.D.C. 2009).

ernment of Afghanistan, a significant percentage of the Afghan detainees at [Bagram] is expected to be transferred to the Government of Afghanistan."[189] The Afghan government had already begun to accept transferees from the American government and had renovated a prison to hold the detainees.[190] Judge Bates, concerned that "[f]riction with the Afghan government could arise if a U.S. court were to entertain Afghan detainees' habeas petitions," set Wazir's petition apart from the other three petitioners in *Al Maqaleh I*.[191] Part of the concern was that U.S. courts should not undermine the legal system already established in Afghanistan, and if a U.S. court were to order an individual's release, they would be released back into Afghanistan, which could upset the balance between the two countries.[192] Judge Bates deferred deciding whether to dismiss Wazir's petition, and ultimately did in *Wazir v. Gates*.[193] In doing so, he stated, "In balancing the *Boumediene* factors, this possibility of friction was sufficiently weighty to defeat Wazir's claim that he is entitled to invoke the protections of the Suspension Clause."[194]

This factor, while it would often weigh in favor of the government, as it mainly applies to Afghan citizens, is not without force when discussing detainees alien to both the United States and Afghanistan. In *Boumediene*, the Court noted that "[n]o Cuban court has jurisdiction over . . . the enemy combatants detained there. . . . [T]he United States is, for all practical purposes, answerable to no other sovereign for its acts on the base."[195] However, in Afghanistan, even with respect to the detainees who are not Afghan citizens, the U.S. is answerable to other sovereigns. As the United States begins to transfer many of its detainees of varying citizenship over to the Afghan government, it is possible that conflicts with Afghanistan could arise even for non-citizens. This is a factor that has been in the background of both *Boumediene* and *Al Maqaleh I*, yet it is of growing concern as tensions mount as the United States begins to transfer control of the prison to Afghanistan. In March of 2012, President Barack Obama and President Hamid Karzai signed a Memorandum of Understanding that the prison at Bagram Air Base would be transferred to Afghan control.[196] Yet, in November of 2012, America had not yet given over control to the Afghan government.[197] There are growing disputes between the two countries over detention centers that would be intensified by a U.S. court reviewing the cases, particularly over certain detainees captured before the Memorandum of Understanding and new detainees captured after the signing of the

189. *Id.* at 229 (alterations in original) (citing Tennison Decl. ¶ 16).

190. *Id.*

191. *Id.*

192. *Id.* at 229-30.

193. Wazir v. Gates, 629 F. Supp. 2d 63, 63 (D.D.C. 2009).

194. *Id.* at 64 (citing *Al Maqaleh I*, 604 F. Supp. 2d 205, 231 (D.D.C. 2009)).

195. Boumediene v. Bush, 553 U.S. 723, 770 (2008).

196. Rod Nordland, *Karzai Orders Afghan Forces to Take Control of American-Built Prison*, N.Y. TIMES, Nov. 20, 2012, at A4.

197. *Id.*

Memorandum.[198] The magnitude of this problem continues to grow as Americans detain approximately one hundred new insurgents each month.[199] Thus, even non-Afghan citizens have come to cause conflicts with the host government, with the winding down of the American presence in Afghanistan and the transfer of prisoners to the Afghan government.

3. Length of Detention

The length of detention has become a recurring theme throughout *Boumediene* and the cases that followed. In his concurrence in *Boumediene*, joined by Justices Ginsburg and Breyer, Justice Souter expressed concern over the length of detention for the detainees.[200] The emphasis on the length of detention in Souter's concurrences suggests that the length of detention should be considered a factor in the *Boumediene* analysis.[201] Because some of the petitioners had been detained for six years by the time *Boumediene* was decided, Souter observed that the "decision is no judicial victory, but an act of perseverance in trying to make habeas review, and the obligation of the courts to provide it, mean something of value both to prisoners and to the Nation."[202]

In *Al Maqaleh I*, Judge Bates viewed the length of detention as a seventh factor influencing the other factors in the *Boumediene* analysis.[203] Though he did not consider it entirely a separate factor, he stated that it would "shade" the other factors.[204] The petitioners in both *Boumediene* and *Al Maqaleh* were detained for six years before the courts considered their cases.[205] As those detained during the war on terror stay in custody for even greater lengths of time, their access to the courts becomes even more essential and will likely weigh on the justices in deciding whether the length of detention should become an additional factor.

4. Age

In October of 2012, the D.C. District Court, in *Hamidullah v. Obama*, dismissed a petition of a Pakistani citizen held at Bagram Airbase under the holding of *Al Maqaleh II*.[206] Hamidullah argued that he was since he was fourteen at the time he was captured, he should be entitled to habeus corpus protections; however, the court found that age did not affect the

198. *Id.*
199. *Id.*
200. *Boumediene*, 553 U.S. at 799 (Souter, J., concurring).
201. Richard Nicholson, Note, *Functionalism's Military Necessity Problem: Extraterritorial Habeas Corpus, Justice Kennedy,* Boumediene v. Bush, *and* Al Maqaleh v. Gates, 81 FORDHAM L. REV. 1393, 1443 (2012).
202. *Boumediene*, 553 U.S. at 801 (Souter, J., concurring).
203. *Al Maqaleh I*, 604 F. Supp. 2d 205, 216 (D.D.C. 2009).
204. *Id.* at 217.
205. *Id.* at 216.
206. Hamidullah v. Obama, No. 10-758 (JDB), 2012 WL 5077127, at *1 (D.D.C. Oct. 19, 2012).

scope of the Suspension Clause.[207] According to the court, Hamidullah had not sufficiently proven that habeas corpus protections for juveniles "[are] somewhat more robust than the concomitant right among adults."[208]

The court was dismissive of Hamidullah's claim that the habeas corpus right for juveniles is more robust historically.[209] Hamidullah first asserted that habeas corpus was used in the early days of the United States to free "underage soldiers from detention by their commanding officers," and were "brought by juveniles in 'a wide variety of child-detention regimes, ranging from work apprenticeships to formal slavery.'"[210] The court refuted this claim by asserting that the mere fact that juveniles had the right to petition for habeas corpus did not make the right more robust.[211] Hamidullah next asserted that, historically, "courts exercised an unusual form of discretion in habeas petitions filed on behalf of juveniles; although they were obligated to free the juvenile from improper restraint, they could choose the best person to take custody thereafter."[212] The court similarly dismissed this claim as not creating "more robust" rights for juveniles.[213] Hamidullah also cited to cases where courts could "issue the writ to an in-state 'jailer' even when the child was located elsewhere."[214] However, the court dismissed this argument, indicating that a court's authority to issue the writ to an in-state "jailer" also existed in adult cases.[215] Finally, Hamidullah claimed that early English judges often conducted factual discoveries for cases involving children, more frequently than they did in other cases.[216] Again, the court did not find this argument persuasive.[217]

However, the court looked more seriously to whether the reference to the "status of the detainee" in the first factor outlined by *Boumediene* included a consideration of "juvenile status."[218] In *Boumediene* and *Al Maqaleh II*, this was discussed purely in the context of "enemy" designation for detainees.[219] Despite evidence that in many settings "juvenile" was a relevant aspect of "status," the *Hamidullah* court found that this was not relevant to the right of habeas corpus.[220] Because there were not specific instances where courts cited a "juvenile" status, the court was unwilling to include it as a factor.[221] Indeed, the court rejected "juvenile" despite the fact that neither the D.C. Circuit nor the Supreme Court has ever stated

207. *Id.* at *3.
208. *Id.*
209. *Id.*
210. *Id.*
211. *Id.*
212. *Id.*
213. *Id.*
214. *Id.*
215. *Id.*
216. *Id.* at *4.
217. *Id.*
218. *Id.* at *4-5.
219. *Id.* *4-5.
220. *Id.*
221. *Id.* at *5.

that classification as an "enemy" was the only relevant classification.[222] However, the court did state that if age were a relevant factor, it weighed in favor of the juvenile's entitlement to the writ.[223]

Despite the court's determination, there are strong policy reasons for using age as a factor for the *Boumediene* analysis when the petitioner is a juvenile or was at the time of his or her capture. Some of the same policy reasons for why children are afforded extra protections in criminal settings also are relevant to the *Boumediene* analysis. For example, since juveniles are more susceptible to coercion, the Supreme Court has held that children are entitled to greater protections in *Miranda* cases. [224] The concerns about coercion are also applicable in habeas corpus cases, particularly because juveniles are not granted any extra protections in the status determination process. If there were additional process in the combatant determination, this might mitigate the relevance of the age factor in the *Boumediene* analysis, but that was not the case in *Hamidullah.* Further, the international community has recognized similar principles. For example, *The Paris Principles: Principles and Guidelines on Children Associated with Armed Forces or Armed Groups* states that "[c]hildren who are accused of crimes under international law allegedly committed while they were associated with armed forces or armed groups should be considered primarily as victims of offences against international law; not only as perpetrators."[225]

Recent news reports state that the United States has informed the United Nations that they have detained more than two hundred Afghan teenagers as enemy combatants since 2008.[226] A recent visit by Human Rights Watch to Bagram Airbase in March 2012 revealed that the United States held 250 juveniles under the age of eighteen.[227] Only juveniles under the age of sixteen were held separately; seventeen and eighteen year-olds were held with the adult population.[228] Additionally, the review process for juveniles was identical to the process for adults: a Detainee Review Board assessed detained juveniles sixty days after their capture, and then at six-month intervals.[229] Juvenile detainees, like adult detainees, did not have access to attorneys or to the evidence that the Review Board used.[230] Likewise, the same rationale might apply to enemy combatants who are determined to have an intellectual disability or severe mental health issues.

222. *Id.*
223. *Id.*
224. J.D.B. v. North Carolina, 131 S. Ct. 2394, 2398-99 (2011).
225. U.N. Children's Fund, The Paris Principles: Principles and Guidelines on Children Associated with Armed Forces or Armed Groups, § 3.6 (Feb. 2007), www.unicef.org/emerg/files/ParisPrinciples310107English.pdf.
226. *E.g.*, Stephanie Nebehay, *U.S. Says Its Military Detained Captured Afghan Teens for a Year*, REUTERS (Dec. 8, 2012, 4:12 PM), http://www.reuters.com/article/2012/12/08/usa-un-rights-idUSL5E8N83LW20121208.
227. HUMAN RIGHTS WATCH & HUMAN RIGHTS FIRST, UNITED STATES OF AMERICA: COMPLIANCE WITH THE OPTIONAL PROTOCOL TO THE CONVENTION ON THE RIGHTS OF THE CHILD ON THE INVOLVEMENT OF CHILDREN IN ARMED CONFLICT 11 (2012).
228. *Id.*
229. *Id.* at 12.
230. *Id.*

Conclusion

The formalistic application of the *Boumediene* factors in recent cases, particularly in *Al Maqaleh II*, has defeated the functional analysis present throughout the line of cases that ultimately led to *Boumediene*. This fundamental flaw in the current regime fails to adequately preserve the functionalist approach that the Court embodied in *Boumediene* and the cases that led up to it. Factors such as executive manipulation, conflicts with host governments, length of detention, and age should be considerations for the court, as they would better serve the policies behind the habeas corpus precedent leading up to and embodied in *Boumediene*.

The formalistic application of *Boumediene* jeopardizes a regime that was intended to balance the importance of the Great Writ, the individual's rights, and the needs of the military, yet it fails to do this. The factors suggested by this Note weigh differently, some tend to support individual rights, while some tend to support the governmental interest. But the consistent theme throughout these additional factors is that the formalistic application of the *Boumediene* factors presents an incomplete picture. The three factors underdetermine how the Court should approach these cases to strike a more equitable result that will ultimately better serve the United States and our Constitution.