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Boumediene v. Bush: Does It Really Curtail ExecutiveManipulation?

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Ohio Northern University
Law Review

Student Articles

Boumediene v. Bush: Does It Really Curtail Executive Manipulation?

NELSON BERARDINELLI*

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ABSTRACT

Many commentators, as well as the United States Court of Appeals for the District of Columbia Circuit, have interpreted *Boumediene v. Bush* to allow the executive branch to avoid judicial review by selecting detention sites that present significant practical obstacles to detainees seeking the writ of habeas corpus. This article argues that *Boumediene*'s functional test, which is used to determine whether the Suspension Clause applies to detainees held abroad, should not be subject to executive manipulation.

The contradiction between *Boumediene*'s strongly worded invocation of separation of powers principles and the potential for the executive to manipulate the functional test to avoid judicial review is best resolved by interpreting the functional test to implicitly include what this article terms the "executive manipulation sub-factor." The executive manipulation sub-factor should be applied when there is a possibility that the executive, in an effort to increase the chances of a ruling in its favor, has unnecessarily chosen to hold a detainee at a location that presents significant practical obstacles to that detainee's assertion of habeas corpus rights. If a court determines that the site of detention was selected by the executive in order to avoid judicial review, the executive manipulation sub-factor will weigh in favor of applying the Suspension Clause.

I. INTRODUCTION

In 2008, the Supreme Court decided *Boumediene v. Bush*,[1] in which it considered whether the detainees being held at Guantanamo Bay have constitutional habeas corpus rights.[2] In a 5-4 decision, the Court in *Boumediene* held that Guantanamo Bay detainees had the right to seek the writ under the Suspension Clause.[3] The *Boumediene* decision was generally applauded for reining in the executive's absolute power over detainees in the War on Terror. However, many commentators have argued that

1. 553 U.S. 723 (2008).

2. The Military Commissions Act of 2006 removed the statutory right of detainees designated by the executive as enemy combatants to seek the writ of habeas corpus. Military Commissions Act of 2006, Pub. L. No. 109-366, § 7, 120 Stat. 2600, 2636 (2006). For further discussion of the Military Commissions Act of 2006, see *infra* notes 21-24 and accompanying text.

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

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Boumediene fails to truly restrain the executive branch.[4] Those who are critical of *Boumediene* argue that the decision allows the executive to choose detention sites that are "legal black holes" where the Suspension Clause would almost never apply.[5] This article argues that *Boumediene*'s functional test contains an implicit "executive manipulation sub-factor" that reconciles the inconsistency between the Court's emphasis on preventing the executive from deciding when detainees can seek the writ and the functional test's apparent neglect of the executive manipulation issue. The executive manipulation sub-factor exists within the functional test's second factor, referred to as the "sites of apprehension and then detention factor."[6]

If the functional test was always applied mechanically and with an exclusive focus on the factors that were relevant to the Court in *Boumediene*, the executive would have the power to decide when the Suspension Clause applies. Under a mechanical application of the functional test, the executive would have the ability to avoid judicial review by selecting detention sites that present significant practical obstacles to detainees seeking the writ because the functional test's third factor, referred to as the "practical obstacles factor," would weigh heavily against application of the Suspension Clause.[7] This article will explain why the Court in *Boumediene* did not intend to allow the executive to manipulate the functional test.

II. *BOUMEDIENE*'S FUNCTIONAL TEST

A. *The Path to Boumediene*

After Germany's surrender in World War II, but prior to Japan's surrender, a number of German citizens were apprehended in China and accused of providing Japan with intelligence on the activities of American forces.[8] The German citizens were subsequently convicted of war crimes by an American war crimes tribunal in China and then transported to Landsberg Prison, an Allied detention facility in Germany, to serve their

4. *See, e.g.*, Tim J. Davis, *Extraterritorial Application of the Writ of Habeas Corpus After* Boumediene*: With Separation of Powers Comes Individual Rights*, 57 KAN. L. REV. 1199, 1223 (2009) ("[T]he central deficiency of the Court's opinion in *Boumediene* is that it failed to truly restrain the Executive - the problem that the opinion itself purported was of serious concern.").

5. *Id.* at 1217 ("[T]he 'practicality' test leaves the Executive great room to create more detention centers where effectively no law would apply – 'legal black holes.'").

6. *See Boumediene*, 553 U.S. at 766 (the second factor of *Boumediene's* functional test asks courts to look at "the nature of the sites where apprehension and then detention took place.").

7. *See id.* (the functional test's third factor weighs "the practical obstacles inherent in resolving the prisoner's entitlement to the writ.").

8. Johnson v. Eisentrager, 339 U.S. 763, 765-66 (1950).

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sentences.[9] The Court's task in *Johnson v. Eisentrager* was to decide whether statutory habeas corpus rights should be extended to the German detainees held at Landsberg Prison.[10] The Court in *Eisentrager* held that the military trial was not subject to judicial review.[11] The Court justified its holding by focusing on the practical difficulties of extending the right to seek the writ to the detainees.[12]

After 9/11, the executive attempted to use the holding in *Eisentrager* to avoid extending the right to petition for the writ to Guantanamo Bay detainees by interpreting the holding to posit a bright-line, sovereignty-based test for determining when constitutional rights apply outside the United States.[13] Recently, the Court has taken incremental steps to prevent the executive from abusing its war-time powers, beginning in 2004 with *Rasul v. Bush*, in which the issue was whether detainees captured and held abroad should be extended the right to seek the writ.[14] In *Rasul*, the Court held that the right to seek the writ could be extended to nonresident aliens held outside the territorial jurisdiction of the United States when the government exercises de facto control over the site of detention, as it does at Guantanamo Bay.[15] From a broader perspective, *Rasul* should be viewed as

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9. *Id.* at 766.
10. *Id.* at 765-67.
11. *Id.* at 781.
12. Emily Garcia Uhrig, Boumediene v. Bush*, The Great Writ, and the Power to "Say What the Law Is*,*"* 33 OKLA. CITY U. L. REV. 389, 403 (2008)

Practical considerations were front and center in the Court's 1950 decision in *Johnson v. Eisentrager*. There, the Court held that the privilege of habeas corpus did not extend to enemy aliens convicted of war crimes and detained at Landsberg prison in Germany during the Allied Powers' post-World War II occupation. The Court underscored "the difficulties of ordering the Government to produce the prisoners in a habeas . . . proceeding." *Id.* (internal citations omitted)

See also Boumediene, 553 U.S. at 762-64 (discussing *Eisentrager*'s focus on practical obstacles).

13. *See* Douglass Cassel, *A Discussion of* Boumediene v. Bush*: Liberty, Judicial Review, and the Rule of Law at Guantanamo: A Battle Half Won*, 43 NEW ENG. L. REV. 37, 48 (2008) ("It may also reflect the evidence, widely reported by 2008, that a belief that federal court jurisdiction did not extend to Guantanamo was at least one important reason why the Executive originally chose to detain post-9/11 prisoners there."). *See also* Davis, *supra* note 4, at 1223-24 ("After *Eisentrager*, the Executive attempted to take advantage of the bright-line rule regarding sovereignty by holding prisoners outside of U.S. sovereign territory to prevent the writ from extending to such prisoners."). *See also* Uhrig, *supra* note 12, at 407

Immediately after the panel discussion, a military official in attendance approached me and indicated that he had participated in the initial decision to use Guantanamo Bay to detain foreign nationals seized in the conflict with al Qaeda and the Taliban. He suggested to me that perhaps the decision had been a mistake. He noted that the entire purpose behind establishing the detention facilities in Guantanamo in the first place was to avoid judicial review and intervention in the executive's detentions. It was apparent that the ensuing litigation had thwarted that executive purpose. *Id.*

14. Rasul v. Bush, 542 U.S. 466, 470 (2004).
15. *Id.* at 480-81. *See also* Daniel R. Williams, *A Discussion of* Boumediene v. Bush*: Who Got Game?* Boumediene v. Bush *and the Judicial Gamesmanship of Enemy-Combatant Detention*, 43 NEW ENG. L. REV. 1, 6-7 (2008).

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an expression of the Court's wariness of the executive's manipulation of the *Eisentrager* decision.[16] Congress responded to *Rasul* with the Detainee Treatment Act of 2005 ("DTA"), which attempted to prevent the extension of statutory habeas corpus jurisdiction to Guantanamo Bay detainees.[17]

After the DTA was passed, detainees being held at Guantanamo Bay attempted to seek the writ in *Hamdan v. Rumsfeld*.[18] The major issues in *Hamdan* were: 1) whether the DTA removed the statutory jurisdiction of U.S. courts to hear petitions from detainees seeking the writ whose cases were pending before the passage of the DTA; and 2) if so, whether detainees could still seek the writ on a constitutional basis through the Suspension Clause.[19] The Court in *Hamdan* never reached the latter issue as the Court avoided a confrontation over whether Guantanamo Bay detainees had constitutional habeas corpus rights by interpreting the DTA to be inapplicable to cases pending before it was passed.[20]

Congress responded to *Hamdan* by passing the Military Commissions Act of 2006 ("MCA").[21] The MCA made it clear that Guantanamo Bay detainees do not have statutory habeas corpus rights, regardless of whether their cases were pending before the MCA was passed.[22] Despite the Court's prior success in avoiding a showdown with the political branches over the extraterritorial scope of the Suspension Clause, it was finally forced to address the issue in *Boumediene*.

B. The Constitutional Underpinnings of Boumediene's Functional Test

If the Suspension Clause applies to certain detainees, Congress would have to formally suspend the writ in order to deny those detainees their habeas rights.[23] In *Boumediene*, the Court held that: 1) the Suspension Clause applied to the detainees held at Guantanamo Bay; and 2) the Combatant Status Review Tribunal ("CSRT") process was an inadequate substitute for habeas, meaning the jurisdiction-stripping section of the MCA was an unconstitutional suspension of the writ.[24] To determine whether the Suspension Clause applied at Guantanamo Bay, the Court in *Boumediene*

16. *See supra* note 13 and accompanying text.
17. Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005, 119 Stat. 2680, 2742 (2005).
18. 548 U.S. 557 (2006).
19. *Id.* at 573-77.
20. *Id.* at 575-76.
21. Military Commissions Act of 2006, Pub. L. No. 109-366, § 7, 120 Stat. 2600, 2636 (2006).
22. *Id.*
23. U.S. CONST. art. I, § 9, cl. 2 (the Suspension Clause requires Congress to formally suspend the right to petition for the writ: "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.").
24. Boumediene v. Bush, 553 U.S. 723, 771, 792 (2008).

articulated a functional test that focuses on practical considerations.[25] The two principal underpinnings of the functional test are: 1) Justice Harlan's concurrence in *Reid v. Covert*[26] and 2) Justice Kennedy's concurrence in *United States v. Verdugo-Urquidez*.[27] In *Reid*, two U.S. citizens, both of whom were wives of American servicemen, were convicted abroad by American Military Commissions for murdering their husbands (the murders also occurred abroad).[28] The *Reid* majority held that the Bill of Rights applied to the two wives, and they were therefore granted civilian trials in the United States.[29] However, because of separate concurrences by Justices Harlan and Frankfurter, only a plurality decided that the Bill of Rights *always* applies to U.S. citizens abroad.[30] In his concurrence, Justice Harlan stated that whether the extension of constitutional rights would be "impractical and anomalous" is a factor that should be weighed by the Court when determining whether the Constitution applies extraterritorially.[31]

Justice Harlan's emphasis on whether the extraterritorial extension of constitutional rights would be "impractical and anomalous" was heavily relied on by Justice Kennedy in his *Verdugo-Urquidez* concurrence.[32] In *Verdugo-Urquidez*, U.S. government officials were alleged to have violated the Fourth Amendment by searching and seizing nonresident alien Verdugo-Urquidez's property in Mexico without a warrant.[33] The Court in *Verdugo-Urquidez* held that the Fourth Amendment does not apply to the property of nonresident aliens when that property is located in a foreign country.[34] Despite the fact that Justice Kennedy joined the Court's opinion, he also wrote a separate concurrence in which he stressed that practical

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25. *See id*. at 766-69.
26. 354 U.S. 1, 65-78 (1957) (Harlan, J., concurring).
27. 494 U.S. 259, 275-78 (1990) (Kennedy, J., concurring).
28. *Reid*, 354 U.S. at 3-4 (majority opinion).
29. *Id.* at 39-41 (majority opinion).
30. *See Verdugo-Urquidez*, 494 U.S. at 269-70 (majority opinion).
31. *Reid*, 354 U.S. at 74 (Harlan, J., concurring)

I cannot agree with the suggestion that every provision of the Constitution must always be deemed automatically applicable to American citizens in every part of the world. For *Ross* and *the Insular Cases* do stand for an important proposition, one which seems to me a wise and necessary gloss on our Constitution. The proposition is, of course, not that the Constitution 'does not apply' overseas, but that there are provisions in the Constitution which do not *necessarily* apply in all circumstances in every foreign place. In other words, it seems to me that the basic teaching of *Ross* and *the Insular Cases* is that there is no rigid and abstract rule that Congress, as a condition precedent to exercising power over Americans overseas, must exercise it subject to all the guarantees of the Constitution, no matter what the conditions and considerations are that would make adherence to a specific guarantee altogether impracticable and anomalous. *Id.*

32. *See Verdugo-Urquidez*, 494 U.S. at 275-79 (Kennedy, J., concurring).
33. *Id*. at 261-62 (majority opinion).
34. *Id*. at 274-75 (majority opinion).

considerations weighed heavily in his decision to deny Verdugo-Urquidez the protection of the Fourth Amendment.[35]

The Court in *Boumediene* laid out the functional test very generally, stating a non-exhaustive[36] list of three factors that should be balanced to determine whether the Suspension Clause applies abroad: "(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."[37] Balancing these three factors, the Court in *Boumediene* held that the Suspension Clause "has full effect at Guantanamo Bay."[38] The Court then went on to hold that CSRT proceedings are not an adequate substitute for habeas corpus.[39]

Boumediene's application of the functional test should serve as a guide for courts tasked with determining whether the Suspension Clause applies abroad. The Court's articulation of the functional test does not set the outer limits of a test that should be mechanically applied in all cases.[40] This article argues for the existence of an implicit executive manipulation sub-factor within the functional test's sites of apprehension and then detention factor.[41]

III. THE EXECUTIVE MANIPULATION SUB-FACTOR

Courts applying the functional test's sites of apprehension and then detention factor should, in certain circumstances, take a nuanced view of the relationship between the site of apprehension and the site of detention. Instead of simply analyzing whether the sites of apprehension and detention are abroad and whether the United States has permanent and complete control over the site of detention, this article argues that it will at times be

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35. *Id.* at 278 (Kennedy, J., concurring) ("The conditions and considerations of this case would make adherence to the Fourth Amendment's warrant requirement impracticable and anomalous"); *see also Reid*, 354 U.S. at 74 (Harlan, J., concurring) (stating that the Bill of Rights should not be applied extraterritorially when it would be "impracticable and anomalous" to do so).

36. *Boumediene v. Bush*, 553 U.S. 723, 766 (2008) (stating that "*at least* three factors are relevant in determining the reach of the Suspension Clause" (emphasis added)).

37. *Id.*

38. *Id.* at 771.

39. *Id.* at 792. A ruling on whether the CSRT proceedings were an adequate substitute for habeas is an issue that would normally be reserved for remand, but due to the exceptional length of time the detainees were held, the Court decided the issue immediately after ruling that the Suspension Clause applied. *Id.* at 772-73.

40. *See generally* Gerald L. Neuman, *The Extraterritorial Constitution After Boumediene v. Bush*, 82 S. CAL. L. REV. 259 (2009).

41. *See infra* Part IV.C and accompanying text (discussing why the Court in *Boumediene* did not explicitly discuss the executive manipulation sub-factor).

necessary for courts, through an application of the executive manipulation sub-factor, to fully examine the relationship between the site of apprehension and the site of detention. More specifically, courts applying the executive manipulation sub-factor should consider whether it was necessary for the executive to choose a particular detention site by looking at the site of apprehension as well as other detention sites the executive could reasonably have chosen.[42]

In cases where the site of detention is less favorable to detainees than other sites of detention that the executive could reasonably utilize, there is a possibility that the executive chose the less favorable detention site in an attempt to avoid judicial review.[43] In those cases, this article argues that the executive manipulation sub-factor is triggered.[44] A less favorable site of detention is one that would, within the functional test's practical obstacles factor, weigh more heavily against an application of the Suspension Clause than other sites of detention that the executive could reasonably utilize.[45] During the triggering analysis, courts simply compare the site of detention with other reasonable alternate sites of detention. The executive manipulation sub-factor will only be triggered when there is at least one reasonable alternate detention site that is more favorable than the actual site of detention.

A determination of what other sites of detention are reasonable would be made by examining the relationship between the site of apprehension and the site of detention.[46] For instance, assume that the executive transported a detainee[47] who was apprehended off the coast of Cuba near Guantanamo Bay to the detention facility at Bagram Air Base in Afghanistan. Guantanamo Bay is a very favorable site of detention for detainees because the United States has complete control over the detention facility, it is located far away from any battlefield, and the United States is not answerable to any other state for its actions there.[48] Bagram, on the other

42. *See Boumediene*, 553 U.S. at 766 (the second factor of *Boumediene's* functional test asks courts to look at "the nature of the sites where apprehension *and then* detention took place" (emphasis added)). The Court's language implies that, at least in certain circumstances, the site of apprehension and the site of detention should be analyzed together.

43. *See* Davis, *supra* note 4, at 1227.

44. The executive manipulation sub-factor will only be applied if it has been triggered. In other words, if the executive manipulation sub-factor is not triggered, it will not be applied.

45. *See* Davis, *supra* note 4, at 1201-04, 1227-28.

46. Note that the level of analysis is much more shallow during the triggering stage than it is during the application stage.

47. Assume this detainee is a nonresident alien.

48. The Court in *Boumediene* cited these same factors as evidence supporting its determination that there was a lack of practical obstacles to Guantanamo Bay detainees asserting their habeas rights. *See Boumediene v. Bush*, 553 U.S. 723, 770 (2008).

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hand, is a less favorable site of detention for detainees.[49] While the United States has complete control over the detention facility at Bagram, as it does at Guantanamo Bay, the United States is answerable to Afghanistan for its actions at the Bagram facility, which is also located in a theater of war.[50] The differences between the two detention facilities make it more likely that a detainee held at Guantanamo Bay would be extended the right to seek the writ than would an otherwise similarly situated detainee held at Bagram. Based on the site of apprehension, which is very close to Guantanamo Bay and very far from Afghanistan, Guantanamo Bay seems to be a reasonable alternate site of detention, and Bagram is a much less favorable site of detention than Guantanamo Bay.[51] Thus, in this example, the executive manipulation sub-factor would be triggered.

After determining that the executive manipulation sub-factor has been triggered, courts should go on to actually apply it by examining whether it was necessary for the executive to move the detainee to the less favorable detention site. Courts making this determination should look at the totality of the circumstances with a particular emphasis on the relationship between the site of apprehension and the site of detention.[52] Returning to the example of the detainee apprehended in Cuba and held at Bagram, it is likely that this detainee would have a strong case that the executive manipulation sub-factor should weigh for application of the Suspension Clause. However, the government may also make its own arguments at this stage.[53] For example, if the detainee had previously been apprehended on the battlefield in Afghanistan and held at Bagram, and had escaped from Bagram, then the executive manipulation sub-factor would likely not weigh for an application of the Suspension Clause.[54] Similarly, in some cases,

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49. *See generally* Al Maqaleh v. Gates (*Al Maqaleh II*), 605 F.3d 84 (D.C. Cir. 2010).

50. *See id*. at 98-99.

51. *See infra* Part IV.C and accompanying text (discussing why Guantanamo Bay is the prototypical favorable site of detention).

52. Courts also examine the relationship between the site of apprehension and the site of detention when determining whether the executive manipulation sub-factor should be triggered, but that analysis is much more superficial, looking only at whether there are alternate sites of detention that would be more favorable to the detainee. *See generally* Al Maqaleh v. Gates (*Al Maqaleh I*), 604 F. Supp. 2d 205, 217-26 (D.D.C. 2009). The government's explanation as to why it chose a particular site of detention will be relevant when the executive manipulation sub-factor is applied, but those arguments will not be relevant during the triggering analysis. Detainees may also present additional evidence at the application stage that may not have been relevant at the triggering stage.

53. The government's arguments would not be relevant at the triggering stage. At the triggering stage, courts should only compare the site where detainees are held to other reasonable detention sites.

54. The executive manipulation sub-factor can never weigh against applying the Suspension Clause. However, in some cases, as in this example, it will not weigh in favor of applying the Suspension Clause. In other words, the executive manipulation sub-factor cannot help the government it can only help detainees.

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courts applying the executive manipulation sub-factor will not be able to determine with any reasonable degree of certainty whether it was necessary for the executive to hold detainees at a particular detention site. In those cases, the executive manipulation sub-factor will not play a significant role in the court's balancing of the functional test's factors. Even when the executive manipulation sub-factor does not end up playing a significant role in a court's balancing of factors, its application still ensures that courts will fully and openly discuss their reasoning, thereby reducing the chance of reaching an arbitrary result.

The underlying purpose of the executive manipulation sub-factor, and the *Boumediene* decision as a whole, is to prevent executive manipulation.[55] Under a mechanical application of *Boumediene*'s functional test, the Executive can avoid judicial review by simply moving detainees to a site of detention where applying the Suspension Clause would be impractical.[56] On the other hand, courts that adopt the executive manipulation sub-factor approach can ensure that the executive does not have the ability to choose when detainees can seek the writ.[57] Further, courts applying the executive manipulation sub-factor will not be tempted to go outside of the functional test to neutralize manipulation by the executive.[58] The executive manipulation sub-factor allows courts to stay within the confines of the functional test while also comporting with the separation of powers principles relied upon by the Court in *Boumediene*.[59]

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55. *See infra* Part IV.B and accompanying text (discussing *Boumediene's* focus on preventing executive manipulation).

56. Davis, *supra* note 4, at 1225-26.

Based on this third prong, an executive branch that desires to keep "the cumbersome machinery of our domestic courts" out of military affairs now has an incentive to hold detainees in areas that would make extension of the writ impractical. For instance, the Executive might decide to keep prisoners detained in an area far away, much farther away than ninety miles off the coast of Florida, thus creating too much a practical impediment for the writ to extend. This line of analysis is not meant to suggest that the executive branch is filled with ill motives about how to keep prisoners from seeing federal courts; rather, it is meant to make the point that the implement designed to balance power becomes ineffective when the target of that implement has control over it. When viewed through a separation of powers paradigm, this prong of the test seems to favor an increase in executive power by providing precedent that says the Executive need only place detainees in a country on the other side of the globe to control the scope of habeas review. *Id*.

57. *See id*.

58. *See infra* Part V.A and accompanying text (discussing *Al Maqaleh I*, where the D.C. District Court goes outside of the functional test in an attempt to counterbalance the executive's manipulation of the site of detention).

59. *See infra* Part IV.A and accompanying text (discussing the Court's reliance on separation of powers principles in *Boumediene*).

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IV. THE ANTI-MANIPULATION PRINCIPLE

A. The Court Puts an End to the Executive's Manipulation of Precedent

The executive's recent practice of manipulating Supreme Court precedent to avoid the extraterritorial application of the Suspension Clause came to an end with *Boumediene*.[60] By affirming the judiciary's role as a check on executive detention,[61] *Boumediene* serves as a decisive final blow to the political branches' recent attempts to avoid judicial review without formally suspending the writ.[62] *Rasul* and *Hamdan* should be viewed as steps on the path from *Eisentrager* to *Boumediene*, with the Supreme Court curtailing executive manipulation while at the same time attempting to avoid the separation of powers showdown it was finally forced to decide in *Boumediene*.[63]

In *Eisentrager*, the Executive provided detainees with a fair and adversarial process broadly in line with American ideals.[64] Fifty years later, the executive attempted to manipulate the *Eisentrager* holding to deprive Guantanamo Bay detainees of any kind of meaningful process.[65] The Court in *Rasul* held that the holding in *Eisentrager* did not support the government's argument that the test for determining whether detainees were entitled to statutory habeas rights should be a de jure, sovereignty-based test, opting instead to frame the issue in terms of whether the United States had de facto control over the territory where the detention site was located.[66]

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60. *See generally* Johnson v. Eisentrager, 339 U.S. 763 (1950); Rasul v. Bush, 542 U.S. 466 (2004); Hamdan v. Rumsfeld, 548 U.S. 557 (2006); *see also* Davis, *supra* note 4, at 1223 (stating that "[t]he unchecked power of the Executive has been evidenced by its manipulation of the holdings of *Eisentrager*, *Rasul*, and *Hamdan*, responding by either holding detainees in a particular place or pressing for passage of new legislation in response to the Court's procedural rulings.").

61. *See* Uhrig, *supra* note 12, at 390 ("[*Boumediene*], at its core, is an affirmation of separation of powers principles.").

62. *See* Boumediene v. Bush, 553 U.S. 723, 797-98 (2008).

63. *See* Daniel J. Meltzer, *Habeas Corpus, Suspension, and Guantanamo: The* Boumediene *Decision*, 2008 SUP. CT. REV. 1, 59 ("Seven years after 9/11, although the Court's decisions have repeatedly rejected the government's legal position, from the perspective of detainees seeking their liberty, the results of judicial intervention have been quite limited.").

64. *Boumediene*, 553 U.S. at 767 (the Court noted the "rigorous" and "adversarial" nature of the military commissions that found the detainees in *Eisentrager* guilty of war crimes).

65. *See supra* note 13 and accompanying text.

66. Williams, *supra* note 15, at 6-7.

[*Rasul* held] that the availability of judicial review of executive detention of "enemy combatants" does not turn on de jure or "ultimate sovereignty" over the territory where the detention occurs; detention in a "territory" where the United States "exercises exclusive jurisdiction and control," de facto sovereignty, as it does in Guantanamo Bay, is enough to trigger statutory habeas jurisdiction. At its core, *Boumediene* builds on *Rasul*'s rejection of *Eisentrager*.

See also Rasul v. Bush, 542 U.S. 466, 472-73 (2004).

Boumediene's functional test builds on *Rasul*'s practical framing of the Constitution's extraterritorial scope.[67]

Instead of overruling *Eisentrager*, the Court in *Boumediene* distinguished the Guantanamo Bay detainees from those held at Landsberg Prison nearly sixty years ago.[68] The Court in *Boumediene* highlighted the following three aspects of the detention facility at Guantanamo Bay and the process afforded to the detainees being held there: 1) the inadequacy of the CSRT process;[69] 2) the complete and permanent de facto control the United States had over the detention facility;[70] and 3) the absence of practical obstacles to extending detainees the right to seek the writ.[71] By contrast, at Landsberg Prison in *Eisentrager*: 1) the process afforded to the detainees was much more adequate;[72] 2) the United States shared sovereignty (de jure and de facto) with other nations on a temporary basis;[73] and 3) there were significant practical obstacles to extending the right to seek the writ to detainees.[74] The situations in *Eisentrager* at Landsberg Prison and at Guantanamo Bay in *Boumediene* should be viewed as opposite ends of a spectrum[75] with factual situations closer to *Boumediene* generally being more favorable to detainees,[76] and situations closer to *Eisentrager* generally being more favorable to the government.[77] By choosing to build on the *Eisentrager* holding instead of overruling it, the Court in *Boumediene* left the door open for further articulation of the functional test.

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67. Williams, *supra* note 15, at 6-7.

68. *See Boumediene*, 553 U.S. at 766-71. Landsberg Prison was the name of the Allied detention facility in Germany where the detainees in *Eisentrager* were held. *Id*. at 762.

69. *Id*. at 766-67.

70. *Id*. at 768-69.

71. *Id*. at 769-70.

72. Boumediene v. Bush, 553 U.S. 723, 766-67 (2008).

73. *Id*. at 768 ("The United States was…answerable to its Allies for all activities occurring there." (internal citations omitted)).

74. *Id*. at 769 ("In addition to supervising massive reconstruction and aid efforts the American forces stationed in Germany faced potential security threats from a defeated enemy.").

75. In *Al Maqaleh II*, the D.C. Circuit concluded that Bagram was an even less favorable site of detention than Landsberg. *Al Maqaleh II*, 605 F.3d 84, 97 (D.C. Cir. 2010) (". . . the nature of the place where the detention takes place weighs more strongly in favor of the position argued by the United States and against the extension of habeas jurisdiction than was the case in either *Boumediene* or *Eisentrager*."). In terms of Supreme Court precedent, the situations at Landsberg Prison and Guantanamo Bay are currently the only two points of reference for courts applying the functional test.

76. *See Boumediene*, 553 U.S. at 766-71.

77. Brian McGiverin, *The Subversion of Means to Ends: Philosophy of Extra-territorial Constitution and Reflections on* Boumediene v. Bush, 8 APPALACHIAN J. L. 123, 153 (2009) ("Kennedy used the circumstances of *Eisentrager*, in which the Court had denied extension of the writ, as a foil for his analysis of the circumstances in extending the writ to Guantanamo.").

B. Boumediene's Underlying Purpose

The underlying purpose of *Boumediene* is to ensure that the executive does not have the power to determine when detainees can seek judicial review. The Court in *Boumediene* stressed the judiciary's central role in the separation of powers structure by affirming its obligation to serve as a check on arbitrary detention by the executive.[78] The existence of the executive manipulation sub-factor is supported by *Boumediene*'s extensive discussion of why judicial prevention of executive manipulation (the so-called "anti-manipulation principle")[79] is the constitutional foundation of the opinion.[80] The fact that the Court in *Boumediene* stressed that executive detention brings with it a temptation for abuse unlike almost any other exercise of executive power makes *Boumediene*'s focus on executive manipulation all the more important to the discussion of how broadly courts should read *Boumediene* when applying the functional test.[81] *Boumediene*'s forward-looking justification of the functional test should be carefully considered by courts applying the test, particularly when there is a potential for executive manipulation.[82] While the hypothetical used by the Court in *Boumediene* to

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78. *Boumediene*, 553 U.S. at 765-66 ("[T]he writ of habeas corpus is itself an indispensable mechanism for monitoring the separation of powers. The test for determining the scope of this provision must not be subject to manipulation by those whose power it is designed to restrain.").

79. Martin J. Katz, *Guantanamo,* Boumediene*, and Jurisdiction-Stripping: The Imperial President Meets the Imperial Court*, 25 CONST. COMMENT. 377, 396-97 (2009) ("Finally, and perhaps most importantly for the jurisdiction-stripping debate, the Court balked at the idea that the political branches could manipulate the courts' ability to perform this function: 'The test for determining the scope of [the Suspension Clause] must not be subject to manipulation by those whose power it is designed to constrain.' This can be thought of as the anti-manipulation principle."). *See also id.* at 399-400. ("*Boumediene*'s anti-manipulation principle (that the political branches may not manipulate the scope of the Constitution's limits on their own power) . . . which the Court had not clearly articulated before, suggests . . . [that the political branches cannot shield themselves] . . . from judicial review in constitutional cases." (internal citations omitted)).

80. *Id.* at 393 ("[T]he Court [in *Boumediene*] held, the scope of the Suspension Clause must be determined by the courts: The courts, not the political branches, are supposed to say 'what the law is.'" (internal citations omitted)).

81. Stephen I. Vladeck, *Federal Courts, Practice & Procedure:* Boumediene's *Quiet Theory: Access to Courts and the Separation of Powers*, 84 NOTRE DAME L. REV. 2107, 2143-44 (2009) ("[T]he critical point of the majority's analysis comes where Justice Kennedy explains why detention by executive order is different from detention pursuant to a criminal conviction--and why habeas corpus in the former category requires more."). *See also Boumediene*, 553 U.S. at 782-83 ("[I]n the usual course, a court of record provides defendants with a fair, adversary proceeding. . . . Where a person is detained by executive order, rather than, say, after being tried and convicted in a court, the need for collateral review is most pressing.").

82. Meltzer, *supra* note 63, at 28 ("The [*Boumediene*] Court also stressed that the writ, as an 'indispensable mechanism for monitoring the separation of powers,' cannot be subject to manipulation by the Executive, 'whose power it is designed to restrain.' That observation, too, suggests a forward-looking, purposive approach." (internal citations omitted)).

highlight the dangers of executive manipulation involved sham-leases[83] in which the government would surrender formal sovereignty over certain territories while maintaining de facto control, the strong implication is that any type of executive manipulation, especially with regard to the site of detention, should not be tolerated by courts applying the functional test.

The question that courts applying the functional test should ask is whether the Court in *Boumediene* would articulate the functional test, justify the test by citing the judiciary's role within the separation of powers scheme as a check on executive manipulation,[84] and then allow the executive to manipulate that test by simply choosing a site of detention located in a foreign country whose government may not want the Suspension Clause to apply, or a detention site located in a theater of war.[85] Interpreting the functional test to include the executive manipulation sub-factor is the most reasonable interpretation of *Boumediene* that allows for both: 1) a direct and open discussion, within the framework of the functional test, of whether the executive manipulated the site of detention; and 2) a proper judicial check on the executive in line with *Boumediene*'s broader focus on preventing executive manipulation.

C. Manipulating the Functional Test

The Court in *Boumediene* held that the Suspension Clause generally applies or "has full effect" at Guantanamo Bay[86] because the Court was confident that the Suspension Clause would always be extended to detainees being held there.[87] Guantanamo Bay is the prototypical detainee-favorable site of detention because of the United States' complete control over the facility and because it is located far away from any battlefield.[88] The fact that Guantanamo Bay is the world's most favorable detention site for

83. *Boumediene*, 553 U.S. at 765 ("[T]he Government's view is that the Constitution had no effect [at Guantanamo Bay], at least as to noncitizens, because the United States disclaimed sovereignty in the formal sense of the term. The necessary implication of the argument is that by surrendering formal sovereignty over any unincorporated territory to a third party, while at the same time entering into a lease that grants total control over the territory back to the United States, it would be possible for the political branches to govern without legal constraint. Our basic charter cannot be contracted away like this.").

84. *See id.* at 765-66.

85. For a discussion of how the executive can avoid judicial review by working with a compliant foreign partner under a mechanical application of the functional test, see Neuman, *supra* note 40, at 280-81.

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

87. The Court was likely operating under the assumption that the process afforded to the Guantanamo Bay detainees would continue to be significantly less adequate than the process afforded to the detainees in *Eisentrager*.

88. *Id.* at 747.

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detainees[89] makes it very dangerous for courts applying the functional test to rely exclusively on the factors that the Court found important in *Boumediene*.

The executive manipulation sub-factor is only triggered in cases in which the executive may have manipulated the site of detention, which is only possible when other reasonable sites of detention are less favorable than the actual site of detention.[90] Regardless of where a particular set of Guantanamo Bay detainees were apprehended, the executive manipulation sub-factor could never be triggered because there are no other detention sites that are more favorable to detainees.[91] Thus, the Court's apparent neglect of the executive manipulation issue in its articulation of the functional test in *Boumediene* should not be interpreted as an indication that preventing executive manipulation was unimportant to the Court.[92]

The Court in *Boumediene* discussed a hypothetical in which the government used sham-leases to avoid the reach of the Constitution in order to illustrate the danger of allowing the executive to manipulate the site of detention.[93] In order to better understand why the Court implicitly included the executive manipulation sub-factor in the functional test's sites of apprehension and then detention factor, it will be helpful to analyze another hypothetical.[94] Assume a case arises in which a Dutch citizen is captured by American forces somewhere in northern Europe, far away from any battlefield, and the executive chooses to hold this person as an enemy combatant at a detention facility in Iraq, where the withdrawal of American military forces is scheduled to be completed by the end of 2011. In this case, powerful arguments could be made by the government that friction with Iraq would occur if the detainee was allowed to petition for the writ. With American withdrawal rapidly approaching, applying the Suspension

89. Excluding detention facilities located in the United States or its territories.

90. *See supra* Part IV.B.

91. The Court barely discussed the various sites where the Guantanamo Bay detainees were apprehended, and when it did, it did not distinguish between the detainees based on where they were apprehended. The Court merely noted that they were all apprehended abroad, and none of them were citizens of countries at war with the United States. *See Boumediene*, 553 U.S. at 734 ("Some of these individuals were apprehended on the battlefield in Afghanistan, others in places as far away from there as Bosnia and Gambia. All are foreign nationals, but none is a citizen of a nation now at war with the United States.").

92. While the Court did not explicitly discuss executive manipulation in its articulation of the functional test, it discussed executive manipulation extensively elsewhere in the opinion. For an analysis of *Boumediene*'s discussion of executive manipulation, *see supra* Part IV.B.

93. For a brief discussion of the sham-lease example used by the Court in *Boumediene*, see *supra* note 83 and accompanying text.

94. The succeeding hypothetical is loosely based on a hypothetical in Neuman, *supra* note 40, at 280-81.

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Clause could lead to controversy,[95] which might complicate the withdrawal of American military forces. Moreover, if the detention facility was located in an unstable part of Iraq, the government would also be able to argue that the Suspension Clause should not apply because of the practical obstacles inherent in a theater of war.[96] Under a mechanical application of the three functional test factors articulated by the Court in *Boumediene*, the detainee would be denied the right to seek the writ almost automatically due to the functional test's practical obstacles factor weighing heavily against application of the Suspension Clause.[97] However, most of the practical obstacles would be a direct result of the executive's choice to hold the detainee in Iraq. In such a circumstance, a narrow and mechanical application of *Boumediene*'s functional test would allow the executive to "switch the Constitution on or off at will," a situation that the Court stated would not be tolerated.[98] Under the executive manipulation sub-factor approach, the government would likely feel compelled[99] to offer an explanation as to why the detainee was being held in Iraq instead of at a detention facility located in a more politically and militarily stable area. Thus, the executive manipulation sub-factor deters the executive from holding detainees at unfavorable detention sites for the sole purpose of avoiding judicial review.

V. TWO DIFFERING APPLICATIONS OF THE FUNCTIONAL TEST

To date, there have only been two applications of the functional test after *Boumediene*. *Boumediene*'s functional test was first applied by the United States District Court for the District of Columbia in Al Maqaleh v. Gates ("*Al Maqaleh I*").[100] The functional test was applied for a second time on May 21, 2010, when *Al Maqaleh I* was reversed, in part, by the United States Court of Appeals for the District of Columbia Circuit in Al Maqaleh v. Gates ("*Al Maqaleh II*").[101] The district court's handling of the

95. For instance, Iraqi leaders may be upset at the United States' perceived lack of respect for Iraq's sovereignty if they found out that the United States was detaining potentially dangerous individuals at one of its Iraqi military bases.

96. *See Boumediene*, 553 U.S. at 770 (internal citations omitted).

97. *Id.*

98. *Id.* at 765 (the political branches should not have the power to "switch the Constitution on or off at will"). *See also* Katz, *supra* note 79, at 399 ("*Boumediene's* anti-manipulation principle (that the political branches may not manipulate the scope of the Constitution's limits on their own power) . . . which the Court had not clearly articulated before, suggests . . . [that the political branches cannot shield themselves] . . . from judicial review in constitutional cases." (internal citations omitted)).

99. If the government failed to justify its choice of detention facility, there would be an increased chance that the Suspension Clause would be extended to the detainee.

100. Al Maqaleh v. Gates *(Al Maqaleh I)*, 604 F. Supp. 2d 205, 207-08 (D.D.C. 2009).

101. *Al Maqaleh II*, 605 F.3d 84, 87 (D.C. Cir. 2010).

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executive manipulation issue in *Al Maqaleh I*, while inconsistent, should be interpreted as a partial and implicit application of the executive manipulation sub-factor. In *Al Maqaleh II*, the D.C. Circuit took a step backward by placing an unreasonable burden on detainees by requiring them to produce direct evidence of the executive's specific intent to avoid judicial review before it would fully examine the executive manipulation issue.[102] In the following sections, the approaches to executive manipulation taken in *Al Maqaleh I* and *Al Maqaleh II* will be analyzed, followed by a discussion of how a court adopting the executive manipulation sub-factor approach can retain the positive aspects of the approaches taken in *Al Maqaleh I* and *Al Maqaleh II* while at the same time minimizing those approaches' major flaws.

A. Halfway There: Executive Manipulation in Al Maqaleh I and the Danger of "Shading"

The central issue for the district court in *Al Maqaleh I* was whether the Suspension Clause should apply to a set of detainees captured abroad, but outside Afghanistan,[103] and held at Bagram.[104] To determine whether the Suspension Clause applied to the Bagram detainees, the district court applied the functional test articulated in *Boumediene*.[105] In its application of the functional test's first and second factors ,[106] the district court compared the Bagram detainees to the Guantanamo Bay detainees in *Boumediene*.[107] The district court found the functional test's first factor to be more favorable to the Bagram detainees because the process afforded to them was less adequate than the CSRT process at Guantanamo Bay.[108] Next, the district court applied the sites of apprehension and then detention factor, finding that the factor was slightly less favorable to the Bagram detainees than it

102. *Id.* at 99.

103. The D.C. Circuit questioned whether one detainee was actually captured outside of Afghanistan, although the issue did not affect the court's analysis, indicating that for purposes of the government's motion to dismiss, the court operated under the assumption that all three detainees were apprehended outside of Afghanistan. *Id.* at 87 ("While Al-Maqaleh's petition asserts 'on information and belief' that he was captured beyond Afghan borders, a sworn declaration from Colonel James W. Gray, Commander of Detention Operations, states that Al-Maqaleh was captured in Zabul, Afghanistan.").

104. *Al Maqaleh I*, 604 F. Supp. 2d at 207.

105. *Id*. at 207-08.

106. The functional test's first factor examines "the citizenship and status of the detainee and the adequacy of the process through which that status determination was made," and the second factor examines "the nature of the sites where apprehension and then detention took place." Boumediene v. Bush, 553 U.S. 723, 766 (2008).

107. *Al Maqaleh I*, 604 F. Supp. 2d at 220-27.

108. *Id*. at 227 ("[T]he process used for status determinations at Bagram is less comprehensive than the CSRT process used for the Guantanamo detainees.").

was for the Guantanamo Bay detainees in *Boumediene* because of the temporary nature of the United States' control over Bagram.[109]

Finally, the district court applied the practical obstacles factor. The court distinguished between the Afghan citizen detainee held at Bagram and the other three Bagram detainees based on citizenship,[110] focusing on the possibility of friction between Afghanistan and the United States if the court had allowed the Afghan citizen detainee to seek the writ.[111] The three non-Afghan citizen detainees won their case,[112] with the district court holding that they were entitled to seek the writ.[113] The district court justified its holding in favor of the non-Afghan citizen detainees by citing a lack of practical obstacles to extending the detainees the right to seek the writ.[114] However, the Afghan citizen detainee lost his case[115] because the "friction with the host government" sub-factor of the functional test's practical

109. *Id.* at 224-25 ("At Bagram, the United States has declared that it only intends to stay until the current military operations are concluded and Afghan sovereignty is fully restored."). *See also Boumediene*, 553 U.S. at 755 (the United States has complete and permanent control over Guantanamo Bay).

110. *Al Maqaleh I*, 604 F. Supp. 2d at 209.

111. *Id.* at 229-30

In *Boumediene*, the Supreme Court also noted the possibility of friction with the host government. There was no such friction at Guantanamo, the Supreme Court reasoned, because "[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." At Bagram, however, there is a real possibility of friction with the Afghan government with respect to Afghan detainees[.] Friction with the Afghan government could arise if a U.S. court were to entertain Afghan detainees' habeas petitions . . . [I]f granted, the habeas remedy -- release -- could create substantial friction with the Afghan government. If a U.S. court were to order the release of an Afghan detainee, the prime destination for such release would be Afghanistan – the country of that detainee's citizenship and detention. Such unilateral releases of Bagram detainees by the United States could easily upset the delicate diplomatic balance the United States has struck with the host government. *Id.*

The potential for friction with the host government was not a concern in *Boumediene*. *See Boumediene*, 553 U.S. at 770 ("[At Guantanamo Bay] the United States is, for all practical purposes, answerable to no other sovereign for its acts on the base. Were that not the case, or if the detention facility were located in an active theater of war, arguments that issuing the writ would be 'impracticable or anomalous' would have more weight.").

112. However, the district court's decision to extend the Suspension Clause to the non-Afghan citizen detainees was reversed by the D.C. Circuit in *Al Maqaleh II*. *Al Maqaleh II*, 605 F.3d 84, 99 (D.C. Cir. 2010). For a discussion of *Al Maqaleh II*, see *infra* Part V.B.

113. *Al Maqaleh I*, 604 F. Supp. 2d at 235 ("Bagram detainees who are not Afghan citizens, who were not captured in Afghanistan, and who have been held for an unreasonable amount of time – here, over six years – without adequate process may invoke the protections of the Suspension Clause, and hence the privilege of habeas corpus, based on an application of the *Boumediene* factors.").

114. *Id.* at 231 ("[F]or detainees at Bagram who are not Afghan citizens and who were not captured within Afghanistan, the practical obstacles are not so substantial as to defeat their invocation of the Suspension Clause.").

115. *Id.* at 235 ("As to the [Afghan citizen detainee], the Court concludes that the possibility of friction with Afghanistan, his country of citizenship, precludes his invocation of the Suspension Clause under the Boumediene balance of factors.").

obstacles factor weighed heavily against application of the Suspension Clause.[116]

In addition to a mechanical application of the functional test that focused on the factors that were important to the Court in *Boumediene*, the district court in *Al Maqaleh I* also allowed two additional factors to "shade" its analysis: 1) the length of detention and 2) the possibility that the executive manipulated the site of detention.[117] The district court did not discretely analyze these two additional factors within the functional test. Instead, the district court allowed the length of detention and the possibility that the executive manipulated the site of detention to shade its application of the three factors articulated in *Boumediene*.[118] The district court also failed to fully discuss the significance of allowing these two additional factors to shade its analysis.[119]

Based on *Al Maqaleh I*'s repeated discussion of the executive's choice to hold the Bagram detainees at an unfavorable detention site,[120] it is clear that the district court understood that executive manipulation was more important to its application of the functional test in *Al Maqaleh I* than it was for the Supreme Court in *Boumediene*. Nonetheless, the district court was unable to find a place in the functional test to fully analyze the issue. At one point, the district court seemed to begin describing the executive manipulation sub-factor and why it should be included in the functional test,

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116. *Id.* at 231 ("[F]or detainees who are Afghan citizens, the possibility of friction with the host country cannot be discounted and constitutes a significant practical obstacle to habeas review.").

117. The district court stated that the length of detention "tacitly informed" the three functional test factors articulated in *Boumediene*. *See id.* at 216 ("[An additional factor] tacitly informed *Boumediene's* analysis as well: the length of a petitioner's detention without adequate review."). Similarly, although the district court did not use the term "shading," it allowed the executive's decision to hold the Bagram detainees at an unfavorable site of detention to weigh for application of the Suspension Clause. *See Al Maqaleh I*, 604 F. Supp. 2d at 230-31 ("In sum, this Court is sensitive to the Supreme Court's observation that practical obstacles could make habeas review 'impracticable and anomalous' for detainees held in an active theater of war. Yet [the government's] repeated reliance on this dictum cannot shield the Executive's detention of these petitioners at Bagram entirely from review. The only reason these petitioners are in an active theater of war is because respondents brought them there. And it would be far more anomalous to allow respondents to preclude a detainee's habeas rights by choosing to put him in harm's way through detention in a theater of war.").

118. *Id.* at 216-17. *See also id.* at 209, 216 at note 7, 220-21, 230-31.

119. *See id.* at 216-17 ("Because the Supreme Court did not include the length of detention in its explicit list of factors that courts should consider in determining the reach of the Suspension Clause, this Court will not separately consider that circumstance here. Instead, the length of detention must exceed that 'reasonable period' to which the Executive is entitled and also may shade other factors, like the practical obstacles inherent in resolving a petitioner's entitlement to the writ."). *See also id.* at 209, 216 at note 7, 220-21, 230-31 (the district court discusses executive manipulation of the site of detention at various stages of its analysis).

120. *Al Maqaleh I*, 604 F. Supp. 2d at 209, 216 at note 7, 220-21, 230-31.

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although the court unfortunately did not go on to explicitly and consistently apply it:[121]

> [T]he site of apprehension plays a more important, albeit more subtle, role than the citizenship and status factors. Guantanamo detainees have all been rendered there[.]
> . . . It is one thing to detain those captured on the surrounding battlefield at a place like Bagram, which [the government] correctly maintain[s] is in a theater of war. It is quite another thing to apprehend people in foreign countries – far from any Afghan battlefield – and then bring them to a theater of war, where the Constitution arguably may not reach. *Such rendition resurrects the same specter of limitless Executive power the Supreme Court sought to guard against in Boumediene* – the concern that the Executive could move detainees physically beyond the reach of the Constitution and detain them indefinitely. There is, then, a *meaningful distinction* between Bagram detainees captured outside Afghanistan -– like the petitioners here – and Bagram detainees who were captured on the battlefield in Afghanistan. *The site of apprehension factor, therefore, is of more importance here than it was for the Guantanamo detainees in Boumediene, and for these petitioners cuts in their favor* because, for purposes of [the government's] current motion, all were apprehended outside of Afghanistan.[122]

The district court was correct in noting that, in many cases, there is more to analyzing the site of apprehension than simply determining whether the site was abroad. Further, the court noted that many of the practical obstacles to extending the Suspension Clause to the Bagram detainees were created by the executive's choice to hold them in a theater of war.[123] However, the district court's failure to fully and openly discuss the

121. The district court's handling of the executive manipulation issue was inconsistent in two ways. First, the court only allowed the issue to factor into its application of the practical obstacles factor. *See id.* at 230-31. The court chose not to allow executive manipulation to factor into its application of the sites of apprehension and then detention factor. *See id.* at 220-26. Based on the passage quoted *infra* at note 122, a reader would assume that executive manipulation would, at a minimum, have factored into the district court's application of the sites of apprehension and then detention factor. Instead, executive manipulation only played a role in the court's application of the practical obstacles factor. *See id.* at 230-31. Second, the district court allowed its shading analysis to counterbalance certain practical obstacles created by executive manipulation, but not others. *See infra* notes 128-32 and accompanying text.

122. *Al Maqaleh I*, 604 F. Supp. 2d at 220-21 (emphasis added).

123. *Id.* at 209, 230-31.

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executive manipulation issue within the framework of the functional test led to an arbitrary result. While *Al Maqaleh I*'s analysis of executive manipulation was inconsistent,[124] the fact that the district court examined the relationship between the site of apprehension and the site of detention indicates that the court began down the path toward applying the executive manipulation sub-factor.[125]

Instead of trying to prevent executive manipulation by allowing factors outside of the functional test to play a part in its balancing of factors, the district court should have handled the issue discretely and within the functional test by applying the executive manipulation sub-factor. More specifically, the district court in *Al Maqaleh I* should have invoked the separation of powers principles relied upon by the Court in *Boumediene*[126] to justify a full and explicit consideration of whether executive manipulation, in the form of the potentially unnecessary decision to hold the Bagram detainees at an unfavorable detention facility, should have weighed in favor of extending the Suspension Clause to the Bagram detainees. Further, the district court's analysis of executive manipulation should have been conducted within the functional test's sites of apprehension and then detention factor. Executive manipulation should not have played a direct role in the district court's application of the practical obstacles factor.[127]

Courts choosing not to include the executive manipulation sub-factor in their application of the functional test's sites of apprehension and then detention factor substantially increase the probability that they will reach an arbitrary result. In *Al Maqaleh I*, the district court found that the executive's choice to hold the Bagram detainees in a theater of war weakened the government's argument that the obstacles resulting from Bagram's location in a warzone should weigh against application of the Suspension Clause.[128] On the other hand, the district court failed to mention that in the same way the Bagram detainees were only in a warzone because the executive chose to bring them there,[129] the Afghan citizen detainee was only in Afghanistan because the executive chose to bring him there.[130] In

124. *See supra* note 121.

125. *See Al Maqaleh I*, 604 F. Supp. 2d at 220-21.

126. *See* Boumediene v. Bush, 553 U.S. 723, 765-66 (2008); *see also supra* Part IV.B.

127. *See Al Maqaleh I*, 604 F. Supp. 2d at 230-31.

128. *Id.* at 231 ("[F]or detainees at Bagram who are not Afghan citizens and who were not captured within Afghanistan, the practical obstacles are not so substantial as to defeat their invocation of the Suspension Clause -- *especially when it is considered that these petitioners . . . are only in the Afghan theater of war because the United States chose to send them there*." (emphasis added)).

129. *See id.* at 230-31 ("The only reason these [detainees] are in an active theater of war is because [the government] brought them there.").

130. *Id.* at 231 ("[F]or detainees who are Afghan citizens, the possibility of friction with the host country cannot be discounted and constitutes a significant practical obstacle to habeas review."). The

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other words, the district court found that the executive's choice to hold the Bagram detainees at an unfavorable detention site weighed for application of the Suspension Clause by reducing the impact[131] of the practical obstacles inherent in a theater of war; however, the executive's choice to hold the Afghan citizen detainee at Bagram did not reduce the impact of the practical obstacles stemming from the possibility of friction between the United States and Afghanistan (the country hosting Bagram).[132] This contradiction in the district court's reasoning is a result of its attempt to mechanically apply the functional test, while simultaneously trying to reduce the impact of executive manipulation by shading the practical obstacles factor.

A court that adopts the district court's approach might also be biased in favor of allowing detainees to seek the writ. For instance, if the government has compelling reasons to hold certain detainees at an unfavorable site of detention when it at first seems more logical to hold those detainees at a more favorable alternate detention site, it is unclear whether the district court's approach would allow the government to make arguments regarding those compelling reasons. Moreover, the government might not have been aware that it had to justify its choice of a particular detention facility because it might have assumed that the court would apply the functional test in a mechanical and straightforward way instead of allowing additional factors, including whether the executive manipulated the site of detention, to play a role in its analysis.[133]

Courts that allow executive manipulation to shade certain functional test factors are more likely to reach inconsistent results than courts that analyze executive manipulation openly and discretely within the framework of the functional test. Arbitrary results are a predictable consequence of allowing additional factors to shade a court's analysis without a full and open discussion of how those additional factors fit into the functional test. Under the executive manipulation sub-factor approach, courts will fully and openly

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district court failed to mention that the only reason friction with Afghanistan was a possibility was because the executive chose to detain the Afghan citizen detainee in Afghanistan.

131. The impact on the court's balancing of the functional test's three factors.

132. *Id.* at 230-31.

133. If the parties are not aware that the court will be allowing executive manipulation to shade its analysis, the government will not know that it can or should attempt to justify its choice of a particular site of detention. The reasoning behind a court's decision to allow executive manipulation to shade certain factors may never be clear, because the court's reasoning will never be fully and openly discussed within the framework of the functional test. *Al Maqaleh I*, 604 F. Supp. 2d at 216-17 (holding that it is possible for the length of detention to shade certain functional test factors even though the Court in *Boumediene* did not include the length of detention in its enumerated list of factors); *see also id.* at 209 (explaining that it is "important[]" that the practical obstacles at Bagram are "of the Executive's choosing.").

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discuss executive manipulation within the functional test's sites of apprehension and then detention factor, ensuring fair and consistent results.

B. Ignoring the Possibility of Executive Manipulation: The D.C. Circuit Takes a Step Backward in Al Maqaleh II

In *Al Maqaleh II*, the D.C. Circuit reversed the district court's holding in *Al Maqaleh I* with regard to the three non-Afghan citizen detainees, holding that it did not have jurisdiction to hear their habeas claims.[134] The Afghan citizen detainee in *Al Maqaleh I* was not a part of *Al Maqaleh II*.[135] Like the district court in *Al Maqaleh I*, the D.C. Circuit in *Al Maqaleh II* applied *Boumediene*'s functional test.[136] The D.C. Circuit agreed with the district court's analysis of the functional test's first factor, finding that the citizenship and status of the detainees, and the adequacy of the process afforded to them, weighed in favor of extending to them the right to seek the writ.[137] While the district court found that the sites of apprehension and then detention factor did not strongly favor either the government or the detainees,[138] the D.C. Circuit, stressing the military's lack of de facto control over Bagram, found that the factor weighed strongly in favor of the government.[139] The D.C. Circuit also departed from the district court's analysis in its application of the practical obstacles factor, holding that the practical obstacles present at Bagram, when considered along with the sites of apprehension and then detention factor, weighed overwhelmingly against extending the Suspension Clause to the Bagram detainees.[140]

After mechanically applying the functional test, the D.C. Circuit briefly discussed the possibility that the executive manipulated the site of detention in an attempt to avoid judicial review.[141] Unfortunately, the D.C. Circuit's discussion of executive manipulation was only one paragraph long.[142] *Al Maqaleh II*'s cursory and superficial analysis of the executive manipulation issue did not comport with *Boumediene*'s underlying purpose, which is to prevent the executive from having the ability to avoid judicial review.[143]

134. *Al Maqaleh II*, 605 F.3d 84, 99 (D.C. Cir. 2010).
135. *Id.* at 87 note 1.
136. *Id.* at 87.
137. *Id.* at 95-96.
138. *Al Maqaleh I*, 604 F. Supp. 2d at 231.
139. *Al Maqaleh II*, 605 F.3d at 96-97.
140. *Id.* at 97 ("But we hold that the third factor, that is 'the practical obstacles inherent in resolving the prisoner's entitlement to the writ,' particularly when considered along with the second factor, weighs overwhelmingly in favor of the position of the United States." (quoting Boumediene v. Bush, 553 U.S. 723, 766 (2008))).
141. *Id.* at 98-99.
142. *See id.*
143. For a discussion of *Boumediene*'s underlying purpose, *see supra* Part IV.B.

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After stating that executive manipulation did not play a role in either the sites of apprehension and then detention factor, or the practical obstacles factor, the D.C. Circuit briefly explained its position:

> Perhaps such manipulation by the Executive might constitute an additional factor in some case in which it is in fact present. However, the notion that the United States deliberately confined the detainees in the theater of war rather than at, for example, Guantanamo, is not only unsupported by the evidence, it is not supported by reason. To have made such a deliberate decision to "turn off the Constitution" would have required the military commanders or other Executive officials making the situs determination to anticipate the complex litigation history set forth above and predict the *Boumediene* decision long before it came down.[144]

The most reasonable interpretation of the D.C. Circuit's very brief discussion of the executive manipulation issue in *Al Maqaleh II* is that the court believed the issue should be analyzed through the following three prongs of analysis, in which the court would only move on to the next prong if the preceding prong had been satisfied: 1) is it possible that the executive attempted to avoid judicial review by manipulating the site of detention; 2) if executive manipulation is a possibility, is there evidence that such manipulation actually occurred; and 3) if there is evidence of executive manipulation, can *Boumediene*'s functional test be read to include an additional factor that examines executive manipulation? While the third prong of analysis is explicitly outlined in the opinion,[145] the existence of the first two prongs must be inferred from the language used by the D.C. Circuit when it stated that the detainees' argument that the executive manipulated the site of detention was not supported by reason (prong one) or the evidence (prong two).[146] In effect, the D.C. Circuit found that: 1) the first

144. *Al Maqaleh II*, 605 F.3d at 99.

145. *Id.* at 98-99 ("[W]e note that the Supreme Court did not dictate that the three enumerated factors are exhaustive. It only told us that '*at least* three factors' are relevant. Perhaps such manipulation by the Executive might constitute an additional factor in some case in which it is in fact present." (quoting *Boumediene,* 553 U.S. at 766)).

146. It is reasonable to infer that where the D.C. Circuit stated that the possibility of executive manipulation was "not supported by reason," the court was essentially saying that executive manipulation was not a possibility. *Id* at 99. On the other hand, it is not reasonable to infer that where the D.C. Circuit stated that executive manipulation was not supported by the evidence, that the D.C. Circuit was saying that executive manipulation was not possible (i.e., simply because there is no direct evidence that an event occurred does not necessarily mean there is no possibility that the event occurred). In other words, saying that an event could not possibly have occurred (i.e., prong one) is very different from saying that there is no direct evidence that it occurred (i.e., prong two). *See id.* ("However, the notion

prong, which looked at whether executive manipulation was possible, was not satisfied;[147] and 2) assuming, *arguendo*, that it was satisfied, the second prong, which looked at whether there was evidence that executive manipulation actually occurred, was not satisfied either.[148] The D.C. Circuit saw no reason to move on to the third prong because the first two prongs were not satisfied.[149]

This article agrees with the D.C. Circuit that the first step of analysis should be to determine whether executive manipulation of the site of detention is possible, but not the way the court made that determination in *Al Maqaleh II*. Under the executive manipulation sub-factor approach, the test for determining whether executive manipulation is a possibility, i.e., whether the executive manipulation sub-factor is triggered,[150] is to compare the site where the detainees are being held with other reasonable sites of detention. If other reasonable sites of detention are more favorable, then executive manipulation is possible in that particular case, and the court should proceed to the second step of analysis and examine whether there is evidence that executive manipulation actually occurred, i.e., courts should apply the executive manipulation sub-factor. Unfortunately, the D.C. Circuit's approach to determining whether executive manipulation was a possibility in *Al Maqaleh II* will, in most cases, allow the executive to avoid judicial review by manipulating the site of detention.

The D.C. Circuit summarily dismissed the possibility of executive manipulation in *Al Maqaleh II*, stating that there was no possibility that the executive attempted to avoid judicial review by holding Al Maqaleh and the other detainees at Bagram.[151] The court cited the fact that the decision to hold the detainees at Bagram was made before *Boumediene* and the line of cases leading up to it were decided.[152] Surprisingly, the D.C. Circuit seemed to forget that there is a distinct possibility that the executive might have been trying to manipulate the holding in *Eisentrager* when it decided to hold the detainees at Bagram over seven years ago. Despite the D.C. Circuit's extensive discussion of *Eisentrager*,[153] which focused on

that the United States deliberately confined the detainees in the theater of war rather than at, for example, Guantanamo, is not only *unsupported by the evidence*, it is *not supported by reason*." (emphasis added)).

147. *Id*.

148. *Al Maqaleh II*, 605 F.3d 84, 99 (D.C. Cir. 2010).

149. *Id*. at 98.

150. The executive manipulation sub-factor must first be triggered before it can be applied. For a discussion of the distinction between the executive manipulation sub-factor's triggering and application stages, *see supra* Part III.

151. *Al Maqaleh II*, 605 F.3d at 98-99.

152. *Id.* at 99.

153. *Id.* at 88-98.

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explaining why the holding was not overruled by *Boumediene*,[154] the court stated that, prior to *Boumediene*, it was not possible for the executive to attempt to manipulate Supreme Court precedent to avoid judicial review of its overseas detentions.[155] The D.C. Circuit's reasoning is especially confusing in light of its pronouncement earlier in *Al Maqaleh II* that "[t]he *Eisentrager* case remained the governing precedent concerning the jurisdiction of United States courts over habeas petitions on behalf of aliens held outside the sovereign territory of the United States until the Court revisited the question in *Rasul v. Bush*."[156] The D.C. Circuit's focus on the fact that Bagram was more similar to Landsberg Prison than it was to Guantanamo Bay makes the D.C. Circuit's reasoning even more perplexing.[157]

The D.C. Circuit's approach to the second prong of analysis, which looked at whether executive manipulation actually occurred, is also at odds with the executive manipulation sub-factor approach. A court applying the executive manipulation sub-factor will look at the totality of the circumstances, including a full examination of the relationship between the site of apprehension and the site of detention, in order to determine whether it is likely that the executive unnecessarily chose an unfavorable site of detention in an attempt to avoid judicial review.[158] In its discussion of whether executive manipulation occurred, the D.C. Circuit implied that there was no evidence of a deliberate attempt by the executive to avoid judicial review.[159] The D.C. Circuit's failure to discuss the importance of the fact that the Bagram detainees were not apprehended on the battlefield[160]

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154. *See id.* at 98 (in its application of the functional test's practical obstacles factor, the D.C. Circuit explained: "We therefore conclude that under both *Eisentrager* and *Boumediene*, the writ does not extend to the Bagram confinement in an active theater of war in a territory under neither the *de facto* nor *de jure* sovereignty of the United States and within the territory of another *de jure* sovereign. We are supported in this conclusion by the rationale of *Eisentrager*, which was not only not overruled, but reinforced by the language and reasoning just referenced from *Boumediene*.").

155. *Id.* at 99 ("To have made such a deliberate decision to 'turn off the Constitution' would have required the military commanders or other Executive officials making the situs determination to anticipate the complex litigation history set forth above and predict the *Boumediene* decision long before it came down.").

156. *Al Maqaleh II*, 605 F.3d at 90.

157. *Id.* at 97.

158. The court would also examine direct evidence of the executive's intent to avoid judicial review, in the rare case that such evidence was available.

159. *Id.* at 99 ("[T]he notion that the United States deliberately confined the detainees in the theater of war rather than at, for example, Guantanamo, is . . . unsupported by the evidence . . . .").

160. Early in *Al Maqaleh II*, the D.C. Circuit appeared to doubt Al-Maqaleh's claim that he was not apprehended on the battlefield, but the court never mentioned the issue again. *See id.* at 87 ("While Al-Maqaleh's petition asserts 'on information and belief' that he was captured beyond Afghan borders, a sworn declaration from Colonel James W. Gray, Commander of Detention Operations, states that Al-Maqaleh was captured in Zabul, Afghanistan."). *But see Al Maqaleh I*, 604 F. Supp. 2d 205, 209, 220-

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is a strong indication that by "evidence" the court was referring to direct evidence of the executive's specific intent to avoid judicial review, i.e., direct evidence of the executive's state of mind when it selected the site of detention.[161] Given that the D.C. Circuit failed to acknowledge the circumstantial evidence of executive manipulation that was present in *Al Maqaleh II*,[162] there is no type of evidence the court could have been referring to other than direct evidence of the executive's specific intent to avoid judicial review.

The D.C. Circuit's approach to executive manipulation in *Al Maqaleh II* does not comport with *Boumediene*'s broader purpose, which is to ensure that the executive does not have the ability to avoid judicial review.[163] Requiring direct evidence of the executive's specific intent to avoid judicial review as a prerequisite for allowing executive manipulation to play a role in the functional test will, in almost all cases, be equivalent to ignoring the issue altogether, because there will generally be no way for detainees to obtain evidence of the executive's state of mind when it selected a particular detention site. Instead of mechanically applying the functional test factors that the Court focused on in *Boumediene*, the D.C. Circuit should have fully examined the circumstances surrounding the Bagram detainees' apprehension and detention by applying the executive manipulation sub-factor. By thoroughly examining the totality of the circumstances to determine whether executive manipulation occurred, the D.C. Circuit would have ensured that the executive will not be tempted to manipulate the site of detention in the future, even if the court had found that the Suspension Clause did not apply.

C. Comparing the Approaches

Courts that adopt the executive manipulation sub-factor approach can retain the positive aspects of the approaches taken by the district court in *Al*

21, 228-31 (D.D.C. 2009) (the district court found the fact that the detainees claimed to have been apprehended away from the battlefield and outside of Afghanistan to be important to its analysis of the functional test's second and third factors).

161. *See Al Maqaleh II*, 605 F.3d at 99.

162. For example, the Bagram detainees were apprehended away from the battlefield and outside of Afghanistan. *Al Maqaleh I*, 604 F. Supp. 2d at 220-21. Nonetheless, the executive decided to hold the detainees in a theater of war, at a detention site that had many similarities to the site of detention in *Eisentrager*, where the Court held that the German detainees did not have habeas rights. *Id.* at 225-26, 230-31; *Al Maqaleh II*, 605 F.3d at 96-98. *See* Johnson v. Eisentrager, 339 U.S. 763, 781 (1950) (*Eisentrager* was the case governing the habeas rights of aliens being held at overseas detention facilities at the time the decision was made to hold Al Maqaleh and the other detainees at Bagram.). *See also supra* notes 151-57 and accompanying text (analyzing the D.C. Circuit's discussion of *Eisentrager* in *Al Maqaleh II*).

163. For a discussion of *Boumediene's* underlying purpose, *see supra* Part IV.B.

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Maqaleh I and the D.C. Circuit in *Al Maqaleh II*, while avoiding their major flaws. Under the district court's shading approach, the executive will generally be unable to move a detainee apprehended away from any battlefield to a theater of war and then claim that the Suspension Clause should not be applied because of the practical obstacles inherent in a war zone. However, the executive would be able to avoid judicial review by transferring detainees to sites of detention where friction with the host country is a distinct possibility. Further, because courts adopting the shading approach would be unlikely to fully and openly discuss their reasoning,[164] both the government and detainees may be unaware of what arguments they should make, leading to arbitrary results. The inconsistency of the district court's shading approach makes it an unattractive option for courts applying the functional test, despite the fact that the approach will sometimes allow executive manipulation to play a proper role in the functional test.

The D.C. Circuit's approach to executive manipulation in *Al Maqaleh II* does not suffer from the same problems with consistency that hampered the district court's shading approach in *Al Maqaleh I*. Under the D.C. Circuit's approach, the parties will usually be aware of exactly how the court will make its decision, including which aspects of each functional test factor will be relevant to its analysis. A court applying this approach will almost always center its analysis on the same aspects of the functional test that the Court focused on in *Boumediene*, so it is unlikely that the parties will be caught off guard by the court's handling of the executive manipulation issue. More specifically, as a result of not allowing circumstantial evidence of executive manipulation to factor into the court's application of the functional test,[165] the parties will likely be aware that executive manipulation will only play a role in the court's analysis if the detainees are in possession of evidence of the state of mind of military commanders or other executive officials when the decision to hold the detainees at a particular detention site was made.[166] While the D.C. Circuit's approach

164. Specifically, their reasoning as to why they would allow executive manipulation to shade certain factors but not others, and what test they would use to determine whether executive manipulation occurred.

165. By requiring direct evidence that the executive intended to avoid judicial review as a prerequisite for fully analyzing the executive manipulation issue, the court will necessarily have to ignore circumstantial evidence of executive manipulation.

166. This evidence must indicate that the site of detention was deliberately selected to avoid judicial review in order for the court to fully examine whether executive manipulation occurred. *See supra* notes 159-62 and accompanying text. Further, even after it has been shown that executive manipulation occurred, there is still a chance that the issue will not play a role in the functional test because of the third prong of the D.C. Circuit's approach, which examines whether executive manipulation constitutes an additional functional test factor (note that this determination would not be made on a case-by-case

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may at first seem like a marked improvement over the district court's shading approach because of its consistency, it must also be noted that because the D.C. Circuit essentially ignored the executive manipulation issue, its approach does not comport with *Boumediene*'s broader purpose, which is to prevent the Executive from having the ability to avoid judicial review.

The executive manipulation sub-factor allows courts to thoroughly analyze executive manipulation discretely and within the functional test, thereby decreasing the chance of reaching an arbitrary result. The executive manipulation sub-factor improves on the district court's approach by allowing executive manipulation to play a more consistent role in the functional test. The executive manipulation sub-factor also improves on the D.C. Circuit's approach by looking at the totality of the circumstances, including circumstantial evidence,[167] when determining whether executive manipulation occurred, thereby increasing the likelihood that courts will fully consider all of the available evidence. Courts adopting the executive manipulation sub-factor approach should feel confident that their approach to executive manipulation is in line with the underlying purpose of *Boumediene*, which is to prevent the executive from being able to decide when detainees can seek the writ.

VI. CONCLUSION

Based upon a narrow reading of *Boumediene*, it appears the executive can manipulate the functional test by choosing to hold detainees at unfavorable sites of detention that present significant practical obstacles to detainees seeking the writ. However, after a careful analysis of the doctrinal underpinnings, purpose, and context of the *Boumediene* decision, it becomes clear that the executive should not have the power to decide when detainees can seek the writ. By adopting the executive manipulation sub-factor approach, courts applying *Boumediene*'s functional test can prevent the executive from being able to avoid judicial review by selecting unfavorable detention sites. Courts that fail to look past the plain text of *Boumediene*'s articulation of the functional test are effectively allowing the Executive to decide when detainees are entitled to seek the writ.

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basis). *See Al Maqaleh II*, 605 F.3d at 99 ("Perhaps such manipulation by the Executive might constitute an additional factor in some case in which it is in fact present.").

167. The D.C. Circuit in *Al Maqaleh II* placed an unreasonable burden on detainees by asking them to provide direct evidence of the executive's specific intent to avoid judicial review as a prerequisite for examining the executive manipulation issue. *See supra* notes 159-62 and accompanying text.