The University of New Hampshire Law Review

Volume 9
Number 2 *University of New Hampshire Law Review*

Article 9

March 2011

Territorial Sovereignty and the Evolving Boumediene Factors: Al Maqaleh v. Gates and the Future of Detainee Habeas Corpus Rights

Luke R. Nelson
University of New Hampshire School of La

Territorial Sovereignty and the Evolving *Boumediene* Factors: *Al Maqaleh v. Gates* and the Future of Detainee Habeas Corpus Rights

LUKE R. NELSON*

TABLE OF CONTENTS

I. INTRODUCTION 298
II. BACKGROUND: FROM *EISENTRAGER* TO *BOUMEDIENE* 299
A. Johnson v. Eisentrager 300
B. Rasul v. Bush 303
C. Boumediene v. Bush 305
III. *AL MAQALEH V. GATES* AND THE EXTRATERRITORIAL REACH OF THE SUSPENSION CLAUSE TO BAGRAM DETAINEES 307
A. *The D.C. District Court* 307
B. *The D.C. Circuit* 310
IV. ANALYSIS 311
A. *What is Left of Territorial Sovereignty in Today's Habeas Corpus Analysis?* 311
1. *Changing Definition of Sovereignty* 312
2. *Multiple Factors Beyond Territorial Sovereignty* 315
B. *The Future of the Habeas Factors: Additional Factors and Unanswered Questions* 317
1. *Additional Factors in Response to Today's Conflicts* 317
a. Length of Confinement Without Adequate Status Review 318
b. Executive Manipulation 319
2. *Unanswered Questions* 320
C. *Guidance on the Practical Obstacles* 322
V. CONCLUSION 324

* B.A., University of Minnesota Duluth, 2007; J.D. Candidate, University of New Hampshire School of Law, 2011. The author thanks Alice Briggs and Tom Sanchez for their thoughtful edits and comments to this Note.

I. INTRODUCTION

In November 2010, the U.S. government prosecuted in a civilian federal court an accused terrorist detainee housed since 2004 at the Guantanamo Bay Detention Center (Guantanamo Bay).[1] The Obama Administration considered this trial a "test case" for prosecuting accused terrorist detainees in civilian federal courts.[2] Of the more than 280 charges against the detainee defendant, a civilian jury convicted him of one count and acquitted him of the remaining charges.[3] Yet, the defendant received a life sentence without parole.[4]

This "test case" is one example of a changing landscape in international armed conflict and detainee rights jurisprudence following September 11, 2001. This Note discusses one area of American constitutional law that has clearly evolved in recent detainee rights litigation: the extraterritorial reach of the Suspension Clause and extension of habeas corpus rights to detainees held beyond U.S. sovereign territory.[5]

Historically, territorial sovereignty determined the extraterritorial reach of the Suspension Clause.[6] In 2008, however, *Boumediene v. Bush*[7] greatly impacted the role of territorial sovereignty in extraterritorial habeas jurisprudence. In *Boumediene*, the Supreme Court developed a practical, multi-factor test for determining the reach of the Suspension Clause while holding that federal courts were not

1. Benjamin Weiser, *Detainee Acquitted on Most Counts in '98 Bombings*, N.Y. TIMES, Nov. 17, 2010, http://www.nytimes.com/2010/11/18/nyregion/18ghailani.html?_r=1.

2. *Id.* The significance of this case is demonstrated by the trial judge's finding that the defendant's "status of 'enemy combatant' probably would permit his detention as something akin 'to a prisoner of war until hostilities between the United States and Al Qaeda and the Taliban end . . . ." *Id.*; *see also* Benjamin Weiser, *Ex-Detainee Gets Life Sentence in Embassy Blasts*, N.Y. TIMES, Jan. 25, 2011, http://www.nytimes.com/2011/01/26/nyregion/26ghailani.html?_r=1&partner=rss&emc=rss.

3. Weiser, *supra* note 2.

4. *Id.*

5. *See* U.S. CONST. art. I, § 9, cl. 2; *see also infra* Part IV.

6. *See* Johnson v. Eisentrager, 339 U.S. 763, 768 (1950).

7. 553 U.S. 723 (2008).

foreclosed from entertaining habeas petitions from Guantanamo Bay detainees.[8] This was the first decision to allow detainee foreign nationals held beyond U.S. sovereign territory to seek habeas corpus relief through the federal courts.[9] Now that Guantanamo Bay has been addressed, recently, the focus has shifted to detainees held at the Bagram Theater Internment Facility (Bagram) in Afghanistan.[10]

In May 2010, the D.C. Circuit in *Al Maqaleh v. Gates*[11] held that the balance of *Boumediene's* multi-factor test weighed against extending the Suspension Clause to four detainees captured beyond Afghanistan and detained at Bagram as unlawful enemy combatants.[12] By analyzing the development of the *Boumediene* multi-factor test and focusing on its application to the Bagram detainees, this Note proposes that territorial sovereignty is no longer a controlling or driving factor in today's extraterritorial habeas analysis. Furthermore, this Note provides a few practical recommendations for future applications of the *Boumediene* multi-factor test and addresses some unanswered questions in applying the test in future detainee cases.

Part II provides a brief history of the extraterritorial habeas jurisprudence relating to foreign national detainees leading up to *Al Maqaleh*. Part III discusses the *Al Maqaleh* decisions in both the district court and the court of appeals. Part IV analyzes the declining role that territorial sovereignty plays in today's habeas analysis. Part IV also discusses various unanswered questions that await decision by the Supreme Court in applying the *Boumediene* test in future detainee cases.

II. BACKGROUND: FROM *EISENTRAGER* TO *BOUMEDIENE*

The Suspension Clause states: "The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebel-

8. *Id.* at 766, 771.

9. *Id.* at 770.

10. *See, e.g.*, Ari Shapiro, *Is the Bagram Air Base the New Guantanamo?*, NPR (Aug. 13, 2009), http://www.npr.org/templates/story/story.php?storyId=111855836.

11. 605 F.3d 84 (D.C. Cir. 2010) (*Al Maqaleh II*).

12. *Id.* at 99.

lion or Invasion the public Safety may require it."[13] "Habeas Corpus" means "that you have the body," a mechanism allowing prisoners to challenge their government detention or confinement as unlawful.[14] The writ of habeas corpus serves to protect individual constitutional rights as well as ensure a separation of powers and a check on executive detention authority.[15]

Little case law exists prior to 2004 discussing the extraterritorial reach of the Suspension Clause to foreign nationals detained beyond U.S. sovereign territory. The leading case on the extraterritorial reach of the Suspension Clause is *Johnson v. Eisentrager*,[16] decided in 1950.[17]

A. Johnson v. Eisentrager

In *Eisentrager*, the U.S. government suspected twenty-one German nationals, who were detained in China, of "continued military activity against the United States after surrender of Germany [in World War II]."[18] All twenty-one nationals were prosecuted and convicted under military commissions and later sent to a German prison to serve their sentences.[19] The detainees filed petitions in the D.C. District Court for habeas corpus relief, claiming that, although they were not U.S. citizens and had never stepped foot on U.S. sovereign territory, their convictions and imprisonments were unlawful.[20]

The D.C. Circuit refused to dismiss the petitions, holding that "*any person* who is deprived of his liberty by officials of the United States, acting under purported authority of that Government, and who can show that his confinement is in violation of a prohibition of

13. U.S. CONST. art. I, § 9, cl. 2.
14. BLACK'S LAW DICTIONARY 728 (8th ed. 2004).
15. Tim J. Davis, Comment, *Extraterritorial Application of the Writ of Habeas Corpus After* Boumediene*: With Separation of Powers Comes Individual Rights*, 57 U. KAN. L. REV. 1199, 1204–05 (2009).
16. 339 U.S. 763 (1950).
17. *See Al Maqaleh II*, 605 F.3d at 90 (stating that *Eisentrager* remained the governing precedent until 2004).
18. *Eisentrager*, 339 U.S. at 766.
19. *Id.*
20. *Id.* at 767–68.

the Constitution, has a right to the writ."[21] The Supreme Court interpreted the D.C. Circuit's ruling as suggesting that "any person, *including an enemy alien*, deprived of his liberty *anywhere under any purported authority of the United States* is entitled to the writ."[22] The Supreme Court responded by reversing the D.C. Circuit's judgment and affirming the district court's dismissal of the petitions.[23]

In reversing the D.C. Circuit, the Supreme Court in *Eisentrager* arguably created a bright-line standard that defined the reach of the Suspension Clause as ending at the legal borders, or sovereign territory, of the United States.[24] Holding that constitutional habeas corpus relief does not extend to a foreign national engaged in war against the United States and detained abroad, the Supreme Court referenced the "inherent distinctions" between citizens and aliens.[25] The Court further noted that the constitutional provisions are "universal in their application, to all persons within the territorial jurisdiction"[26] and that it is the "alien's presence within its territorial jurisdiction that [gives] the Judiciary power to act."[27] In other words, the Suspension Clause did not reach beyond U.S. sovereign territory to individuals possessing little to no connection to the United States' territory.

On the other hand, the *Eisentrager* majority discussed various other factors beyond territorial sovereignty in reaching its decision, thus indicating that multiple practical and objective factors could determine the extraterritorial reach of the Suspension Clause. The majority stated that when a foreign national "increases his identity

21. Eisentrager v. Forrestal, 174 F.2d 961, 963 (D.C. Cir. 1949), *rev'd*, 339 U.S. 763 (1950) (emphasis added).

22. *Eisentrager*, 339 U.S. at 767 (emphasis added).

23. *Id.* at 791.

24. *See* Boumediene v. Bush, 553 U.S. 723, 835 (2008) (Scalia, J., dissenting). Justice Scalia stated that *Eisentrager* has always held "beyond any doubt" that "the Constitution does not ensure habeas for aliens held by the United States in areas over which our Government is not sovereign." *Id.* The government's main argument in *Boumediene* also reiterated the contention that "noncitizens designated as enemy combatants and detained in territory located outside our Nation's borders have no constitutional right and no privilege of habeas corpus." *Id.* at 739.

25. *Eisentrager*, 339 U.S. at 768–69.

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

27. *Id.*

with [American] society," situations could arise allowing foreign national detainees to petition federal courts for habeas relief.[28] The Court then listed various factors that required it to reject extending the Suspension Clause to the German nationals.[29] Particularly, the German nationals failed to increase their identities with American society because each one:

> (a) is an enemy alien; (b) has never been or resided in the United States; (c) was captured outside of our territory and there held in military custody as a prisoner of war; (d) was tried and convicted by a Military Commission sitting outside the United States; (e) for offenses against laws of war committed outside the United States; (f) and is at all times imprisoned outside the United States.[30]

Eisentrager became the driving precedent in determining whether constitutional habeas corpus protections extend to foreign nationals detained beyond U.S. sovereign territory. This precedent would continue to control until 2003, when U.S.-led military operations in Iraq and Afghanistan were initiated, drastically changing the entire nature of international armed conflict.[31]

September 11, 2001 marked the beginning of a remarkable change in U.S. foreign policy and the state of international armed conflict. Not only would the United States engage in armed conflicts in both Afghanistan and Iraq as a result of 9/11, but the post-9/11 era fittingly became known as a "Global War on Terrorism," reflecting the global front to fighting the enemy and the lack identifiable enemy nations.[32] As the conflicts in Afghanistan and Iraq escalated,

28. *Id.* at 770.

29. *Id.* at 777.

30. *Id.*

31. *See, e.g.*, David Weissbrodt & Amy Bergquist, *Methods of the "War on Terror,"* 16 MINN. J. INTL. L. 371, 374–384 (2007) (discussing certain provisions of international law regulating today's law of war).

32. *See* President George W. Bush, Address to a Joint Session of Congress (Sept. 20, 2001), *available at* http://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010920-8.html ("Our war on terror begins with al Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped, and defeated."); Guy Raz, *Defining the War on Terror*,

suspected "unlawful enemy combatants"[33] were captured, transported, and detained in military prisons, most notably at Guantanamo Bay, located just ninety miles beyond U.S. sovereign territory.[34] Under *Eisentrager* and its progeny, the capture and detainment of foreign nationals as unlawful enemy combatants anywhere beyond U.S. sovereign territory was believed to restrict any successful attempt by a foreign national at obtaining habeas corpus relief. In fact, Bush Administration officials relied heavily on the *Eisentrager* precedent in deciding to hold accused terrorist detainees at Guantanamo Bay.[35] Then, beginning in 2004, the Supreme Court addressed *Eisentrager's* historical precedent.

B. Rasul v. Bush

Within two years after enemy combatants were transported and detained at Guantanamo Bay, the Supreme Court, in *Rasul v. Bush*,[36] addressed whether foreign national detainees held beyond U.S. sovereign territory could seek habeas corpus relief, not under the Constitution, but, under the federal habeas statute.[37] *Rasul* involved two Australians and twelve Kuwaiti enemy combatants who challenged

NPR (Nov. 1, 2006), http://www.npr.org/templates/story/story.php?storyId=6416780.

33. Military Commissions Act of 2006, Pub. L. No. 109-366, § 3, 120 Stat. 2600, 2601 (2006) (codified as amended at 10 U.S.C. § 948a(1) (2006)) (defining "unlawful enemy combatant").

34. Tung Yin, *The Role of Article III Courts in the War on Terrorism*, 13 WM. & MARY BILL RTS. J. 1061, 1080–81 (2005) (discussing reasons for transporting detainees to Guantanamo Bay).

35. *See* Boumediene v. Bush, 553 U.S. 723, 828 (2008) (Scalia, J., dissenting) ("[T]he President's Office of Legal Counsel advised [the President] that the great weight of legal authority indicates that a federal district court could not properly exercise habeas jurisdiction over an alien detained at Guantanamo Bay.") (internal quotation marks and brackets omitted); Edward F. Sherman, *Terrorist Detainee Policies: Can the Constitutional and International Law Principles of the* Boumediene *Precedents Survive Political Pressures?*, 19 TUL. J. INT'L & COMP. L. 207, 208 (2010).

36. 542 U.S. 466 (2004).

37. *Id.* at 470, 475; *see also* 28 U.S.C. §§ 2241–2266 (2006). The federal habeas statute at the time of *Rasul* authorized district courts, "*within their respective jurisdictions*," to entertain habeas applications by persons claiming unlawful detention. §§ 2241(a)(1) (emphasis added).

their detention at Guantanamo Bay as unlawful under the federal habeas statute.[38] The Supreme Court interpreted the federal habeas statute as authorizing courts to entertain habeas petitions within their "respective jurisdictions," indicating that a court's jurisdiction is not limited to "sovereign territory," but beyond that to "territorial jurisdictions" where the U.S. government exercised significant control.[39] This interpretation authorized federal courts to entertain habeas petitions under the federal habeas statute from detainees held at Guantanamo Bay.[40] While making this determination, the Court noted the need for a flexible jurisdictional rule because the United States exerted such large amounts of control over Guantanamo Bay.[41] Although the Court did not analyze *Rasul* under *Eisentrager's* constitutional habeas analysis, it still noted certain detainee characteristics that distinguished *Eisentrager*:

> [Petitioners] are not nationals of countries at war with the United States, and they deny that they have engaged in or plotted acts of aggression against the United States; they have never been afforded access to any tribunal, much less charged with and convicted of wrongdoing; and for more than two years they have been imprisoned in territory over which the United States exercises exclusive jurisdiction and control.[42]

Following *Rasul*, the Supreme Court engaged in a back-and-forth battle with Congress to define the federal courts' ability to entertain petitions under the federal habeas statute by detainees held at Guantanamo Bay. First, Congress enacted the Detainee Treatment Act of 2005 (DTA), effectively stripping federal courts of jurisdiction to entertain habeas corpus petitions.[43] Following the DTA, the Supreme Court, in *Hamdan v. Rumsfeld*,[44] ruled that courts could enter-

38. *Rasul*, 542 U.S. at 470–71.
39. *Id.* at 481–82.
40. *Id.* at 484.
41. *Id.* at 478.
42. *Id.* at 476.
43. *See* Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005, 119 Stat. 2739, 2742 (2005).
44. 548 U.S. 557 (2006).

tain petitions filed before the DTA was enacted in 2005.[45] In response to *Hamdan*, Congress enacted the Military Commissions Act of 2006,[46] which suspended any and all statutory petitions for habeas corpus relief by any detainee held after September 11, 2001.[47] Now that federal courts were entirely stripped of any authority to entertain habeas petitions under the federal habeas statute, the question remained whether habeas corpus protections under the Constitution could extend extraterritorially to foreign nationals at Guantanamo Bay and beyond.

C. Boumediene v. Bush

Constitutional habeas corpus is considered a "privilege not to be withdrawn except in conformance with the Suspension Clause."[48] In 2008, the Supreme Court in *Boumediene v. Bush* revisited a constitutional issue that the *Eisentrager* Court appeared to have already answered: "whether foreign nationals, apprehended and detained in distant counties during a time of serious threats to our Nation's security, may assert the privilege of the writ and seek its protection."[49] Identifying constitutional habeas corpus as the "surest safeguard of liberty,"[50] the Court ruled that detainees held beyond U.S. sovereign territory at Guantanamo Bay, who have never stepped foot within the United States and who have no connection with the United States other than capture by U.S. authorities, could invoke Suspension Clause protections and petition for habeas corpus relief in the federal courts.[51]

By comparing and contrasting the facts in *Boumediene* to *Eisentrager*, the majority adopted an objective and practical three-factor balancing test to determine the extraterritorial reach of the Suspension Clause:

45. *Id.* at 575–77.
46. Military Commissions Act of 2006, Pub. L. No. 109-366, § 7, 120 Stat. 2600, 2636 (2006) (amended 2009).
47. *Id.*
48. Boumediene v. Bush, 553 U.S. 723, 732 (2008).
49. *Id.* at 746.
50. *Id.* at 745.
51. *Id.* at 771.

> [A]t least three factors are relevant in determining the reach of the Suspension Clause: (1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner's entitlement to the writ.[52]

Applying these three factors to the detainees held at Guantanamo Bay, the Court deviated from *Eisentrager's* view that territorial sovereignty is the driving determination and reason for not extending constitutional habeas corpus protections beyond U.S. sovereign territory. Under the first factor, the process afforded the detainees at Guantanamo Bay was considerably less than the process in *Eisentrager*.[53]

Under the second factor, the degree of U.S. *de facto* sovereignty, or level of government control, over Guantanamo Bay since 1903, compared to the German prison in *Eisentrager*, drove the Court's ruling that the Suspension Clause extends beyond simply U.S. *de jure*, or legal, sovereign territory.[54] Thus, although the United States did not exercise *de jure* territorial sovereignty over Guantanamo Bay because the base sat beyond the U.S. legal border, it did maintain sufficient *de facto* sovereignty, or objective government control, over the base such that it weighed in favor of extending habeas corpus protections to the detainees.[55]

Under the third factor, few practical obstacles existed compared to post-World War II Germany because Guantanamo Bay sat beyond an active theater of war, and extending the Suspension Clause protections would have little effect on the military mission.[56] Within two years of this decision, these practical *Boumediene* factors would

52. *Id.* at 766.
53. *Id.* at 766–67.
54. *Boumediene*, 553 U.S. at 754–55, 768–69. "*De facto*" means "existing in fact" or "having effect even though not formally or legally recognized." BLACK'S LAW DICTIONARY 448 (8th ed. 2004). "*De jure*" means "[e]xisting by right or according to law." *Id.* at 458.
55. *See Boumediene*, 553 U.S. at 754–55, 768–69.
56. *Id.* at 769–70.

be tested and applied to a detention facility halfway around the world: the Bagram Theater Internment Facility in Afghanistan.

III. *AL MAQALEH V. GATES* AND THE EXTRATERRITORIAL REACH OF THE SUSPENSION CLAUSE TO BAGRAM DETAINEES

The Bagram Theater Internment Facility (Bagram) comprises a large, multi-nationally operated detention facility located in Afghanistan.[57] Upwards of 650 detainees are housed at Bagram, which the Republic of Afghanistan has maintained sovereignty over and leased to the United States and Coalition Forces for military purposes.[58] However, the United States possesses "complete jurisdiction and control" over Bagram and has the right to remain at Bagram as long as it desires.[59]

Al Maqaleh is a unique case because, as the D.C. District Court recognized, it is the "first application of the multi-factor functional test crafted by the Supreme Court in *Boumediene*."[60] The case involved four detainee petitioners held as unlawful enemy combatants at Bagram.[61] Two detainees were confined since 2002 and a third since 2003.[62] All four detainees were allegedly captured beyond Afghanistan in Pakistan, Thailand, and the United Arab Emirates and later brought into the Afghanistan theater of war and confined at Bagram.[63]

A. *The D.C. District Court*

Even after *Boumediene*, the government maintained that territorial sovereignty should determine whether the Suspension Clause

57. *See* Marc D. Falkoff & Robert Knowles, *Bagram*, Boumediene, *and Limited Government*, 59 DEPAUL L. REV. 851, 857 (2010).
58. *Id.*
59. *Id.* at 858.
60. Al Maqaleh v. Gates (*Al Maqaleh I*), 604 F. Supp. 2d 205, 207–08 (D.D.C. 2009), *rev'd*, 605 F.3d 84 (D.C. Cir. 2010).
61. *Id.* at 209.
62. *Id.*
63. *Id.*

extends to the Bagram detainees.[64] Before discussing territorial sovereignty, however, the district court set the stage for its opinion by emphasizing that "petitioners have been in custody for six years with no definitive judicial determination as to the legality of their detention."[65] Recognizing that the only material difference between the Guantanamo Bay detainees and the Bagram detainees was the location of confinement,[66] the district court proceeded to apply *Boumediene's* three-factor test to the Bagram detainees and hold that the Suspension Clause extended extraterritorially to Bagram.[67] For the sake of analysis, the court divided the three *Boumediene* factors into six:

> (1) the citizenship of the detainee; (2) the status of the detainee; (3) the adequacy of the process through which the status determination was made; (4) the nature of the site of apprehension; (5) the nature of the site of detention; and (6) the practical obstacles inherent in resolving the petitioner's entitlement to the writ.[68]

The district court then assigned the factors different weight by characterizing them as either "primary drivers" or factors deserving lesser weight in *Boumediene's* multi-factor analysis.[69] Assigned to the "primary drivers" group were the nature of the site of detention, the adequacy of process, and the practical obstacles.[70] First applying the three factors of lesser weight, the court found that the Bagram detainees were similarly situated to the Guantanamo Bay detainees, as the Bagram detainees were not U.S. citizens, were labeled as

64. After President Obama took office in January 2009, the district court "invited [the government] to notify the Court whether they intended to refine the position they had taken to date" on the jurisdictional question. *Id.* at 210. In essence, the court asked the new Administration whether it would retain the Bush Administration's argument that the right of habeas corpus does not extend to noncitizens being held beyond the United States' sovereign territory. The government responded that it "adheres to its previously articulated position." *Id.*

65. *Id.* at 208 (quoting Boumediene v. Bush, 553 U.S. 723, 797 (2008)).

66. *Al Maqaleh I*, 604 F. Supp. 2d. at 214.

67. *See id.* at 215–225.

68. *Id.* at 215.

69. *Id.* at 218.

70. *Id.*

"enemy combatants," and were apprehended beyond U.S. sovereign territory.[71]

In applying the "primary drivers" group, the court first addressed the nature of the site of detention by examining the United States' "objective degree of control" over Bagram.[72] The court found that the United States maintained "near-total operational control" over Bagram, even though U.S. jurisdictional authority over Bagram was considerably less than the degree of control over Guantanamo Bay.[73] Noticeably absent from the site-of-detention analysis was territorial sovereignty; the entire analysis focused on the objective degree of U.S. government control over Bagram, up to and including the length of the property lease and future intention to remain at the base.[74]

The application of the next "primary driver"—adequacy of the status determination process—required a comparison of the process afforded to the Bagram detainees to that afforded to the Guantanamo Bay detainees.[75] Interestingly, while the Supreme Court found in *Boumediene* that the Combatant Status Review Tribunals at Guantanamo Bay were an inadequate process substitute for habeas corpus protections,[76] the government in *Al Maqaleh* conceded that the Bagram detainees' status-determination process was even "less comprehensive" than the review tribunals at Guantanamo Bay.[77] Therefore, this factor weighed in favor of extending the Suspension Clause to the Bagram detainees.

---

71. *Id.* at 218–21.

72. *Al Maqaleh I*, 604 F. Supp. 2d at 222–23.

73. *Id.* at 222.

74. *See id.* at 222–23.

75. *Id.* at 226–27.

76. *See* Boumediene v. Gates, 553 U.S. 723, 767 (2008).

77. *Al Maqaleh I*, 604 F. Supp. 2d at 227. The district court summarized the status determination process afforded to the Bagram detainees:

> Bagram detainees represent themselves. Obvious obstacles, including language and cultural differences, obstruct effective self-representation by petitioners such as these. Detainees cannot even *speak* for themselves; they are only permitted to submit a written statement. But in submitting that statement, detainees do not know what evidence the United States relies upon to justify an "enemy combatant" designation–so they lack a meaningful opportunity to rebut that evidence.

Id.

The last "primary driver"—practical obstacles in extending the Suspension Clause to Bagram—considered various obstacles, including the effect on the military mission, issues in evidence and fact gathering, and whether the detention site is located in an active theater of war.[78] The court sympathized with the fact that Bagram was under constant threats of suicide bombers in the war theater, but emphasized that Bagram was under near-total U.S. control.[79] The government stressed the practical difficulties in evidence and fact gathering as well as providing counsel to detainees for habeas corpus hearings; this argument was quickly discounted, however, by focusing on the technological advances since *Eisentrager*.[80] Furthermore, the high degree of U.S. control over Bagram, along with the fact that the detainees were captured beyond Afghanistan and later transferred into the Afghanistan theater, discounted any concern that the site of detention was located in an active theater of war.[81] Ultimately, after balancing these weighted factors, the court held that Bagram was no different from Guantanamo Bay, and, thus, the Suspension Clause and its protections must extend to the Bagram detainees.[82]

B. *The D.C. Circuit*

On appeal, the D.C. Circuit performed the same *Boumediene* analysis but reached a drastically different outcome. The court began by sticking with *Boumediene's* three-factor test rather than the district court's six-factor test.[83] As to the first factor, it agreed with the district court that the Bagram detainees were similarly situated to the Guantanamo Bay detainees and that they had received an inadequate process substitute.[84]

---

78. *Id.* at 227–30.
79. *Id.* at 228.
80. *Id.*
81. *Id.* at 230–31.
82. *Id.* at 231. The court, however, ruled against extending the Suspension Clause protections to the Afghan detainee petitioner because of the inevitable practical obstacle when the Afghan government takes over custody of that detainee. *See id.*
83. *Al Maqaleh II*, 605 F.3d 84, 93–94 (D.C. Cir. 2010).
84. *Id.* at 96.

The application of second and third factors—the nature of the apprehension and detention sites and the practical obstacles in extending the Suspension Clause—illustrates a large analysis disconnect between the D.C. Circuit and the D.C. District Court.[85] The second factor, according to the D.C. Circuit, weighed "heavily" in favor of not extending the Suspension Clause to Bagram for two reasons.[86] First, the detainees were captured abroad, so, under the second factor, the site of apprehension itself weighed against extending the Suspension Clause.[87] Second, although the United States exerted some degree of control over Bagram and its military operations, the level of *de facto* sovereignty over Bagram—mainly the short lease and lack of intent to occupy the base indefinitely—simply did not compare to Guantanamo Bay, and, therefore, weighed against extending the Suspension Clause protections to Bagram.[88] The third factor weighed "overwhelmingly" in favor of not extending the Suspension Clause to Bagram, mainly because Afghanistan remains an active theater of war.[89] Ultimately, after balancing the three factors, the D.C. Circuit reversed and refused to extend the Suspension Clause to the Bagram detainees because the second and third factors weighed so heavily against extending constitutional habeas protections in this case.[90]

IV. ANALYSIS

A. *What is Left of Territorial Sovereignty in Today's Habeas Corpus Analysis?*

The case law development from *Eisentrager* to *Al Maqaleh* illustrates an evolving standard in extraterritorial habeas jurisprudence. One factor certainly affected in this evolution is the role of territorial sovereignty. Arguably, territorial sovereignty is no longer the driving habeas determination that the *Eisentrager* majority once envi-

85. *See id.* at 96–98.
86. *Id.* at 96.
87. *Id.*
88. *Id.* at 97.
89. *Al Maqaleh II*, 605 F.3d at 97.
90. *Id.* at 98–99.

sioned. The change from *de jure* to *de facto* sovereignty and the emerging consideration of fluid, more practical factors in the *Boumediene* analysis creates an uncertain future for territorial sovereignty at Bagram and future foreign detention sites.

1. *Changing Definition of Sovereignty*

The recent change in focus from *de jure* to *de facto* sovereignty has greatly affected the role that territorial sovereignty will play in future detainee habeas cases. Justice Jackson's majority opinion in *Eisentrager* discussed the inherent significance of territorial sovereignty in determining the extraterritorial reach of the Suspension Clause:

> We are cited to no instance where a court, in this or any other country where the writ is known, has issued it on behalf of an alien enemy who, at no relevant time and in no stage of his captivity, has been within its territorial jurisdiction. Nothing in the text of the Constitution extends such a right, nor does anything in our statutes.[91]

Justice Jackson went on to state that "in extending constitutional protections beyond the citizenry, the Court has been at pains to point out that it was the alien's presence within its territorial jurisdiction that gave the Judiciary power to act."[92]

Justice Jackson clearly indicated that *de jure* territorial sovereignty, as defined by the legal borders marking United States' territory,[93] is the driving factor determining the reach of the Suspension Clause. In fact, the reason Bush Administration officials selected Guantanamo Bay to hold accused terrorist detainees was not a coincidence: The Administration believed that *Eisentrager's* precedent would put Guantanamo Bay beyond the reach of the law and the courts.[94]

---

91. Johnson v. Eisentrager, 339 U.S. 763, 768 (1950).

92. *Id.* at 771.

93. For the definition of "territoriality," see BLACK'S LAW DICTIONARY 1512 (8th ed. 2004).

94. *See* Boumediene v. Bush, 553 U.S. 723, 828 (2008) (Scalia, J., dissenting) ("[T]he President's Office of Legal Counsel advised [the President] that the great weight of legal authority indicates that a federal district court could not properly

But then came *Boumediene*, where Justice Kennedy, writing for the majority, stressed the importance of analyzing the territoriality question not in a "narrow technical sense," but as the "degree of control the military asserted over the facility."[95] Justice Kennedy went on to state that "[n]othing in *Eisentrager* says that *de jure* sovereignty is or has ever been the only relevant consideration in determining the geographic reach of the Constitution or of habeas corpus."[96]

In any event, no longer will U.S. borders determine the reach of the Suspension Clause; rather, the determination will be made on a case-by-case basis after considering the degree of U.S. government control asserted over a particular facility or location. Justice Kennedy even acknowledged the Court's rather remarkable change on this territoriality ruling:

> It is true that before today the Court has never held that noncitizens detained by our Government in territory over which another country maintains *de jure* sovereignty have any rights under our Constitution. But the cases before us lack any precise historical parallel. They involve individuals detained by executive order for the duration of a conflict that, if measured from September 11, 2001, to the present, is already among the longest wars in American history. The detainees, moreover, are held in a territory that, while technically not part of the United States, is under the complete and total control of our Government. Under these circumstances the lack of a precedent on point is no barrier to our holding.[97]

Considering today's globalization and the level of U.S. presence in international conflicts, this change from *de jure* to *de facto* sovereignty was appropriate. As a policy matter, territorial sovereignty should not determine the reach of the Suspension Clause to foreign detention sites when the United States asserts such high levels of control over these facilities all around the world. However, the change from *de jure* to *de facto* sovereignty has resulted in uncer-

---

exercise habeas jurisdiction over an alien detained at Guantanamo Bay.") (internal quotation marks and brackets omitted); *see also* Sherman, *supra* note 35, at 208.

95. *Boumediene*, 553 U.S. at 763.

96. *Id.* at 764.

97. *Id.* at 770–71 (internal citation omitted).

tainty and disconnect between the two *Al Maqaleh* courts in analyzing and applying this standard to the Bagram detainees. When analyzing the site of detention, the D.C. District Court held that the United States' "high objective degree of control at Bagram" supported extending the Suspension Clause to the Bagram detainees.[98] The D.C. Circuit, on the other hand, held that the site of detention weighed "strongly" against extending the Suspension Clause to Bagram because the detainees were apprehended abroad and the United States failed to exert as much control over Bagram as it did over Guantanamo Bay.[99]

These polar-opposite holdings illustrate a disconnect that is ripe for Supreme Court review. *Al Maqaleh* presents an opportunity for the Supreme Court to define an objective standard or principle on which to base the degree of control necessary to weigh in favor of extending the Suspension Clause extraterritorially. While both courts in *Al Maqaleh* used the degree of U.S. control at Guantanamo Bay as the guiding principle on which to compare this factor, they reached opposite conclusions.[100] The extraterritorial habeas precedent is fairly limited and recent, and *Al Maqaleh* illustrates the lower courts' struggles in applying *Boumediene's* site-of-detention analysis. While *Boumediene* stressed using objective factors with practical concerns to evaluate the reach of the Suspension Clause,[101] courts are struggling to determine exactly what objective facts and practical concerns are relevant in this inquiry. The Supreme Court must address how the "objective degree of control"[102] is to be determined as well as the standard on which to base this determination and weigh in favor of, or against, extending the Suspension Clause protections.

98. *Al Maqaleh I*, 604 F. Supp. 2d 205, 226 (D.D.C. 2009), *rev'd*, 605 F.3d 84 (D.C. Cir. 2010).

99. *Al Maqaleh II*, 605 F.3d 84, 97 (D.C. Cir. 2010).

100. Some of the disconnect in *Al Maqaleh's* opposite holdings can be attributed to the district court's decision to split up the factors and remove the site of apprehension from the court's site-of-detention analysis, which the court of appeals found relevant and included in its analysis. However, the courts' determinations regarding the site of detention and level of U.S. control over Bagram clearly remain in conflict and deserve Supreme Court review.

101. Boumediene v. Bush, 553 U.S. 723, 764 (2008).

102. *Id.* at 763.

2. *Multiple Factors Beyond Territorial Sovereignty*

The emergence of *Boumediene's* multi-factor test also greatly affects the role of territorial sovereignty in future detainee habeas cases. In *Boumediene*, for the first time the Supreme Court used a multi-factor, practical approach when analyzing the extraterritorial reach of the Suspension Clause.[103] However, reasonable minds may differ in deciding whether *Boumediene* actually expanded or modified *Eisentrager*'s historical standard and precedent.[104] On the one hand, *Boumediene* merely clarified precedent already established in *Eisentrager*. The majority in *Boumediene* analyzed extensive case law and found a "common thread" in history and precedent showing that "questions of extraterritoriality turn on objective factors and practical concerns, not formalism."[105] To support this claim, Justice Kennedy referenced the various practical factors—beyond just territorial sovereignty—that *Eisentrager* found relevant in denying the German nationals' petitions for habeas relief.[106]

On the other hand, the Supreme Court arguably greatly expanded and modified the standard for analyzing the extraterritorial reach of the Suspension Clause. For instance, in *Boumediene*, Justice Kennedy was mindful that the Supreme Court has been "careful not to foreclose the possibility that the protections of the Suspension Clause *have expanded* along with post-1789 developments that define the present scope of the writ,"[107] indicating that the Court could expand the Suspension Clause protections after *Eisentrager*. Justice Scalia, in his dissenting opinion, also attacked the multi-factor test as a complete departure from history and precedent established in *Eisentrager*.[108] Justice Scalia reiterated the predominance of territorial sovereignty when he stated "[l]est there be any doubt about the primacy of territorial sovereignty in determining the jurisdiction of a

103. *See id.* at 766.
104. *See* Falkoff & Knowles, *supra* note 57, at 875 (discussing whether *Eisentrager* was decided on "purely territoriality and status grounds" or other, more practical factors).
105. *Boumediene*, 553 U.S. at 764.
106. *See supra* note 30 and accompanying text.
107. *Boumediene*, 553 U.S. at 746 (emphasis added).
108. *See id.* at 833–35 (Scalia, J., dissenting).

habeas court over an alien" and that "*Eisentrager* thus held . . . that the Constitution does not ensure habeas for aliens held by the United States in areas over which our Government is not sovereign."[109] In *Al Maqaleh*, the D.C. Circuit even stated that it "read *Eisentrager* as holding that constitutional habeas rights did not extend to any aliens who had never been in or brought into the sovereign territory of the United States."[110] Even the government's chief argument in both *Boumediene* and *Al Maqaleh* was that detainees held beyond the U.S. borders have no constitutional habeas corpus rights.[111] Today, the emergence of various factors, including the status-determination process, the site of apprehension and detention (with a focus on *de facto* sovereignty), and the practical obstacles in extending the Suspension Clause has certainly diminished the role that territorial sovereignty will play in future detainee habeas cases.[112]

So what role should territorial sovereignty play in future foreign detainee habeas cases? Territorial sovereignty has maintained at least some presence in the current analysis. For instance, the *Boumediene* test is not required for a detainee held within U.S. sovereign territory.[113] Territorial sovereignty also remains present in the second factor regarding the site of apprehension: apprehension beyond U.S. sovereign territory weighs against extending the Suspension Clause to the detainee.[114] However, the analysis on the site of detention has clearly shifted to focusing on, and analyzing, the objective degree of government control over the detention site and not whether the site of detention, or site of apprehension for that matter, is beyond U.S. sovereign territory.[115] Thus, what once was a

109. *Id.* at 835 (Scalia, J., dissenting).
110. *Al Maqaleh II*, 605 F.3d 84, 92 (D.C. Cir. 2010).
111. *See Boumediene*, 553 U.S. at 739; *Al Maqaleh I*, 604 F. Supp. 2d 205, 210 (D.D.C. 2009), *rev'd*, 605 F.3d 84 (D.C. Cir. 2010).
112. *See Boumediene*, 553 U.S. at 766.
113. Falkoff & Knowles, *supra* note 57, at 881.
114. *See Boumediene*, 553 U.S. at 768.
115. *See id.* (discussing at length the Government's control of Guantanamo Bay, stating that "[i]n every practical sense Guantanamo is not abroad; it is within the constant jurisdiction of the United States"); *see also Al Maqaleh I*, 604 F. Supp. 2d at 221 ("The touchstone of the site of detention factor is the 'objective degree of control' the United States has over Bagram.") (quoting *Boumediene*, 553 U.S. at 754). *But see* James Thornburg, Comment, *Balancing Act in Black Robes: Extra-*

"touchstone" factor[116] driving a court's determination in foreign detainee habeas cases has been greatly diminished. In future detainee habeas cases, analyzing the objective degree of U.S. government control over a detention site, rather than whether the United States apprehended and held a detainee beyond its sovereign territory, would produce a more just and accurate result. With today's globalized conflicts and high levels of U.S. presence and control over foreign detention sites, courts should question whether territorial sovereignty should play any role in future detainee habeas cases.

B. *The Future of the Habeas Factors: Additional Factors and Unanswered Questions*

Given the rather limited and young precedent on the extraterritorial reach of the Suspension Clause in detainee habeas cases, the future of the *Boumediene* factors is uncertain. The multi-factor test was meant to be "detainee-specific" rather than a bright-line standard applied to every detainee.[117] Thus, the future expects further litigation involving the application of *Boumediene's* multi-factor test to Bagram and other foreign detention sites. *Al Maqaleh* demonstrates that *Boumediene's* multi-factor test is not defined and, at a minimum, should encompass better guidance and additional factors. This section provides recommendations and discusses unanswered questions for future detainee habeas cases applying the *Boumediene* test: the need for additional factors, more guidance on the third, practical-obstacles factor, and weights that should be assigned to the "primary drivers."

1. *Additional Factors in Response to Today's Conflicts*

Boumediene stated that "at least" three factors are relevant to determining the extraterritorial reach of the Suspension Clause.[118] The phrase "at least" indicates that *Boumediene's* multi-factor test is not

territorial Habeas Corpus Jurisdiction Beyond Boumediene, 48 DUQ. L. REV. 85, 96 (2010) (arguing that the second factor only favors Suspension Clause extension when the site of detention is within the sovereign territory of the United States).

116. *Boumediene*, 553 U.S. at 755.

117. *Al Maqaleh I*, 604 F. Supp. 2d at 215.

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

exclusive or foreclosed from modification. As international conflicts develop in the future, the military mission, international law, and the laws of war are certain to adapt to these changes. *Boumediene's* three-factor habeas analysis is certain to adapt as well.

a. Length of Confinement Without Adequate Status Review

Al Maqaleh presents an opportunity for the Supreme Court to add an additional practical factor to the *Boumediene* test: the detainee's length of confinement without adequate status review.[119] While *Boumediene* failed to include this factor as part of its habeas test, the Supreme Court was mindful that the Guantanamo Bay detainees spent six years in confinement without any adequate status review:

> The gravity of the separation-of-powers issues raised by these cases and the fact that these detainees have been denied meaningful access to a judicial forum for a period of years render these cases exceptional.[120]
>
> . . . .
>
> In some of these cases six years have elapsed without the judicial oversight that habeas corpus or an adequate substitute demands. And there has been no showing that the Executive faces such onerous burdens that it cannot respond to habeas corpus actions.[121]

The district court in *Al Maqaleh* even went so far as to claim that the length of detainee detention without adequate status review is already an additional factor to be analyzed in the multi-factor test.[122] Yet, when the D.C. Circuit reversed, it made no mention of the detainees' length of confinement. With the right to habeas corpus considered by the Supreme Court as one of the "few safeguards of liberty,"[123] length of confinement without adequate status review should

119. *See id.* at 799–800 (Souter, J., concurring); *Al Maqaleh I*, 604 F. Supp. 2d at 216.
120. *Boumediene*, 553 U.S. at 772.
121. *Id.* at 794.
122. *See Al Maqaleh I*, 604 F. Supp. 2d at 216.
123. *Boumediene*, 553 U.S. at 745.

encompass a stand-alone factor in today's extraterritorial habeas analysis. This additional factor would actually represent precisely what the right to habeas corpus is meant to protect: indefinite executive detention without adequate process and review determinations by a detached judicial officer.[124]

With occupation at Bagram now many years and likely to extend further into the future, courts should recognize the inherent risk in indefinite detention without adequate status review procedures. While there is no U.S. intention to occupy Bagram with "permanence,"[125] the intent is to remain at Bagram until military operations have concluded.[126] And every indication is that the current hostilities will not come to any formal completion soon.[127] The district court in *Al Maqaleh* recognized this problem, stating that the United States' "promise may be no more than a distant hope given the indefinite nature of our global efforts against terrorism."[128] Furthermore, the Supreme Court has recognized the right to habeas corpus as the "surest safeguard of liberty."[129] Under the circumstances with Iraq and Afghanistan, unreasonable executive detention until all hostilities have ended also runs contrary to America's fundamental principles of freedom, democracy, and basic rights and liberties. This right deserves an extension to those individuals detained by the U.S. executive branch for unreasonable periods without adequate status review.

b. Executive Manipulation

A second factor that deserves inclusion into the *Boumediene* test would analyze whether the executive branch transferred the detainee

124. *See id.*
125. *Al Maqaleh II*, 605 F.3d 84, 97 (D.C. Cir. 2010).
126. *Al Maqaleh I*, 604 F. Supp. 2d at 224–25 (citing Press Release, The White House, Joint Declaration of the United States-Afghanistan Strategic Partnership, THE WHITE HOUSE (May 23, 2005), *available at* http://merln.ndu.edu/archivepdf/afghanistan/WH/20050523-2.pdf).
127. *See, e.g.*, Heidi Vogt, *NATO: Combat Role in Afghanistan Could Pass 2014*, HUFFINGTON POST (Nov. 17, 2010), http://www.huffingtonpost.com/2010/11/17/nato-combat-role-in-afgha_n_784680.html.
128. *Al Maqaleh I*, 604 F. Supp. 2d at 225.
129. *Boumediene*, 553 U.S. at 745.

into an active theater of war following apprehension. This factor would guard against potential executive manipulation by transferring detainees into an active theater of war, thereby distorting *Boumediene's* third factor—practical obstacles in extending the Suspension Clause. Interestingly, the D.C. Circuit in *Al Maqaleh* even invited the Supreme Court to modify the three-factor test by adding "manipulation by the Executive."[130]

Maintaining the current three-factor test risks executive manipulation by transferring detainees beyond the reach of the Suspension Clause. In *Boumediene*, Justice Kennedy briefly noted that, had Guantanamo Bay been located within an active theater of war, the practical obstacles would weigh against extending the Suspension Clause protections to the detainees.[131] In *Al Maqaleh*, all four Bagram detainees were allegedly captured beyond Afghanistan and later transferred into the Afghanistan theater.[132] Relying on Justice Kennedy's statement in *Boumediene*, the D.C. Circuit held that the third factor weighed "overwhelmingly" in favor of not extending the Suspension Clause to the Bagram detainees because Bagram remained in an active theater of war.[133] Thus, once the government transfers a detainee into an active theater, the practical-obstacles factor, considered a "primary driver" under the habeas test,[134] is greatly affected.

2. *Unanswered Questions*

Granted, a multi-factor balancing test only begs for arbitrary applications and rulings.[135] Illustrated by the conflicting outcomes in *Al Maqaleh*, unanswered questions remain as to how the *Boumediene* factors should be applied. The first is whether the Supreme Court should adopt the D.C. District Court's assignment of weights to the "primary drivers" under the current detainee habeas analy-

130. *Al Maqaleh II*, 605 F.3d at 99.
131. *See Boumediene*, 553 U.S. at 770.
132. *See Al Maqaleh I*, 604 F. Supp. 2d at 209.
133. *Al Maqaleh II*, 605 F.3d at 97.
134. *Al Maqaleh I*, 604 F. Supp. 2d at 218.
135. *See* Falkoff & Knowles, *supra* note 57, at 887 (discussing the risk in analyzing the functional test in a "theoretical vacuum" that would lead to applying the writ "random or even unprincipled").

sis.[136] The Supreme Court was not clear in *Boumediene* whether certain weight, or equal weight, should be given to each factor. The D.C. District Court correctly pointed out, though, that three of the actual six factors—site of detention, adequacy of the process, and practical obstacles—clearly drove the Court's analysis in *Boumediene*.[137] Thus, the district court assigned these three factors as the "primary drivers" in the *Boumediene* analysis.[138] Arguably, the three "primary drivers" encompass precisely what the writ of habeas corpus is meant to protect: unreasonable executive detention without adequate process and status review. Thus, the Supreme Court should carefully consider modifying the *Boumediene* test to accurately reflect the writ's purpose.

Second, courts have focused heavily on the adequacy of the process afforded to detainees, but have failed to answer exactly how much process is considered "adequate" under today's *Boumediene* test. In both *Boumediene* and *Al Maqaleh*, the procedures were found to be inadequate substitutes for habeas corpus protections.[139] Without delving into particular process characteristics afforded in the Combatant Status Review Tribunals and the Unlawful Enemy Combatant Review Board at Guantanamo Bay and Bagram, respectively, the procedures lacked one clear process demand: review by a detached judicial officer.[140] Furthermore, the seemingly broad definition of "enemy combatant" used for status determinations in Afghanistan and Iraq reflects the need for an objective, guiding principle or standard to analyze exactly what process would be considered an "adequate" habeas substitute in current and future status determinations.[141]

But how much process should be considered "adequate" under today's habeas test? The courts have not answered this question, and

136. *Al Maqaleh I*, 604 F. Supp. 2d at 218.
137. *Id.*
138. *Id.*
139. *See* Boumediene v. Bush, 553 U.S. 723, 790–92 (2008); *Al Maqaleh II*, 605 F.3d 84, 96 (D.C. Cir. 2010).
140. *See Boumediene*, 553 U.S. at 786 ("For the writ of habeas corpus, or its substitute, to function as an effective and proper remedy in this context, the court that conducts the habeas proceeding must have the means to correct errors that occurred during the CSRT proceedings.").
141. *See Al Maqaleh I*, 604 F. Supp. 2d at 219.

it is beyond the scope of this Note to answer.[142] The *Boumediene* Court was even mindful to not state that the Guantanamo Bay detainees were entitled to guaranteed constitutional due process. Even the D.C. District Court in *Al Maqaleh* brushed over this issue when it stated that "[t]his court need not determine how extensive process must be to stave off the reach of the Suspension Clause to Bagram."[143] However, having an objective standard or principle by which to determine what is adequate process under the *Boumediene* test would allow military commanders and executive branch officials to formulate and implement satisfactory policies in future conflicts.

C. *Guidance on the Practical Obstacles*

Lastly, *Al Maqaleh* presents another opportunity for the Supreme Court to provide further guidance on the practical-obstacles factor. As mentioned earlier, the inherent deficiency of a multi-factored, functional test is its arbitrary and unequal application.[144] The *Boumediene* Court's deficient guidance on the practical-obstacles factor only exacerbates this problem. Unquestionably, deference to the President and military leaders regarding decisions on military necessity, operations in an active theater of war, and reasonable detention of enemy combatants should not be circumvented. However, questions remain regarding the risk of executive manipulation of the *Boumediene* test.[145] For instance, one question is the effect on the practical-obstacles analysis when a detainee is captured beyond an active theater of war and later transported into an active theater for detention. This scenario played out in *Al Maqaleh*. In our current "Global War on Terrorism," another lingering question is the actual

142. For a discussion on the "adequate process" needed to support substituting habeas protection, see Michael J. Buxton, Note, *No Habeas For You! Al Maqaleh v. Gates, the Bagram Detainees, and the Global Insurgency*, 60 AM. U. L. REV. 519, 530–33 (2010); Saxby Chambliss, *The Future of Detainees in the Global War on Terror: A U.S. Policy Perspective*, 43 U. RICH. L. REV. 821, 835–40 (2009).

143. *Al Maqaleh I*, 604 F. Supp. 2d at 227.

144. *See* Falkoff & Knowles, *supra* note 57, at 887 (discussing the risk in analyzing the functional test in a "theoretical vacuum" that would lead to applying the writ "random or even unprincipled").

145. *See* Davis, *supra* note 15, at 1224–26 (discussing problems associated with the practical-obstacles factor).

boundaries of an active theater of war.[146] A detainee should not be denied Suspension Clause protections because the government transported him into an active theater where the Suspension Clause would arguably not reach. Furthermore, another question is the effect of military necessity and the military mission on the practical-obstacles factor. These questions require that a delicate and fine line be drawn. On one hand are the surest safeguards of liberty and the separation of powers check on the executive.[147] On the other hand is the importance of the military mission and executive deference in international conflict policy decisions.

The answer to these questions must include some level of deference to the legitimate needs of the armed forces in advancing the military mission[148] but also address the pertinent constitutional issues that cannot be overlooked. Safe to say, the writ of habeas corpus is one of these pertinent constitutional issues. However, as the *Boumediene* Court recognized, the executive branch is entitled to a "reasonable period of time" before a court will entertain a habeas corpus petition from a detainee.[149] This reasonable period of time is necessary to allow the military to screen and review the detainee and determine the detainee's combatant status.[150] This balance between the military mission and an individual's surest safeguard of liberty will allow the courts to maintain a practical, functional, and detainee-by-detainee, detention-site-by-detention-site application of the habeas test that the *Boumediene* Court envisioned.

146. *See generally* Buxton, *supra* note 142, at 524–29 (discussing the effect of global insurgency on habeas jurisprudence).

147. *See* Davis, *supra* note 15, at 1204–05.

148. This is related to the "military deference doctrine," where courts routinely defer to military administrative and operational decisions. *See* John F. O'Connor, *The Origins and Application of the Military Deference Doctrine*, 35 GA. L. REV. 161, 165–66 (2000); Phillip Carter, *Judicial Deference to Military May Affect Gay Rights, War on Terror*, CNN (July 15, 2003), http://www.cnn.com/2003/LAW/07/15/findlaw.analysis.carter.security.

149. Boumediene v. Bush, 553 U.S. 723, 793–94 (2008).

150. *See id.*

V. CONCLUSION

Over time, technology, globalization, and the media have greatly impacted the laws of war and how wars are fought.[151] Conflicts are no longer fought on a single front, but rather on a global front, both internationally and domestically.[152] The enemy is no longer a recognized and uniformed nation, but rather terrorist cells or groups stationed all around the world.[153] Thus, the laws of every nation, principles of international law, and the laws of warfare must evolve and adapt to these changing dynamics in armed conflict.[154] The Suspension Clause jurisprudence has evidently evolved during the most recent international armed conflict. *Al Maqaleh* illustrates how territorial sovereignty is no longer the driving factor in today's extraterritorial habeas analysis. Additionally, the *Boumediene* factors are in need of further evolution. This Note attempted to highlight some of these needed changes as well as address some unanswered questions for the Supreme Court to consider. One thing certain, however, is that unreasonable executive detention without adequate status reviews from a detached judicial officer is simply not the answer.

Currently, the United States is constructing a new forty-acre prison at Bagram Air Base, set to house hundreds of additional detainees.[155] Uncertainty exists today whether military commissions, federal courts, or another venue will serve to prosecute accused ter-

151. *See, e.g.*, BRUCE BERKOWITZ, THE NEW FACE OF WAR: HOW WAR WILL BE FOUGHT IN THE 21ST CENTURY, 1–9 (2007) (discussing information technology's impact on war fighting); Jennifer Barrett, *Live From Iraq*, NEWSWEEK, Mar. 26, 2003, http://www.newsweek.com/2003/03/25/live-from-iraq.html# (discussing the media's evolution of war coverage).

152. *See* Jason Rineheart, *Counterterrorism and Counterinsurgency*, PERSP. ON TERRORISM, http://www.terrorismanalysts.com/pt/index.php?option=com_rokzine&view=article&id=138 ("After 9/11, Al-Qaeda's network across national borders was characterized by many as a global insurgency. This new insurgency threat was not only local, it was international, which as some argue, requires a rethinking of how such irregular warfare should be combated.").

153. *See id.*

154. *See* John B. Bellinger, III, *Terrorism and Changes to the Laws of War*, 20 DUKE J. COMP. & INT'L L. 331, 335–37 (2010) (discussing the inherent problem in traditional armed conflict in the post-9/11 war fighting).

155. Falkoff & Knowles, *supra* note 57, at 857.

rorist detainees.[156] As more detainees are housed at Bagram and new conflicts emerge in the future, issues regarding detainee rights will not go away. In his dissenting opinion in *Eisentrager*, Justice Black provided a possible solution to some of today's struggles over detainee rights.[157] At the time considered a far-reaching solution, Justice Black proposed that constitutional habeas corpus rights need not be judged upon an alien's identity with the United States, or even physical presence on U.S. territory, but rather that constitutional habeas corpus protections should extend to "all persons coming within the ambit of our power."[158] In today's globalized world with ongoing international conflicts and U.S. presence, Justice Black's solution may not seem so far-reaching after all.

156. *See* Daphne Eviatar, *Detainee Task Force Recommends Reformed Military Commissions to Try Some Gitmo Detainees*, WASH. INDEP. (July 21, 2009), http://washingtonindependent.com/51889/detainee-task-force-recommends-reformed-military-commissions-to-try-some-gitmo-detainees.
157. *See* Johnson v. Eisentrager, 339 U.S. 763, 791 (1950) (Black, J., dissenting).
158. *Id.*