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I. International Law & Its Applicability to Detention Policies

Although the U.S. Supreme Court has long held that its interpretation of the U.S. Constitution trumps aspects of international law,[1] the ongoing international conflict stemming from the events of September 11, 2001 (hereinafter 9/11) has put the United States at the forefront of international debate. In addressing the detention cases arising out of post-9/11 U.S. military operations, it is important to understand how the Supreme Court treats international law and perceives international obligations under treaty law. Considering the evolving detention cases as a whole, it becomes clear that the U.S. judiciary has woven a complex system by selectively incorporating aspects of international law while calling on the Supremacy Clause of the Constitution to avoid other international law.[2]

In June 2008, the U.S. Supreme Court made the unprecedented decision to extend the constitutional right of habeas corpus to individuals held outside the United States.[3] The writ of habeas corpus is one of the most important individual liberties in the American legal system.[4] Used to challenge the basis of government detention, the writ literally compels the government to "produce the body" of the accused so that a court "may inquire into the basis of [his or her] detention."[5] Wary of a repressive executive, the Founding Fathers carefully inserted the privilege into the U.S. Constitution notwithstanding the idea of a future Bill of Rights.[6]

Just as the purpose of the writ of habeas corpus was to protect

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1 *See* Sarah H. Cleveland, *Our International Constitution*, 31 YALE J. INT'L L. 1, 2 (2006) (suggesting that because "international and foreign law is important to the jurisprudence of the modern Supreme Court," it does not "trump" the U.S. Constitution).

2 *See* Michael Stokes Paulsen, *The Constitutional Power to Interpret International Law*, 118 YALE L.J. 1762, 1773-74 (2009) ("[S]ome extremely important treaties, central to the regime of international law . . . are explicitly part of U.S. law.").

3 Boumediene v. Bush, 553 U.S. 723, 724 (2008).

4 Justin D. D'Aloia, *From Baghdad to Bagram: The Length & Strength of the Suspension Clause After Boumediene*, 33 FORDHAM INT'L L.J. 957, 961 (2010) ("The writ has always been justly regarded as the stable bulwark of civil liberty." (quoting *In re* Kaine, 55 U.S. (14 How.) 103, 147 (1852))).

5 *Id.*

6 *See Boumediene*, 553 U.S. at 739.

an individual against a repressive executive in the domestic sphere, the framers of the Geneva Conventions sought to design an international framework for safeguarding individuals during international conflicts.[7] The four Geneva Conventions created a system of rules and regulations by which nations were to abide in the conduct of armed conflict.[8] While the writ of habeas corpus is part of the bedrock of American domestic law, the Geneva Conventions do not enjoy the same stalwart respect in the international community.[9]

In *Boumediene v. Bush*,[10] the Supreme Court addressed the question of whether detainees held at the Guantanamo Naval Base in southern Cuba had a right to "the constitutional privilege of habeas corpus, a privilege not to be withdrawn except in conformance with the Suspension Clause, Art. I, § 9, cl. 2."[11] The Court held that the Suspension Clause[12] of "the Constitution has full effect at Guantanamo Bay. If the privilege of habeas corpus is to be denied to the detainees . . . before [the Court], Congress must act in accordance with the requirements of the Suspension Clause."[13] The ruling meant that for the first time, the nearly 300 foreign nationals being held at the Guantanamo detention facility had the right to file a petition for habeas corpus in a federal district court.[14] From an international law perspective, notably absent was

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7 *See* Aya Gruber, *Who's Afraid of Geneva Law?*, 39 ARIZ. ST. L.J. 1017, 1025 (2007) ("[T]he majority of Geneva's articles contain mandatory language about protecting individual rights.").

8 Melysa H. Sperber, *John Walker Lindh and Yaser Esam Hamdi: Closing the Loophole in International Humanitarian Law for American Nationals Captured Abroad While Fighting with Enemy Forces*, 40 AM. CRIM. L. REV. 159, 173-74 (2003) ("[T]he essential purpose of all four Conventions is 'to provide minimum protections, standards of humane treatment, and fundamental guarantees of respect to individuals who become victims of armed conflicts.'" (citations omitted)).

9 *See* Imogen Foulkes, *Geneva Conventions' Struggle for Respect*, BBC NEWS (Aug. 12, 2009, 2:48am), http://news.bbc.co.uk/2/hi/8196166.stm.

10 *Boumediene*, 553 U.S. 723.

11 *Id.* at 732.

12 The full text of the Suspension Clause reads: "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." U.S. CONST. art. I, § 9, cl. 2.

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

14 James Thornburg, *Aliens Detained at Guantanamo Bay Have a Constitutional Right to File Habeas Corpus Petitions in Federal Court:* Boumediene v. Bush, 47 DUQ. L. REV. 179, 181 (2009) ("[T]he Supreme Court . . . held that the detainees did have a

a discussion of the detainees' rights with respect to the Geneva Conventions or other international treaty law.[15] Instead, the Supreme Court resolved the *Boumediene* case entirely upon constitutional, domestic law.[16]

Although the United States operates detention facilities in Iraq and Afghanistan, among other places, the *Boumediene* decision only addressed the narrow question of whether the detainees held at Guantanamo Bay, a military base considered to be within the United States, were allowed to file a petition for habeas corpus to contest their detention.[17] While the *Boumediene* decision did not address the availability of the constitutional privilege for the writ of habeas corpus, the Court's decision did provide a three-part balancing test to assess whether non-citizen detainees would be able to exercise the protections of the great writ.[18]

Al Maqaleh v. Gates[19] represents the first time that U.S. federal courts have applied the three-factor test laid out in *Boumediene*.[20] Under former President George W. Bush, the government position was that habeas did not "extend beyond Guantanamo" Bay.[21] The Obama Administration has "embraced" this view despite the new president's "narrower claims for presidential detention power."[22] Whereas the district court opinion found that habeas corpus should extend to the *Al Maqaleh* detainees held at Bagram Airfield in Afghanistan, the D.C. Circuit Court under de novo review ruled that habeas did not reach Bagram.[23] Jeh Johnson, General Counsel of the U.S. Department of Defense, stated that the D.C. Circuit opinion was the most important court case of 2010 for the Department of Defense.[24] The case represents the next legal

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constitutional right to file habeas petitions in federal court.").

15 *See Boumediene*, 553 U.S. 723.

16 *See id.*

17 *Id.* at 771.

18 *Id.* at 766.

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

20 *Id.*

21 Lyle Denniston, *No Habeas Rights at Bagram*, SCOTUSBLOG (May 21, 2010, 10:38 AM), http://www.scotusblog.com/2010/05/no-habeas-at-bagram/.

22 *Id.*

23 *Id.*

24 Jeh Johnson, *Panel I – Exec. Update on Developments in National Law*, ABA

chapter in the evolving line of detention cases arising out of post-9/11 U.S. military operations abroad.[25] The *Al Maqaleh* decision is also a good example of how the United States, while using international law as a touchstone, divests itself of some international law considerations because certain American constitutional provisions trump the consideration and importance of the international issues.[26]

To begin the analysis of the *Al Maqaleh* habeas decisions at the district court and circuit court levels, it is important to understand the origins of the writ of habeas corpus in American law and how the writ has come to be understood by American courts in the international context. Section II of this article provides a general overview of this progression. Beginning by addressing how the post-9/11 world has drastically altered the context in which the writ is analyzed, this section also discusses the *Boumediene v. Bush* and *Al Maqaleh v. Gates* decisions.[27] Section III then provides a historical treatment of the origins of the writ of habeas corpus and how it is incorporated (or not) extraterritorially through the Suspension Clause of the U.S. Constitution.[28] A discussion of two pivotal Supreme Court cases, *Johnson v. Eisentrager* and *Boumediene v. Bush*, also fleshes out the foundation for the legal analysis of the *Al Maqaleh* petitioners.[29]

Section IV then provides an in-depth analysis of the *Al Maqaleh* petitioners as well as judicial opinions issued by both the D.C. District Court and the D.C. Circuit Court.[30] Although the

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STANDING COMMITTEE ON LAW AND NATIONAL SECURITY (Nov. 4, 2010), http://www.americanbar.org/ghoups/public_services/law_national_security/events_cle/past_annual_review_conferences.html.

25 Luke R. Nelson, *Territorial Sovereignty and the Evolving Boumediene Factors:* Al Maqaleh v. Gates *and the Future of Detainee Habeas Corpus Rights*, 9 U. N.H. L. REV. 297, 311 (2011) ("The case law development from Eisentrager to Al Maqaleh illustrates an evolving standard in extraterritorial habeas jurisprudence.").

26 *See Al Maqaleh I*, 604 F. Supp. 2d 205; *see also* Michael Stokes Paulsen, *The Constitutional Power to Interpret International Law*, 118 YALE L.J. 1762, 1764 (2009) (raising questions regarding the interaction between U.S. constitutional law and international law).

27 *See infra* Part I.A-B.

28 *See infra* Part II.A-B.

29 *See infra* Part II.B.

30 *See infra* Part III.A-D.

district court concluded that, following *Boumediene*, the writ of habeas corpus was available to the *Al Maqaleh* petitioners, Chief Judge Sentelle, writing for the D.C. Circuit Court, held, on de novo review, that the writ did *not* extend to the *Al Maqaleh* petitioners held at Bagram Airfield in Afghanistan.[31] This section also addresses why Chief Judge Sentelle's opinion is the right result and why the circuit court approach to the habeas question is the correct line of analysis.[32]

Finally, Section V provides a look at the likely endgame for the *Al Maqaleh* petitioners in light of the D.C. Circuit opinion.[33] This article then concludes by looking at the implications of the *Al Maqaleh* decision and how future petitioners are likely to fare in similar situations.[34] In looking toward the future of habeas corpus litigation, this article also notes that while the functional approach to analyzing petitions for habeas corpus was a useful mechanism for determining both the *Boumediene* and *Al Maqaleh* cases, the functional approach still leaves something to be desired. In the end, functionality does not equal finality and closure to habeas litigation.

II. Detention Cases in an International Context

"The U.S. military adheres to a historical legal precedent and framework regarding the capture and detention of foreign enemies engaged in hostilities against the United States."[35] For much of the past fifty years, whenever the United States "engag[ed] in overseas wars, capturing prisoners, and holding them in overseas and domestic camps controlled by U.S. forces . . . [T]hese detainees [were] entitled to the panoply of legal protections afforded by international law, primarily the Geneva Conventions."[36] The post-9/11 operational environment has lead to several changes in the U.S. position on certain types of

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31 *See infra* Part III.C.

32 *See infra* Part III.D.

33 *See infra* Part IV.

34 *See infra* Part IV.

35 Colonel Fred K. Ford, *Keeping* Boumediene *Off the Battlefield: Examining Potential Implications of the* Boumediene v. Bush *Decision to the Conduct of United States Military Operations*, 30 PACE L. REV. 396, 397 (2010).

36 *Id.*

detainees. While many detainees held by the United States have not received the same Geneva Conventions coverage as in past wars, the new detainees have, in some instances, been afforded procedural protections never before granted to detainees who were located outside U.S. borders.[37] *Boumediene v. Bush* marked the change in the "legal landscape."[38] The case marked the first time that detainees held abroad received the privilege of habeas corpus.[39] While the *Boumediene* decision was limited to detainees held at Guantanamo Bay, Cuba, *Al Maqaleh v. Gates* could possibly extend the *Boumediene* rule to some detainees held at Bagram Airfield in Afghanistan.[40]

A. Boumediene v. Bush

Writing as amici curiae in support of the *Boumediene* petitioners, several international law professors stressed the enforceability of the Geneva Conventions as applied to *Boumediene*.[41] Providing a "historical overview of the enforceability of treaty-based rights in U.S. courts," the amici asserted that the *Boumediene* petitioners should have been able to draw upon treaty law in their defense.[42] The first part of the amici argument was that the court had already determined under *Hamdan v. Rumsfeld*[43] that the Geneva Conventions were enforceable by detainees held at Guantanamo Bay, Cuba.[44] Amici stressed that the "availability of [petitioner's use of] habeas corpus for treaty-based claims" stems from the Constitution's Supremacy

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37 *See id.*

38 *Id.* at 397-98.

39 *Id.*

40 *See* Ford, *supra* note 35, at 396-97 ("[T]he Court's decision has implications in two general areas: (1) the application of the habeas right to foreign fighters detained in locations other than Guantanamo Bay; and (2) the application of other constitutional and statutory rights to persons stopped or detained by U.S. military forces during military operations.").

41 Brief of Federal Courts and International Law Professors as Amici Curiae in Support of Petitioners at 4, Boumediene v. Bush, 553 U.S. 723 (2008) (Nos. 06-1195, 06-1196), 2007 WL 2441588 at *2 [hereinafter Brief for Petitioners].

42 *Id.* at 4, 2007 WL 2441588, at *1-2.

43 548 U.S. 557 (2006).

44 Brief for Petitioners, *supra* note 41, at 5, 2007 WL 2441588, at *5.

Clause.[45] Habeas is, therefore, "consistent with – and compelled by—the Constitution's Supremacy Clause" because the Constitution holds treaties in a high regard, "plac[ing] treaties alongside statutes and the Constitution as the 'supreme Law of the Land.'"[46] Based upon this assertion, the amici felt that the idea that treaty sources could extend habeas to the petitioners at Guantanamo Bay via federal statutes and the Constitution was "beyond question."[47] Addressing the issue of non-self executing treaties, the amici pointed to previous Supreme Court precedent showing that habeas had generally been available where the treaty establishing the right "did not create a private right of action" for individuals.[48]

As to the government position on the U.S. implementation of the four Geneva Conventions, amici asserted that, "because the crux of Respondents' argument is that the detention of Petitioners is recognized and justified by the laws of war, such an argument necessarily presupposes that the Authorization for the Use of Military Force ("AUMF")[49] incorporates that same body of law" in its analysis.[50] This assertion is given weight by Justice O'Connor's treatment of the *Hamdi* case in her plurality opinion.[51] In *Hamdi*, Justice O'Connor illustrated that,

> because the [AUMF] authorizes the use of military force in acts of war by the United States, the [government's] argument goes, it is reasonably clear that the military and its Commander in Chief are authorized to deal with enemy belligerents according to the treaties and customs known collectively as the laws of war.[52]

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45 *Id.* at 6, 2007 WL 2441588, at *7.

46 *Id.* at 6, 2007 WL 2441588, at *7 (citing U.S. CONST. art. VI, cl. 2).

47 *Id.*

48 *Id.* at 6, 2007 WL 2441588, at *7-8 (citing Chew Heong v. United States, 112 U.S. 536 (1884)) (granting habeas relief to a Chinese laborer where the laborer's cause of action was not the result of a private action created by an 1880 treaty between China and the United States).

49 Authorization for the Use of Military Force, 50 U.S.C. § 1541 (2001).

50 Brief for Petitioners, *supra* note 41, at 7, 2007 WL 2441588, at *10.

51 *See* Hamdi v. Rumsfeld, 542 U.S. 507, 548-49 (2004).

52 Brief for Petitioners, *supra* note 41, at 7, 2007 WL 2441588, at *10 (citing *Hamdi*, 542 U.S. at 548-49).

Once this finding was established, the question remained "whether the [Military Commissions Act] MCA subsequently rejected the implementation of the laws of war" as read into the AUMF.[53] In addressing this question, amici for the petitioners found highly relevant that international treaty law has historically not been repealed based on statutory language that only has an implied repeal.[54] In addition to pointing out that nothing in the MCA explicitly repealed any portion of the Geneva Conventions, the MCA also seemed to have explicit language endorsing international treaty obligations under the Geneva Conventions. For instance, under section 6 of the MCA, dealing with the "Implementation of Treaty Obligations," the MCA specifically addresses the "extent to which violations of the Geneva Conventions remain actionable pursuant to the War Crimes Act[55]."[56] Additionally, section 3 of the MCA states that all the "necessary 'judicial guarantees which are recognized as indispensable by civilized peoples' for purposes of common Article 3 of the Geneva Conventions" should apply.[57] These specific parts of the MCA indicate that "Congress's intent was not to 'un-execute' the Geneva Conventions or even to 'un-implement' the treaty obligations" previously identified in *Hamdan*.[58]

B. Al Maqaleh v. Gates

Many of the claims from the amici curiae brief written on behalf of the *Boumediene* petitioners hold true for the *Al Maqaleh* petitioners as well. Numerous scholars of international law maintain that the rules concerning detention under international law are perfectly clear: "civilian non-combatants may *not* be seized far from the battlefield and held indefinitely without

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53 *Id.* at 11, 2007 WL 2441588, at *20-21 [hereinafter MCA].

54 *See id.* at 12, 2007 WL 2441588, at *23 (citing Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243, 252 (1984)).

55 18 U.S.C. § 2441 (2008).

56 Brief for Petitioners, *supra* note 41, at 8, 2007 WL 2441588, at *11.

57 *Id.* at 8, 2007 WL 2441588, at *12.

58 *Id.* at 8, 2007 WL 2441588, at *12 (citations omitted).

judicial review, even if designated as 'enemy combatants.'"[59] Furthermore, these scholars writing as amici on behalf of Al Maqaleh and his three fellow petitioners believe that the circuit court opinion subverts "the fundamental human rights norms developed over hundreds of years."[60] Based upon the fact that all remaining *Al Maqaleh* petitioners were "seiz[ed] in peaceful zones," international human rights law should govern the analysis of the case.[61] The amici view the specific facts of the remaining *Al Maqaleh* petitioners—apprehension abroad and subsequent rendition to Afghanistan—as a sinister procedure designed to "switch the Constitution on or off at will."[62]

In addressing the *Boumediene* precedent with regard to analyzing the *Al Maqaleh* petitioners, the *Boumediene* extension of habeas corpus rights represented to some international law scholars the U.S. recognition of a fundamental human right – freedom from arbitrary, indefinite detention.[63] British courts had previously recognized that the writ of habeas corpus is a "flexible remedy adaptable to changing circumstances."[64] While the Supreme Court had made similar assertions in past cases, stating that "[h]abeas corpus is not a static, narrow, formalistic remedy, but one which must retain the ability to cut through barriers of form and procedural mazes,"[65] *Boumediene* represented the first time that the "procedural maze" applied to aliens held outside the United States.[66] Based on the evolving trend of international humanitarian law and the *Boumediene* extension of habeas to detainees at Guantanamo Bay, many human rights scholars felt

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59 Brief of Amici Curiae Professors of International Human Rights Law and Related Subjects in Support of Petitioners-Appellees at 3, Al Maqaleh v. Gates, 605 F.3d 84 (D.C. Cir. 2010) (No. 09-5265), 2009 WL 6043975 at *9 [hereinafter Amicus Brief] (emphasis in original).

60 *Id.*, 2009 WL 6043975, at *9.

61 *Id.* at 14, 2009 WL 6043975, at *20.

62 *Id.* at 6, 2009 WL 6043975, at *3 (quoting *Boumediene*, 553 U.S. at 765).

63 *See id.* at 9, 2009 WL 6043975, at *9.

64 Amicus Brief, *supra* note 59, at 9, 2009 WL 6043975, at *9 (citations omitted).

65 *See id.*, 2009 WL 6043975, at *9 (citations omitted) (quoting Hensley v. Mun. Ct., San Jose Milpitas Judicial Dist., Santa Clara County, Cal., 411 U.S. 345, 349-50 (1973)).

66 *See* D'Aloia, *supra* note 4, at 977.

that the *Al Maqaleh* district court opinion should be affirmed.[67] Such an affirmance would represent "a more nuanced understanding of the writ, already recognized by U.S. jurisprudence."[68]

Addressing the actual detention of the *Al Maqaleh* petitioners, the amici point to the Universal Declaration of Human Rights ("UDHR") in its statement that "[n]o one shall be subjected to arbitrary arrest, detention, or exile."[69] Additionally, the International Covenant on Civil and Political Rights ("ICCPR"), to which the United States is a signatory, states in article 9(1) that, "[e]veryone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law."[70]

The drafting history of article 9(1) of the ICCPR also evinces that "'arbitrariness' is not to be equated with 'against the law,' but must be interpreted more broadly to include elements of inappropriateness, injustice or lack of predictability."[71] As such, detention should never be "unjust, unreasonable, or infringe upon human dignity."[72] In ratifying the ICCPR, however, the United States only approved the agreement with certain "reservations, understandings, and declarations" ("RUDs"), including that articles 1 to 27 would be nonself-executing in the United States.[73] Therefore, regarding the American detention process, an investigation into the degree of procedure afforded to a detainee would be very important in determining the legal viability of the system within the framework of the ICCPR and international humanitarian law more generally.[74] It is possible that an

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67 *See* Amicus Brief, *supra* note 59, at 9, 2009 WL 6043975, at *9.

68 *Id.*, 2009 WL 6043975, at *9.

69 *Id.*, 2009 WL 6043975, at *10 (citing Universal Declaration of Human Rights, G.A. Res. 217A, art. 9, U.N. Doc. A/810 (Dec. 12, 1948)).

70 International Convention on Civil and Political Rights art. 9, Dec. 16, 1966, 1916 U.S.T. 521, 999 U.N.T.S. 171 [hereinafter ICCPR].

71 Amicus Brief, *supra* note 59, at 9-10, 2009 WL 6043975, at *11-12 (citations omitted).

72 *Id.* at 10, 2009 WL 6043975, at *12.

73 *See id.* at 9-10, 2009 WL 6043975, at *10-11 n.38.

74 *See id.* at 9-11, 2009 WL 6043975, at *10-14 (discussing the American reservations to the ICCPR and how "[c]ontemporary international human rights law

invalidation of the U.S. detention policy may occur when analyzed from an international law perspective; however, the RUDs that the United States made in ratifying the ICCPR would likely render the U.S. procedure permissible under domestic law.[75] Notwithstanding, the ICCPR remains binding on the United States as a treaty ratified by the Senate.[76] It is, therefore, arguable that the ICCPR "obliges the President and Congress faithfully to implement it."[77] This argument is even greater "where, as here, [the ICCPR] embod[ies] binding principles of customary international law."[78]

The prohibition against indefinite detention under international humanitarian law is only the baseline of procedural process. In order to ensure that "a detention is not arbitrary, international human rights law guarantees a right to *meaningful* review."[79] As part of this review process, "any individual – other than a combatant captured on the battlefield – who is arrested or detained has the rights to appear before a court without delay, to ask the court to determine the legality of detention, and to be released if the detention is unlawful."[80] Here, petitioner Al Bakri "has been denied the right to appear before the military panel that determined his status and was not given access to counsel or to evidence."[81] If the degree of procedure afforded to the *Al Maqaleh* detainees were the only issue before the court, it may be more likely that the courts would recognize that "the Executive has proceeded against Petitioners in a manner that is contradictory to both the letter and the spirit of the ICCPR."[82]

III. Origins of the Great Writ

Historians often describe the writ of habeas corpus as a

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clearly prohibits arbitrary detention").

75 *See id.* at 9-10, 2009 WL 6043975, at *10-11 n.38 (explaining that articles 1 through 12 are not self-executing in the United States).

76 *See* Amicus Brief, *supra* note 59, at 13, 2009 WL 6043975, at *13.

77 *Id.*, 2009 WL 6043975, at *18-19.

78 *See id.*, 2009 WL 6043975, at *19.

79 *Id.* at 11, 2009 WL 6043975, at *14-15 (emphasis in original).

80 *Id.*, 2009 WL 6043975, at *15 (citing ICCPR, *supra* note 70, art. 9(4)).

81 Amicus Brief, *supra* note 59, at 16, 2009 WL 6043975, at *24.

82 *Id.* at 13, 2009 WL 6043975, at *19.

"bulwark" of individual liberty in the scheme of American rights.[83] The American legal system inherited the writ from common law under which it had been used to challenge the legal basis for detention.[84] The writ commands a detaining authority to "produce the body"[85] of a prisoner before a court so that the court may make a determination as to the legality of the detention.[86] The Founding Fathers were well aware of the importance of the writ, and they sought to ensure the continued use of the writ under the new American Constitution.[87] The "protection for the habeas privilege was one of the few safeguards of liberty specified in a Constitution that, at the outset, had no Bill of Rights."[88] The framers of the Constitution explicitly incorporated the right within the Suspension Clause.[89] The clause stipulates that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."[90] The writ is "currently codified in section 2241 of the judicial code."[91] Although the writ has evolved from its common law origins and now covers additional restraints on liberty, the writ has historically always been a check on executive power.[92] Its central purpose is to ensure that the Executive only detains individuals in accordance with the law.[93] The recent post-9/11 line of habeas

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83 D'Aloia, *supra* note 4, at 961 (citing *In re* Kaine, 55 U.S. (14 How.) 103, 147 (1852) (Nelson, J., dissenting) ("The writ has always been justly regarded as the stable bulwark of civil liberty."); *see also* THE FEDERALIST No. 83, at 512 (Alexander Hamilton) (Clinton Rossiter ed., 2003) (arguing that habeas corpus is a bulwark against arbitrary punishment).

84 D'Aloia, *supra* note 4, at 962-63 (citing Rasul v. Bush, 542 U.S. 466, 473 (2004) ("Habeas corpus . . . throw[s] its root deep into the genius of our common law." (quoting Williams v. Kaiser, 323 U.S. 471, 484 n.2 (1945)))).

85 The term "habeas corpus" literally means "that you have the body." BLACK'S LAW DICTIONARY 778 (9th ed. 2009).

86 *See* D'Aloia, *supra* note 4, at 961.

87 *See Boumediene*, 553 U.S. at 739.

88 *Id.* at 725.

89 U.S. CONST. art. I, § 9, cl. 2.

90 *Id.*

91 D'Aloia, *supra* note 4, at 965 (citing 28 U.S.C. § 2241 (2006)).

92 *See, e.g.*, Preiser v. Rodriguez, 411 U.S. 475, 485 (1973) ("[O]ver the years, the writ of habeas corpus evolved as a remedy available to effect discharge from any confinement contrary to the Constitution or fundamental law.").

93 *See* D'Aloia, *supra* note 4, at 967.

cases concerning detained enemy combatants has tested the strength of the writ and put the three branches of the federal government at odds over how far and to whom the writ should extend.[94]

A. Prelude to Expanding the Great Writ

Since the 9/11 attacks on the World Trade Center and the Pentagon, the United States has been engaged in an ongoing conflict against radical jihadist Islam; this conflict has given rise to several American-operated military detention facilities across the globe.[95] Perhaps the most well-known detainment facility is located in Cuba at the Guantanamo Bay Naval Station.[96] The Executive branch derives its detention powers largely from the Authorization for Use of Military Force ("AUMF"), a document promulgated by the U.S. Congress that gives the Executive the power to do the following:

> [U]se all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.[97]

On September 18, 2001, only one week after the 9/11 attacks, Congress approved the AUMF.[98] For over eighteen months, American detention practices at Guantanamo Bay and other

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94 *See generally* Judith Resnik, *Detention, the War on Terror, and the Federal Courts an Essay in Honor of Henry Monaghan*, 110 COLUM. L. REV. 579 (2010) (outlining issues surrounding habeas corpus and detention since 9/11).

95 Detention facilities still in operation exist in Afghanistan, Iraq, and the Guantanamo Bay Naval Station in southern Cuba. D'Aloia, *supra* note 4 (giving examples of detention facilities in Afghanistan, Iraq, and Guantanamo Bay throughout his piece). President Obama ordered the decommissioning of all CIA detention facilities still in use at the beginning of his presidency. *See id.* at 983-96.

96 *See id.* at 985-88 (describing the Guantanamo Bay detention facility and the worldwide criticism it has garnered).

97 Authorization for Use of Military Force. § 1541.

98 *See id.*

detention facilities went virtually unchallenged.[99] In 2004, the Supreme Court upheld the Executive's power to detain individual enemy combatants as "so fundamental and accepted an incident to war as to be an exercise of 'necessary and appropriate force'" under the AUMF.[100]

The first initial check on the Executive's post-9/11 detention powers came in another 2004 case, *Rasul v. Bush*.[101] In *Rasul*, enemy combatants held at Guantanamo Bay filed petitions for habeas corpus.[102] In a plurality opinion, the Court held that the alien detainees held at Guantanamo Bay had a statutory right to invoke federal habeas corpus.[103] In *Hamdi v. Rumsfeld*,[104] the Supreme Court held that due process rights required that a U.S. citizen being held as an enemy combatant be given a meaningful opportunity to contest the factual basis for his detention. In response to the *Rasul* decision, the Department of Defense ordered the creation of Combatant Status Review Tribunals ("CSRT"); the CSRTs provided a formal mechanism for reviewing the status of each "enemy combatant" detainee.[105] Congress supported the creation of the CSRTs and formally supplemented the Department of Defense action with the enactment of the Detainee Treatment Act of 2005 ("DTA").[106] The DTA addressed several matters related to detainees, including the relevant test for determining the legality of an alien's detention.[107] More importantly, however, the DTA amended 28 U.S.C. § 2241, stripping Article III federal courts of jurisdiction to hear petitions for habeas corpus from detainees held at Guantanamo Bay, like the petitioner in *Rasul*.[108]

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99 *See* D'Aloia, *supra* note 4, at 999.

100 *Id.* (citing *Hamdi*, 542 U.S. at 518).

101 *See id.*

102 *See* Rasul v. Bush, 542 U.S. 466 (2004).

103 *See* D'Aloia, *supra* note 4, at 999-1000 (citing *Rasul*, 542 U.S. at 481, "[A]liens held at the bases . . . are entitled to invoke the federal courts' authority under [28 U.S.C.] § 2241.").

104 *Hamdi*, 542 U.S. 507.

105 *See* D'Aloia, *supra* note 4, at 1000.

106 *See* Detainee Treatment Act of 2005, 28 U.C.S. § 2241 (2005) amended by Detainee Treatment Act of 2005, 28 U.C.S. § 2241 (2005).

107 *See Al Maqaleh I*, 604 F. Supp. 2d at 212.

108 The Detainee Treatment Act of 2005 amended the federal habeas statute (28

The DTA gave formal statutory recognition to the CSRTs and specified that the CSRT would be the official substitute for Article III habeas review.[109] The DTA also amended section 2241 to give limited Article III court review solely to the U.S. Court of Appeals for the District of Columbia.[110]

Although the DTA precluded potential future litigants held at Guantanamo Bay from petitioning Article III courts for habeas review, the statute left open the question as to whether the DTA mooted habeas cases that were pending at the time of its enactment.[111] In 2006, the Supreme Court took up the issue in *Hamdan v. Rumsfeld*.[112] The Court held that, "[o]rdinary principles of statutory construction" rebutted the idea that section 1005(e) of the DTA applied to cases pending before the Court during the enactment of the DTA.[113] In another act of reactive legislation, Congress passed the MCA[114] "in order to void this legal gap."[115] MCA § 7(a) explicitly and retroactively applied the provisions of the DTA which stripped Article III courts of jurisdiction against all pending cases.[116]

U.S.C. § 2241), adding section 2241(e). The section states, "no court, justice, or judge shall have jurisdiction to hear or consider . . . an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba." *See* Detainee Treatment Act; *see also* D'Aloia, *supra* note 4, at 999-1000 (outlining Rasul v. Bush, 542 U.S. 466 (2004), and explaining that petitioner was held at Guantanamo Bay).

109 *See* Detainee Treatment Act (outlining jurisdictional rules for habeas review in the section titled "Procedures for Status Review of Detainees Outside the United States").

110 28 U.S.C. § 2241(e)(2) (2006), *amended by* Detainee Treatment Act (stating in § 1005(e)(1) that the "United States Court of Appeals for the District of Columbia Circuit shall have exclusive jurisdiction to determine the validity of any final decision of a [CSRT] that an alien is properly detained as an enemy combatant").

111 *See* Detainee Treatment Act.

112 Hamdan v. Rumsfeld, 548 U.S. 557 (2006).

113 *See id.* at 575-76.

114 *See* Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006) (codified in scattered sections of 10, 18, 28, and 42 U.S.C.) [hereinafter MCA].

115 D'Aloia, *supra* note 4, at 1001; *see also Boumediene*, 553 U.S. at 738 ("[T]he MCA was a direct response to *Hamdan*'s holding that the DTA's jurisdiction-stripping provision had no application to pending cases.").

116 MCA § 7(a)-(b) (amending § 2241(e) to read: "No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the

B. The Extraterritorial Reach of the Suspension Clause

The congressional reaction to the *Rasul* decision firmly closed the door for detainees held at Guantanamo Bay desiring to assert a statutory right to habeas corpus.[117] With the enactment of MCA, however, the question remained open as to the availability of constitutional habeas to detainees held at Guantanamo Bay and elsewhere outside the United States.[118] Prior to the *Al Maqaleh* decisions, two Supreme Court cases squarely addressed the availability of constitutional habeas as applied to individuals held outside U.S. territory.[119] The first, *Johnson v. Eisentrager*,[120] was a post-World War II case involving German saboteurs. The second case, *Boumediene v. Bush*,[121] involved alien detainees held at Guantanamo Bay. These two cases provide a vital framework for understanding both the district and appellate court opinions regarding Al Maqaleh.[122]

1. Johnson v. Eisentrager

Prior to the contemporary Guantanamo Bay habeas cases, the Supreme Court had only once examined the extraterritorial reach of habeas corpus.[123] In *Johnson v. Eisentrager*,[124] allied forces captured German saboteurs and repatriated them to an American-operated prison in Landsberg, Germany.[125] The German saboteurs filed petitions for habeas corpus on both statutory and

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United States to have been properly detained as an enemy combatant *or is awaiting such determination*") (emphasis added).

117 *See* Al Maqaleh v. Gates (*Al Maqaleh II*), 605 F.3d 84 (D.C. Cir. 2010) (explaining that in response to the *Rasul* decision, Congress passed the Detainee Treatment Act of 2005).

118 *See Boumediene*, 553 U.S. at 736 (addressing the issue of the availability of Constitutional habeas to detainees held outside the United States).

119 *See* Johnson v. Eisentrager, 339 U.S. 763 (1950); *see also Boumediene*, 553 U.S. 723.

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

121 *Boumediene*, 553 U.S. 723.

122 *See Al Maqaleh II*, 605 F.3d 84 (taking into account both *Eisentrager*, 339 U.S. 763, and *Boumediene*, 553 U.S. 723).

123 *See* D'Aloia, *supra* note 4, at 1003-04.

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

125 *See id.* at 766.

constitutional grounds.[126] The *Eisentrager* petitioners "had been convicted by a military commission in China of 'engaging in, permitting or ordering continued military activity against the United States after the surrender of Germany and before the surrender of Japan.'"[127] As such, the *Eisentrager* petitioners were unlawful combatants in violation of the law of war.[128] Petitioners were "captured in China, tried in China, and repatriated to Germany to serve sentences in Landsberg Prison, a facility under the control of the United States as part of the Allied Powers' post-war occupation."[129] The Court held "that the Constitution does not confer a right of personal security or an immunity from military trial and punishment upon an alien enemy engaged in the hostile service of a government at war with the United States."[130] The Court found that "[n]othing in the text of the Constitution extends such a right."[131] Furthermore, to grant such a right to the saboteurs would extend the habeas right to a detainee who:

> (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.[132]

In addition to addressing the standing issue, the *Eisentrager* Court highlighted concerns it had over extending habeas and how it might interfere with an ongoing military occupation.[133] The Court foresaw that such an extension of rights would create a heavy burden on American resources that would be better directed

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126 *See id.* at 765-66.

127 *Al Maqaleh II*, 605 F.3d at 89 (quoting *Eisentrager*, 339 U.S. at 766).

128 *See id.*

129 *Id.* (citing *Eisentrager*, 339 U.S. at 766).

130 *Eisentrager*, 339 U.S. at 785.

131 *Id.* at 768.

132 *Id.* at 777.

133 *See id.* at 784.

at continuing the war effort.[134] Taking into account the saboteurs' standing issue and the practical problems that extending habeas would create for the war effort, the Court concluded that the detainees did not have access to habeas corpus.[135]

2. Boumediene v. Bush

In 2008, the Supreme Court in *Boumediene v. Bush* revisited the question of constitutional habeas as applied to detainees held at Guantanamo Bay.[136] Despite the statutory jurisdiction-stripping provisions of MCA section 7(a),[137] the *Boumediene* petitioners "challenged their [CSRT] designation as enemy combatants by asserting a common law right to habeas corpus."[138] The Court held that the petitioners did have access to the privilege of habeas corpus and section 7(a) of the MCA was an unconstitutional suspension of the writ.[139] The decision marked the first time that non-U.S. citizens who had never before been present in the United States and who had been designated as "enemy combatants" by the United States had the constitutional right to habeas review.[140] In so holding, the Court established that the Suspension Clause had "full effect at Guantanamo Bay."[141] In reaching its conclusion, the Court considered the factors relied upon in *Eisentrager* in developing its own three-factor test for defining the extraterritorial reach of the Suspension Clause.[142] The *Boumediene* Court resolved that the following three factors are relevant to 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

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134 *See id.* at 779.

135 *See Eisentrager*, 339 U.S. at 777.

136 *See Boumediene*, 553 U.S. 723.

137 *See* MCA, 10 U.S.C. § 948-49.

138 D'Aloia, *supra* note 4, at 1001.

139 *See Boumediene*, 553 U.S. at 732-33.

140 *See Eisentrager*, 339 U.S. at 771.

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

142 *See id.* at 766.

the prisoner's entitlement to the writ.[143]

The test was to represent a "functional approach" for determining the reach of the Constitution.[144] The newly crafted functional framework allowed "questions of extraterritoriality [to] turn on objective factors and practical concerns, not formalism."[145] Under this analytical approach, the "Court observed that de jure sovereignty in the strict legal sense was not outcome-determinative for purposes of the writ of habeas corpus."[146] Instead, the Court found that the proper test was to "inquire into the objective degree of control the Nation asserts over foreign territory."[147]

Although the *Boumediene* decision established that detainees held at Guantanamo Bay had the privilege of habeas corpus, the decision left open the habeas question as to detainees held elsewhere outside the United States.[148] With the resolution of the Guantanamo Bay question, attention turned to American detention sites elsewhere.[149] Recently, the D.C. District Court and, on appeal, the D.C. Court of Appeals undertook the issue in *Al Maqaleh v. Gates*.[150] The issues surrounding the *Al Maqaleh* case closely parallel the issues addressed in *Boumediene*, "in large part because the detainees themselves as well as the rationale for detention are essentially the same."[151]

IV. Whether *Boumediene* Reaches Bagram: *Al Maqaleh v. Gates*

The *Al Maqaleh* case centers on the same issue that the Supreme Court addressed in *Boumediene*—how far the

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143 *Id.*

144 *See id.*

145 *Id.* at 727.

146 D'Aloia, *supra* note 4, at 1003 (citing *Boumediene*, 553 U.S. at 753).

147 *Boumediene*, 553 U.S. at 754.

148 *See id.* at 756 (noting that fundamental questions of constitutional scope outside of the United States remain).

149 *See Al Maqaleh I*, 604 F. Supp. 2d 205 (addressing the four aliens' challenge of their detention in Afghanistan).

150 *Id.*; *Al Maqaleh II*, 605 F.3d 84.

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

Suspension Clause reaches.[152] In *Al Maqaleh*, the *Boumediene* question remains central—whether aliens who are detained abroad during a time of conflict can assert the privilege of habeas corpus.[153] However, the *Al Maqaleh* opinions yield opposing results.[154] While the D.C. District Court uses the *Boumediene* framework to extend habeas to detainees at Bagram, the D.C. Circuit undertakes the same *Boumediene* analysis and finds that the privilege of habeas does not extend to Bagram.[155] Ultimately, this paper argues the D.C. Circuit has the correct interpretation of the *Boumediene* framework, and this interpretation is likely to be adopted should the Supreme Court take up the case.

Because the D.C. Circuit reviewed Judge Bates's district court opinion exercising de novo review upon a motion to dismiss under Rule 12 of the Federal Rules of Civil Procedure, the district court and the D.C. Circuit Court opinions both represent viable legal analyses that the Supreme Court may draw upon should it take up the case.[156] Both decisions regarding the *Al Maqaleh* petitioners represent the first serious judicial attempts to apply the functional approach laid out in *Boumediene* for determining the reach of the Constitution.[157] In ruling on whether the D.C. District Court has jurisdiction over the case, the Supreme Court may apply the legal reasoning exhibited in Judge Bates's opinion,[158] Chief Judge Sentelle's opinion,[159] a combination thereof, or a completely new line of reasoning.

To develop the competing analytical frameworks that the D.C. District Court and the D.C. Circuit undertook in addressing the *Al Maqaleh* petitioners, this paper first addresses Chief Judge Sentelle's D.C. Circuit Court opinion.[160] The circuit opinion represents both the current status of the law and the legal

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152 *See id.* at 214.

153 *See Boumediene*, 553 U.S. at 746-47.

154 *Compare Al Maqaleh I*, 604 F. Supp. 2d at 231-32, *with Al Maqaleh II*, 605 F.3d at 95-99.

155 *See Al Maqaleh II*, 605 F.3d 84.

156 *See id.* at 94.

157 *See id.*

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

159 *See Al Maqaleh II*, 605 F.3d at 87.

160 *See id.*

determination that the Supreme Court would likely adopt should the High Court receive and grant cert to a writ of certiorari from the *Al Maqaleh* petitioners.[161] The paper will then present the opposing legal determinations made in Judge Bates's district court opinion and develop why these views are unlikely to be adopted should the Supreme Court review the *Al Maqaleh* petitioners' claims.

A. The Petitioners

Al Maqaleh v. Gates involves three petitioners[162] who are currently held as unlawful enemy combatants at the Bagram Theater Internment Facility on the Bagram Airfield Military Base in Afghanistan.[163] Petitioner Fadi Al Maqaleh is a Yemeni citizen who claims he was first taken into American custody sometime in 2003.[164] Although Al Maqaleh asserts that he was captured outside of Afghanistan, an American Commander of Detention Operations asserts that Al Maqaleh was captured within Afghanistan.[165] Amin Al Bakri is also a Yemeni citizen; he was allegedly captured in Thailand in 2002.[166] The third petitioner, Redga Al Najar, is a Tunisian citizen who alleges being captured in Pakistan in 2002.[167] Family members filed habeas petitions for each of the petitioners.[168]

B. The Place of Detention

"Bagram Airfield Military Base is the largest military facility in Afghanistan occupied by United States and coalition forces."[169] After the *Rasul* decision, the Bagram facility "became the

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161 *See id.*

162 A fourth petition filed in the district court was dismissed for lack of jurisdiction and is, therefore, not subject to the D.C. Court of Appeal's interlocutory appeal. *See id.* at 87 n.1.

163 *See id.* at 87.

164 *See Al Maqaleh II*, 605 F.3d at 87.

165 *See id.*

166 *See id.*

167 *See id.*

168 Brief for Petitioner-Appellees at 4-5, *Al Maqaleh I*, 604 F. Supp. 2d 205 (D.D.C 2009) (No. 09-5265), 2009 WL 6043974 at *2-4.

169 *Al Maqaleh II*, 605 F.3d at 87.

preferred destination for indefinite detention."[170] The United States entered into a lease agreement with the government of Afghanistan that "consigns all facilities and land located at Bagram Airfield . . . owned by [Afghanistan,] or Parwan Province, or private individuals, or others, for use by the United States and coalition forces for military purposes."[171] The leasehold created by the agreement "refers to Afghanistan as the 'host nation' and the United States 'as the lessee.'"[172] Additionally, the leasehold is to continue "until the United States or its successors determine that the premises are no longer required for its use."[173]

Afghanistan was an active theater of military combat at the initiation of the *Al Maqaleh* litigation[174] and continues to be an active theater today.[175] The United States continues to conduct military operations from Bagram Airfield.[176] In addition to the United States providing overall security at the airfield, other coalition nations also operate on the base and control parts of the airfield.[177] The coalition partners at present constitute both the "American-led military coalition in Afghanistan" as well as the NATO International Security Assistance Force (ISAF).[178] As of October 25, 2010, ISAF consisted of forty-eight troop-contributing nations[179] with over 40,000 non-American forces deployed in Afghanistan.[180]

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170 D'Aloia, *supra* note 4, at 989-90 (citation omitted).

171 *Al Maqaleh II*, 605 F.3d at 87 (quoting the Accommodation Consignment Agreement for Lands and Facilities at Bagram Airfield Between the Islamic Republic of Afghanistan and the United States of America) (internal quotation marks omitted).

172 *Id.*

173 *Id.* at 87-88 (internal quotation marks omitted).

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

175 *See Al Maqaleh II*, 605 F.3d at 88.

176 *See id.*

177 *Id.*

178 *Id.*

179 International Security Assistance Force (ISAF): *Key Facts and Figures* (Oct. 25, 2010), http://www.isaf.nato.int/images/stories/File/Placemats/25OCT10%20Placemat%20page%201,2,3.pdf.

180 *See id.*

C. D.C. Circuit: Bagram is No Guantanamo Bay

In an opinion delivered by Chief Judge Sentelle,[181] the D.C. Circuit Court held that "the jurisdiction of the courts to afford the right to habeas relief and the protection of the Suspension Clause does not extend to aliens held in executive detention in the Bagram detention facility in the Afghan theater of war."[182] This holding, based on the circuit court's de novo review,[183] means that "foreign nationals held at a U.S. military prison at Bagram airbase outside of Kabul, Afghanistan, do not have a right to challenge in U.S. courts their continued imprisonment."[184] The circuit court's analysis in its decision was controlled by the "Supreme Court's interpretation of the Constitution in *Eisentrager* as construed and explained in the Court's more recent opinion in *Boumediene*."[185] On interlocutory appeal as to the jurisdictional question,[186] the circuit court opinion was unanimous in striking down the district court's ruling.[187] Of significance for possible Supreme Court review, the unanimous panel consisted of jurists from across the philosophical spectrum with Chief Judge David B. Sentelle, considered a conservative jurist, being joined by two liberal judges, Circuit Court Judge David S. Tatel and Senior Circuit Judge Harry T. Edwards.[188]

In beginning its analysis of the *Boumediene* factors as applied to the petitioners at Bagram, the circuit court rejected what it considered to be "an extreme understanding" and "bright-line arguments" that both parties drew from *Boumediene*.[189] The government asserted that *Boumediene* yielded a bright-line rule that the "*Boumediene* analysis [had] no application beyond the territories that are, like Guantanamo, outside the *de jure* sovereignty of the United States but are subject to its *de facto*

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181 *See Al Maqaleh II*, 605 F.3d at 87.

182 *Id.* at 99.

183 *Id.* at 94.

184 Denniston, *supra* note 21.

185 *Al Maqaleh II*, 605 F.3d at 94.

186 *Id.* at 87.

187 *See id.* at 86.

188 *See* Denniston, *supra* note 21.

189 *Al Maqaleh II*, 605 F.3d at 94.

sovereignty."[190] The circuit court rejected the government's argument because 1) the *Boumediene* Court had already "expressly repudiated the argument . . . [observing] that the *Eisentrager* Court adopted a formalistic, sovereignty-based test for determining the reach of the Suspension Clause,"[191] and 2) the government's narrow interpretation of the word "sovereignty"[192] conflicted with the general meaning given in *Eisentrager*, and 3) such a reading of *Eisentrager* "would have been inconsistent" with the functional questions of extraterritoriality that "unite" the Insular Cases with "a common thread."[193]

Likewise, the circuit court also rejected the petitioners' extreme position that the U.S. leasehold at Bagram is sufficient to trigger a similar extraterritorial application of the Suspension Clause as in *Boumediene*.[194] The circuit court felt that the natural extension of this broad understanding of *Boumediene* would implicate the "extraterritorial extension of the Suspension Clause to noncitizens held in any United States military facility in the world, and perhaps to an undeterminable number of other United States-leased facilities as well."[195] The circuit court reasoned that if the *Boumediene* Court had intended such a "sweeping application" of its ruling, it would have explicitly stated so.[196] Since *Boumediene* only applied to detainees held at Guantanamo Bay, the circuit court found the petitioners' broad view of *Boumediene* untenable.[197] Upon dismissing both the government

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190 *Id.*

191 *Id.* (quoting *Boumediene*, 553 U.S. at 762) (internal quotation marks omitted).

192 The government sought to limit the definition of "sovereignty" to the "narrow technical sense," whereas the *Eisentrager* court clearly included "the degree of control the military asserted over the facility." *Id.* (quoting *Boumediene*, 553 U.S. at 763) (internal quotation marks omitted).

193 *Id.* at 93 (internal quotation marks omitted). The "Insular Cases" include, but are not limited to, Dorr v. United States, 195 U.S. 138 (1904); Hawaii v. Mankichi, 190 U.S. 197 (1903); Armstrong v. United States, 182 U.S. 243 (1901); De Lima v. Bidwell, 182 U.S. 1 (1901); Dooley v. United States, 182 U.S. 222 (1901); and Downes v. Bidwell, 182 U.S. 244 (1901). D'Aloia, *supra* note 4, at 969 n.53. *See* Reid v. Covert, 354 U.S. 1 (1957) (more contemporary example of the functional approach to examining questions of extraterritoriality).

194 *Al Maqaleh II*, 605 F.3d at 94-95 (citing *Boumediene*, 553 U.S. at 763-64).

195 *Id.* at 95.

196 *Id.*

197 *See id.* at 95-96.

and petitioners' extreme understandings of *Boumediene*, the circuit court carefully addressed the functional approach test as laid out in *Boumediene*.[198]

1. The Process for Deciding Who May Be Detained

The first factor of the *Boumediene* three-factor test is "the citizenship and status of the detainee and the adequacy of the process through which that status determination [has been] made."[199] In analyzing the first factor, the circuit court found that the circumstances weigh in the petitioners' favor for finding the right to habeas relief and having the Suspension Clause apply to the Bagram petitioners as it had to the Guantanamo petitioners.[200] The court divided its analysis of the first factor into separate analyses of "citizenship and status" and "adequacy of process for making status determination" inquiries.[201] As to citizenship, the court found that the *Al Maqaleh* petitioners differ "in no material respect from the petitioners at Guantanamo who prevailed in *Boumediene*;"[202] likewise, the status of the *Al Maqaleh* petitioners as enemy aliens mirrors that of the *Boumediene* petitioners.[203] Looking to the adequacy of process for making the enemy alien determination, the court found that the *Al Maqaleh* petitioners have a much stronger case for invoking the writ because the process afforded to the detainees at Bagram was much less sophisticated than that of the *Eisentrager* saboteurs or even the *Boumediene* detainees.[204] Given the stark similarities among the

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198 *Id.* at 95.

199 *Al Maqaleh II*, 605 F.3d at 95 (internal quotation marks omitted).

200 *Id.* at 96.

201 *Id.* at 95-96.

202 *Id.* at 96.

203 *Id.*

204 *See Al Maqaleh II*, 605 F.3d at 96. In addition to being charged with a "bill of particulars" that laid out a detailed factual basis for the underlying charges, the *Eisentrager* petitioners were entitled to "representation by counsel, allowed to introduce evidence on their own behalf, and were permitted to cross-examine the prosecution's witnesses." *Boumediene*, 553 U.S. at 767. A Combatant Status Review Tribunal (CSRT) determined the *Boumediene* petitioners' status. *Id.* at 733. Under a CSRT, a "Personal Representative," as opposed to legal counsel, advises an individual detainee. *Id.* at 767. This representative is neither the detainee's lawyer nor advocate. *Id.* The differences between a CSRT and the *Eisentrager* military tribunal procedures differed in other aspects as well, and the Supreme Court stated in *Boumediene* that these differences

Boumediene and *Al Maqaleh* detainees with regards to citizenship and status, as well as the even greater inadequacy of process for the *Al Maqaleh* detainees, the circuit court made the uncontroversial finding that the first *Boumediene* factor weighs in favor of the petitioners.[205] This finding shows that the circuit court has at least considered some of the aspects of the ICCPR and the requisite procedure to be afforded to a detainee.[206] Because no one factor alone is outcome-determinative in *Boumediene's* three-factor test,[207] the fact that international law urges the extension of the writ here does not mean that it will necessarily happen.

2. *The Nature of the Site of Detention*

The second factor in the *Boumediene* functional model is "the nature of the sites where apprehension and then detention took place."[208] Unlike the first factor, the circuit court found that the analysis of the second factor weighs heavily in favor of the government position.[209] The circuit court conceded that the petitioners in *Eisentrager*, *Boumediene*, and *Al Maqaleh* were all apprehended abroad;[210] however, the court argued that the weight of the second factor turns on the nature of the detention location.[211]

While the court stressed that "*de facto* sovereignty is not determinative,"[212] the court also acknowledged that the nature of the detention site is highly relevant in deciding the reach of the Suspension Clause.[213] For the circuit court, the second factor turned on the extent of de jure control exercised by the United States over the detention area.[214] Unlike in *Boumediene*, the

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were "not trivial." *Id.* For detainees held at Bagram, an "Unlawful Enemy Combatant Review Board" (UECRB) determines a detainee's status. *Al Maqaleh II*, 605 F.3d at 96. UECRB proceedings "afford even less protection to the rights of detainees in the determination of status than was the case with the CSRT." *Id.*

205 *Al Maqaleh II*, 605 F.3d at 96.

206 *See* Amicus Brief, *supra* note 59, at 10-11, 2009 WL 6043979 at *16.

207 *See infra* Part IV.C.2.

208 *Al Maqaleh II*, 605 F.3d at 96 (internal quotation marks omitted).

209 *Id.*

210 *Id.*

211 *Id.* at 97.

212 *Id.*

213 *Al Maqaleh II*, 605 F.3d at 97.

214 *See id.*

detainees at Bagram are held at a facility under the open invitation of the Afghani host government through a temporary leasehold agreement.[215] In other words, the U.S. presence in Afghanistan is at the invitation of the de jure sovereign. As a result, it cannot be argued that the U.S. presence at Bagram is somehow standing in opposition to the de jure sovereign and establishing de facto sovereignty.[216] Further distinguishable from Guantanamo Bay, there is no demonstrated intent to establish a permanent American presence at the base.[217] As a result, the court found that "the notion that de facto sovereignty extends to Bagram is no more real than would have been the same claim with respect to Landsberg in the *Eisentrager* case."[218] Determining that the second factor weighs in favor of the government, the court stated that this finding is still not outcome-determinative.[219]

3. *The Practical Problems of Having Courts Validate Detention*

As to "the practical obstacles inherent in resolving the prisoner's entitlement to the writ," the circuit court found this third factor to "weigh[] overwhelmingly in favor of the position of the United States."[220] Whereas the first two *Boumediene* factors seem to have canceled each other out, the circuit court indicated that the third factor is the central test for extending the writ.[221] The court analyzed the third factor using largely the same approach as it used with the second factor: the court distinguished Guantanamo Bay and ruled that the Bagram facts more closely parallel Landsberg.[222]

In distinguishing Bagram and Landsberg from Guantanamo Bay, the circuit court highlighted the finding in *Boumediene* that

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215 The Circuit Court found it highly relevant that Guantanamo Bay is under the complete and total control of the U.S. government despite the fact that Cuba, a nation hostile to the United States, maintains "*de jure* sovereignty over the property." *Id.*

216 *Id.*

217 *Id.*

218 *Al Maqaleh II*, 605 F.3d at 97.

219 *Id.*

220 *Id.*

221 *See id.* at 97-98.

222 *Id.* at 97.

threats similar to those at Landsberg were entirely lacking at Guantanamo Bay.[223] Far removed from an active theater of war, Guantanamo Bay lacked the practical concerns that existed at Landsberg for extending the writ.[224] Guantanamo Bay is also distinguishable in that the United States is the de facto sovereign over the naval base despite being "within the territory of another de jure sovereign."[225] These two distinctions made Guantanamo Bay very different from Landsberg in *Boumediene*, and the circuit court saw these distinctions as even further distinguishing the situation at Bagram.[226]

While hostilities had ended at the time of the *Eisentrager* decision, "many of the problems of a theater of war remained."[227] With Bagram being located within an active theater of war, the court found the actual threats of an ongoing war make the government position even stronger than that of the post-War *Eisentrager* case.[228] The circuit court noted that the concerns of the *Eisentrager* Court echo more forcefully in circumstances of an actual ongoing war.[229] In Afghanistan, the American-led coalition and ISAF forces face daily security threats from a present enemy, not a defeated foe.[230] Similarly, providing judicial process to enemy aliens would be a "conflict between judicial and military opinion highly comforting to enemies of the United States."[231] In addressing the practical concerns of the third *Boumediene* factor, the circuit court took into account the overall strategic military concerns in conducting ongoing hostilities in Afghanistan.[232]

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223 *Al Maqaleh II*, 605 F.3d at 97.

224 *See id.* at 97-98.

225 *Id.* at 98.

226 *See id.*

227 The *Eisentrager* court expressed concern over "judicial interference with the military's efforts to contain 'enemy elements, guerilla fighters, and 'were-wolves.'" *Boumediene*, 553 U.S. at 769-70 (quoting *Eisentrager*, 339 U.S. at 784).

228 *See Al Maqaleh II*, 605 F.3d at 97-98.

229 *See id.* at 98.

230 *See id.*

231 *Eisentrager*, 339 U.S. at 779.

232 *See Al Maqaleh II*, 605 F.3d at 97-98.

D. District Court of D.C.: Why Bagram Might Be Like Guantanamo

While reversed by the circuit court, the analysis of the *Al Maqaleh* petitioners' situation in Judge Bates's district court ruling is important for laying out the competing argument that a United States federal court has jurisdiction to hear habeas claims out of Bagram. Because the Supreme Court may agree with the district court's findings, it is important to understand where and how the two opinions differ in their legal analysis. For this reason, the discussion of Judge Bates's opinion is limited to areas in which the district court opinion yielded opposite legal conclusions than in the circuit court.[233]

In the district court application of the *Boumediene* three-factor test, Judge Bates divided the original three factors into six tests.[234] Like Chief Judge Sentelle's circuit court opinion, Judge Bates found that 1) the citizenship of the detainees; 2) the status of the detainees; and 3) the site of apprehension for the *Al Maqaleh* detainees were no different than for the *Boumediene* petitioners.[235] Also similar to the circuit court opinion, Judge Bates found the adequacy of process at Bagram to be much more lacking than at Landsberg or even at Guantanamo Bay.[236] While both the district and appellate courts agree that these factors either mirror the status of the *Boumediene* petitioners or even amplify support for extending the writ, the agreement within the opinions ends there.[237] The two opinions have divergent views regarding the site of detention and the practical obstacles in extending the writ.[238]

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233 *See generally Al Maqaleh I*, 604 F. Supp. 2d 205 (providing the full opinion of Judge Bates).

234 *Id.* at 215 ("For the sake of analysis, [the] three [*Boumediene*] factors can be subdivided further into six: (1) the citizenship of the detainee; (2) the status of the detainee; (3) the adequacy of 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.").

235 *See id.* at 217-18.

236 *Id.* at 226-27.

237 *Compare Al Maqaleh II*, 605 F.3d at 96-97, *with Al Maqaleh I*, 604 F. Supp. 2d at 222-23.

238 *Compare Al Maqaleh II*, 605 F.3d at 96-97, *with Al Maqaleh I*, 604 F. Supp. 2d at 222-23.

1. Bagram Looks Similar to Guantanamo

Both the circuit court and district court agree that *Boumediene* requires that a "site of detention" analysis include inquiry into both the "duration" and "degree" of U.S. control over the detention site.[239] In fact, both opinions agree that the United States has not manifested intent to remain at Bagram indefinitely, as in the case of Guantanamo Bay.[240] The divergence in legal thought, therefore, concerns the "degree" to which the United States exercises control over Bagram as compared to Guantanamo Bay.

The circuit court gives significant deference to the fact that the Bagram facility is operated at the invitation of the host, de jure sovereign through a leasehold agreement.[241] As mentioned above, this legal determination is distinguishable from Guantanamo Bay where the United States has maintained de facto control of the naval base for over a century notwithstanding a hostile de jure sovereign.[242] In framing its "degree" analysis, the district court goes into a lengthy analysis of specific provisions of the Status of Forces Agreement (SOFA) between the American and Afghan governments, which regulates, among other things, Bagram Airfield.[243] Using specific provisions of the SOFA and the lease agreement for Bagram, Judge Bates makes it clear that the United States has overwhelming authority to regulate Bagram as it chooses.[244] The district court then goes on to state that "when assessing day-to-day activities at Bagram, the lack of complete 'jurisdiction' does not appreciably undermine the conclusion that

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239 *Compare Al Maqaleh II*, 605 F.3d at 96-97, *with Al Maqaleh I*, 604 F. Supp. 2d at 221-22.

240 *Compare Al Maqaleh II*, 605 F.3d at 97 ("In Bagram, while the United States has options as to duration of the lease agreement, there is no indication of any intent to occupy the base with permanence."), *with Al Maqaleh I*, 604 F. Supp. 2d at 225 ("As to the duration of the U.S. presence. . . Bagram appears to be closer to Landsberg than Guantanamo—the United States has been at Bagram for less than a decade and has disavowed any intention of a permanent presence there.").

241 *See Al Maqaleh II*, 605 F.3d at 97.

242 *See id.*

243 *See Al Maqaleh I*, 604 F. Supp. 2d at 222-24.

244 *See id.* at 222-23 ("[P]aragraph 9 of the [Bagram] lease grants the United States exclusive use of the premises at Bagram . . . . [Paragraph 4 of] the Bagram lease provides the United States with assignment and reversion authority . . . . Under [Paragraph 7 of] the SOFA, the United States has criminal jurisdiction over U.S. personnel.").

the United States exercises a very high 'objective degree of control.'"[245]

This argument, while true from an "on the ground analysis," leapfrogs and dismisses the central distinction between Guantanamo Bay and Bagram, namely, the circumstances under which the American presence in each respective base is achieved. Strained relations continue to exist between Cuba and the United States.[246] The fact that a hostile government constitutes only a latent threat[247] does not erode the distinction between Guantanamo Bay and Bagram. Afghanistan continues to support an American presence within its borders.[248] Absent a change to this Afghan position, it cannot be successfully argued that the United States has asserted any real de facto control of Bagram.[249]

Ultimately, Judge Bates stops short of concluding that Bagram, like Guantanamo Bay, is "not abroad;" however, the district court opinion does find that the United States exercises a high degree of objective control over Bagram.[250] This weighs in favor of extending the writ, but not to the same extent as in *Boumediene*.[251] Judge Bates waivers in deciding whether the government or the *Al Maqaleh* petitioners ultimately benefits from this finding.[252] By incorporating a thorough treatment of the de jure and de facto sovereignty,[253] the circuit court provided a better mechanism for determining whether the detention site favored the government or the petitioners under the *Boumediene* second factor test.

2. *Practically No Obstacles*

Whereas the circuit court finds that hostilities surrounding Bagram necessitated more deference to the executive and its ongoing military operations, the district court found that the practical procedural obstacles could be overcome with modern

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245 *Id.* at 223 (citations omitted).

246 *See Al Maqaleh II*, 605 F.3d at 97.

247 *See id.*

248 *See id.*

249 *See id.*

250 *See Al Maqaleh I*, 604 F. Supp. 2d at 231.

251 *See id.*

252 *See id.*

253 *See Al Maqaleh II*, 605 F.3d at 96-97.

technology.[254] In *Boumediene*, assessing practical obstacles was a matter of "focusing on the impact that habeas review would have on the military mission and on whether litigating habeas cases would cause friction with the host government."[255] Thus, practical concerns under *Boumediene* turn on the impact on "host country relations" and on the "military mission."[256] Because the discussion of "host country relations" primarily involved the possibility of friction between the United States and Afghan governments concerning Afghan citizens, this segment of the district court opinion is not discussed.[257] At the appellate level, the only Afghan citizen among the original *Al Maqaleh* petitioners is excluded because of this "host friction."[258]

Judge Bates sees the practical concerns relating to the "military mission" as little more than a question of capability.[259] The district court finds that despite Bagram being located within an active theater of war, the Bagram detention facility is a "secure" location.[260] Addressing the issue of in-court appearances for detainees, the court stresses that "[r]eal-time video-conferencing provides a workable substitute for an in-court appearance."[261] The mitigating factors that Judge Bates presents in order to calm practical concerns are facially valid; however, the district court analysis is ultimately a well-intentioned "tactical" assessment of the "military mission."[262] Concentrating on the actual on-the-ground capability to put on habeas proceedings ignores the strategic considerations that the government has for not extending habeas to an active theater of war.[263] The Court expressed in *Eisentrager* these strategic concerns:

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254 *See Al Maqaleh I*, 604 F. Supp. 2d at 228.

255 *Id.* at 227 (citing *Boumediene*, 553 U.S. at 769-70).

256 *Id.*

257 *See id.* at 229.

258 For a complete discussion of the "host friction" issue, see *id.* at 229-31.

259 *See Al Maqaleh I*, 604 F. Supp. 2d at 228.

260 *See id.*

261 *Id.*

262 *See generally id.* at 228-31 (discussing the relationship between providing habeas corpus hearings and the military mission in Afghanistan).

263 *See Al Maqaleh II*, 605 F.3d at 98.

> Such trials would hamper the war effort and bring aid and comfort to the enemy. They would diminish the prestige of our commanders, not only with enemies but with wavering neutrals. It would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home. Nor is it unlikely that the result of such enemy litigiousness would be a conflict between judicial and military opinion highly comforting to enemies of the United States.[264]

These post-War concerns are even more relevant during an active ongoing conflict.[265] The circuit court is arguably implying that, at Bagram, the military mission would be hampered if its detention powers were constantly subject to judicial oversight.[266] Where "the vagaries of war are present," then "arguments that issuing the writ would be impractical or anomalous" are entitled to more deference.[267] In *Boumediene*, these "practical" concerns were not present.[268] Far removed from the battlefield, the "military mission" analysis at Guantanamo Bay could turn on Judge Bates's "tactical" assessment of the military mission.[269]

V. Moving Forward: Options for *Al Maqaleh* Petitioners

Currently, the *Al Maqaleh* petitioners have two options for overturning the D.C. Circuit Court opinion. Both options, however, are unlikely to yield an unfavorable result for the government. The first option available to the petitioners would be to ask the D.C. Circuit to reconsider the case en banc.[270] This option, if the D.C. Circuit agreed to reexamine the case, is unlikely to change the outcome. Because the original three-judge panel

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264 *Id.* (quoting Eisentrager, 339 U.S. at 779).

265 *See id.*

266 *See id.*

267 *Id.* at 97-98 (internal quotation marks omitted).

268 *See Al Maqaleh II*, 605 F.3d at 97.

269 *See id.*

270 *See* D.C. CIR. R. 35(b).

was unanimous despite being composed of judges of varied political ideologies,[271] an en banc opinion may only yield a similar result.

Should the *Al Maqaleh* petitioners file for certiorari in the Supreme Court, they would face a daunting uphill battle to reverse the D.C. Circuit Court opinion. *Al Maqaleh* is one of the first cases to apply the *Boumediene* three-factor functional model.[272] *Boumediene* itself was a 5-4 opinion.[273] Thus, it would be very unlikely that any of the four *Boumediene* dissenters[274] would find that habeas extends to Bagram when they rejected extending habeas to Guantanamo Bay. Of the remaining five justices, Elena Kagan would likely recuse herself due to her involvement in the *Al Maqaleh* case when she served as Solicitor General.[275] This would leave, at most, four justices to equal out the four likely opponents of extending habeas to the *Al Maqaleh* detainees held at Bagram.[276] As a matter of Supreme Court procedure, a 4-4 tie has the effect of an affirmance of the circuit court's ruling.[277]

VI. Conclusion: Implications of the *Al Maqaleh* Application of *Boumediene*

It now appears that the reasoning underlying the D.C. Circuit Court opinion in *Al Maqaleh v. Gates* will stand for the foreseeable future. In the first application of the *Boumediene* three-factor functional approach, the D.C. Circuit found that

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271 *See* Denniston, *supra* note 21.

272 *See Al Maqaleh I*, 604 F. Supp. 2d at 207-08.

273 *Boumediene*, 553 U.S. at 730.

274 Chief Justice Roberts, along with Justices Scalia, Thomas, and Alito, dissented in *Boumediene*. *Id.*

275 Justice Kagan still served as Solicitor General of the United States at the time the government's Brief for Respondents-Appellants was filed. Reply Brief for Respondents-Appellants, Maqaleh v. Gates, 605 F.3d 84 (D.C. Cir. 2010) (Nos. 09-5265, 09-5266, 09-5267). Her involvement in the case would make her participation in deciding *Al Maqaleh* should it come to the High Court is, thus, very unlikely. *See* Faiza Patel, *The Writ Stops Here: No Habeas for Prisoners Held by U.S. Forces in Afghanistan*, ASIL INSIGHT (Am. Soc'y of Int'l L.), June 3, 2010, *available at* http://www.asil.org/files/insight100603pdf.pdf.

276 Justice Kennedy delivered the opinion of the court, and Justices Souter, Ginsburg, and Breyer wrote or joined in separate concurring opinions. *Boumediene*, 553 U.S. at 730.

277 *See* Patel, *supra* note 275.

federal courts do not have jurisdiction to hear the Bagram detainees' petitions for habeas corpus.[278] Whether the petitioners choose to request the D.C. Circuit to examine the case en banc or appeal directly to the Supreme Court, a reversal of the original circuit opinion is unlikely. While the *Boumediene* functional approach does lay the groundwork for deciding the extraterritorial reach of the writ, the test is "so inherently subjective that it clears a wide path for the Court[s] to traverse in the years to come."[279]

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

279 *Boumediene*, 553 U.S. at 843 (Scalia, J., dissenting).