Al Maqaleh v. Gates: An Unworkable Application of the Boumediene Factors

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This paper analyzes the recent D.C. District Court decision in al Maqaleh v. Gates. The issue in al Maqaleh was whether the Suspension Clause of the U.S. Constitution reaches four detainees held at the Bagram military facility in Afghanistan. The court answers this question by invoking the three factors used in Boumediene v. Bush, splitting them into six factors and systematically applying each one to the alleged facts surrounding the Bagram detainees and their detention facility. In this application, the court relies primarily on a model, comparing on one hand, the facts and facility involved in the post-World War Two case Johnson v. Eisentrager, and on the other, the circumstances involved in the Guantanamo Bay detention facility as examined in Boumediene. The court ultimately concludes that the al Maqaleh detainees were more similar to the detainees in Boumediene and should therefore be subject to the reach of the Suspension Clause. This paper examines the analysis used in al Maqaleh and argues that the balancing test as used in Boumediene is unworkable as applied by the District Court and that the Bagram military facility is substantially different than the facility in Guantanamo Bay.
INTRODUCTION

In June 2008, the U.S. Supreme Court made the unprecedented decision to extend an articulately narrow but fundamentally powerful Constitutional protection to the detainees being held at the detention facility in Guantánamo Bay.\(^1\) For the first time, the almost 300 foreign detainees brought to the southern tip of Cuba would be allowed to file a Habeas Corpus petition in federal court to contest their detention. However, despite its lengthy seventy-page majority opinion, Boumediene v. Bush\(^2\) constrained its habeas extension to Guantánamo Bay.\(^3\) For further situations inquiring about the extraterritoriality of the Suspension Clause, the court set forth a three-part balancing test to determine, as it had done, whether other non-citizen detainees would be able to invoke the protections of habeas corpus.\(^4\)

As the active conflict in the wake of the September 11, 2001 attacks continue in full-force, detentions have unsurprisingly followed suit as what has been labeled, “incident[s] of war.”\(^5\) For example, the Bagram Theater Internment Facility (“Bagram detention facility”) in Afghanistan, located 40 miles north of Kabul, currently houses approximately 600 detainees.\(^6\) As is such, it was only a matter of time before Bagram detainees began questioning whether they too fell under the Suspension Clause’s purview. In April 2009, the District Court for the District of Columbia undertook this analysis, and just as was done for Guantánamo Bay, applied the Boumediene factors to four Bagram detainees that sought to challenge their detention by a writ of

\(^1\) See Boumediene v. Bush, 128 S.Ct. 2229, 2262 (2008) (“We hold that [the Suspension Clause,] Art. I, § 9, cl.2, of the Constitution has full effect at Guantanamo Bay. If the privilege of habeas corpus is to be denied to the detainees now before us, Congress must act in accordance with the requirements of the Suspension Clause.”).

\(^2\) Id. at 2262.

\(^3\) Id. The three factors as established and applied in Boumediene are listed infra, PART I.B.2., Boumediene v. Bush

\(^4\) Ex parte Quirin, 317 U.S. 1, 28 (1942)

habeas corpus. Extending the Constitutional rights granted in Boumediene one step further, the District Court in Al Maqaleh v. Gates held that three of the four Bagram detainees could “invoke the protections of the Suspension Clause, and hence the privilege of habeas corpus.”

The District Court further declared that although the Bagram detention facility was located amidst an “active theater of war,” the detainees were “for all practical purposes, no different than the detainees at Guantánamo.”

As this paper will argue, the District Court’s resulting application of the Boumediene factors was fatally incorrect—and ultimately unworkable—as applied to Bagram for two reasons. First, the District Court’s multi-factor analysis inaccurately construes the applicable test created by the Supreme Court, resulting in a conclusion wholly inconsistent with the underlying rationale of Boumediene. This paper argues that when the factors are applied correctly, the facts surrounding the four Al Maqalah detainees will establish that Bagram, and its military detention facility, are fundamentally different than Guantánamo Bay. Second, the District Court erred by making factual presumptions about practicalities, when deference to the Executive Branch was more appropriate. This paper argues that by substituting its own judgment, the judiciary replaces the expertise and first-hand experience that the Executive branch and military have historically maintained, and increases the probability of subjective and inconsistent outcomes.

To further elaborate on these arguments, part one of this paper begins by explaining how habeas corpus, as applied to non-citizen detainees, has effectively evolved and continues to expand into new territory. Focus is primarily on the statutes and litigation arising since the 9/11 terrorist attacks. In particular, part one details the three influential factors established in

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7 604 F. Supp. 2d 205 (D.D.C. 2009)
8 Al Maqaleh, at 235.
9 Id. at 230.
Boumediene v. Bush\textsuperscript{10} as well as the Supreme Court’s denial of habeas corpus protection to the post-World War II detainees in Johnson v. Eisentrager.\textsuperscript{11} Together, these two decisions provide the guiding foundation for the Al Maqaleh v. Gates\textsuperscript{12} decision. Part two of this paper analyzes the D.C. District Court’s opinion in Al Maqaleh v. Gates. By first examining how the Al Maqaleh court separates the three Boumediene factors into six distinct ones, this paper is then able to explain how each factor, as it pertains to the Bagram detainees, is taken by the District Court and systematically compared to the circumstances surrounding Eisentrager and Boumediene. Within this breakdown, this paper details not only how the District Court’s application and conclusion is fundamentally at odds with Boumediene, but that its analysis is unworkable given Bagram’s distinctive context.

I. THE EXPANSION OF HABEAS CORPUS FOR ALIEN DETAINEES

The writ of habeas corpus was originally a common law right used to challenge the legality of detention.\textsuperscript{13} Although there is no explicit right to the writ of habeas corpus outlined in

\textsuperscript{11} Johnson v. Eisentrager, 339 U.S. 763 (1950).
\textsuperscript{13} In Preiser v. Rodriguez, 411 U.S. 475 (1973), the U.S. Supreme Court underscored the original breadth of the writ: “The original view of a habeas corpus attack upon detention under a judicial order was a limited one. The relevant inquiry was confined to determining simply whether or not the committing court had been possessed of jurisdiction. But over 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, even though imposed pursuant to conviction by a court of competent jurisdiction. . . . [I]n each case [the petitioner’s] grievance is that he is being unlawfully subjected to physical restraint and in each case habeas corpus has been accepted as the specific release from such confinement.” Id. at 485-86; see also INS v. St. Cyr, 533 U.S. 289, 301 (2001) (“At its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been the strongest.”); Black’s Law Dictionary 728 (8th ed. 2004) (defining habeas corpus as “[a] writ employed to bring a person before a court, most frequently to ensure that the party’s imprisonment or detention is not illegal”).
the Constitution, the Framers did not neglect its value in the separation-of-powers scheme they 
foresaw.14 Indeed, “few exercises of judicial power are as legitimate or as necessary as the 
responsibility to hear challenges to the authority of the Executive to imprison a person.”15 With 
this in mind, the Framers embedded what has become known as the “Suspension Clause,”16 a 
constitutional provision safeguarding the habeas writ’s privilege, only to be suspended in cases 
of “rebellion or invasion” as “public safety may require it.”17 In order to provide a literal 
mechanism for invoking the right, in 1948 Congress gave statutory life to the writ by enacting 28 
U.S.C. § 2241.18 What has transpired recently has been an intra-branch quarrel over the extent 
the habeas writ should be available to non-U.S. citizen detainees.19

A. From 9/11 to the Military Commissions Act of 2006

In the wake of the 9/11 attacks and the ensuing conflict that remains active today, 
thousands of individuals from a multitude of countries have been detained and sent to various 
military facilities abroad.20 In no small part, the Executive’s authority to conduct many of its

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14 For example, Alexander Hamilton notably recognized that “confinement of the person, by 
secretly hurrying him to jail, where his sufferings are unknown or forgotten, is a less 
public, a less striking, and therefore a more dangerous engine of arbitrary government.” The Federalist No. 84, at 512 (Alexander Hamilton) (C. Rossiter ed., 1961).
17 Id. (capitalization modernized). In full, the 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.” Id.
18 There are several statutory provisions outlining the various facets and procedures for invoking 
the writ found in §§ 2241 through 2255. Many of which have been significantly amended throughout the years. See, e.g., Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (1996). As discussed below, 
only the recent amendments to § 2241 involve the detainees discussed in this paper.
19 See generally Richard H. Fallon, Jr. & Daniel J. Meltzer, Habeas Corpus Jurisdiction, 
Substantive Rights, and the War on Terror, 120 HARV. L. REV. 2029 (2009); see also 
Bismullah v. Gates, 551 F.3d 1068, 1073 (2009) (noting that the “‘dialogue’ between the 
Court and Congress shows that the Congress’s overriding goal throughout was to limit 
judicial review available to detainees”).
20 See e.g., Lois Romano and David S. Fallis, Probe’s Detainees Shrouded in Secrecy - The 
Terrorist Hunt has Jailed Hundreds - Alarmed Civil-Rights Advocates Want Answers,
operations, including detention, derives from the Authorization For Use Of Military Force ("AUMF"). The AUMF was enacted on September 18, 2001 and authorizes the President “to use 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…” With such a broad authorization of power, it was no surprise that the applicability of the habeas writ—the very purpose of which is to curtail excessive Executive power—was questioned regarding the increasing Executive detentions.

The first time the U.S. Supreme Court addressed the issue was in the 2004 case Rasul v. Bush. Rasul involved habeas petitions filed by Guantánamo Bay detainees who were captured in Pakistan and Afghanistan and declared as “enemy combatants.” In a 6-3 decision, the Supreme Court held that the federal statutory provision granting the writ of habeas corpus, 28 U.S.C. § 2241, could be invoked by the detainees at Guantánamo Bay.

A year after Rasul and another decision issued the same day regarding a U.S. citizen detained as an “enemy combatant,” Congress responded by passing the Detainee Treatment

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22 Authorization For Use of Military Force (AUMF), 50 U.S.C. § 1541 (2001); see also Hamdi v. Rumsfeld, 542 U.S. 507, 510 (2004) (“On September 11, 2001, the al Qaeda terrorist network used hijacked commercial airliners to attack prominent targets in the United States. Approximately 3,000 people were killed in those attacks. One week later, in response to these ‘acts of treacherous violence,’ Congress passed [the AUMF]. Soon thereafter, the President ordered United States Armed Forces to Afghanistan, with a mission to subdue al Qaeda and quell the Taliban regime that was known to support it.”).
23 See Boumediene v. Bush, 128 S.Ct. 2229, 2283 (“[T]he central purpose of habeas corpus is to test the legality of executive detention…”).
25 Id.; The Executive designation “enemy combatant” is discussed below.
26 Rasul, at 484 (“We therefore hold that § 2241 confers…jurisdiction to hear petitioners’ habeas corpus challenges to the legality of their detention at the Guantánamo Bay Naval Base.”).
27 See Hamdi v. Rumsfeld, 542 U.S. 507 (discussing, inter alia, the Due Process rights of a U.S. citizen detained on an Afghanistan battlefield as designated an “enemy combatant”).
Act of 2005 (“DTA”). Among other things, the DTA defines the applicable measures to test the legality of an alien’s detention. Of controversial significance, was the amendment to § 2241 of the federal habeas statute. After the DTA’s enactment, federal courts were effectively stripped of their jurisdiction over all habeas petitions coming out of Guantánamo Bay.\(^{29}\) As a substitute, the DTA provided that a Combatant Status Review Tribunal (“CSRT”) would be implemented in order to determine “the status of the detainees held at Guantánamo Bay.”\(^{30}\) For Afghanistan and Iraq, the DTA mandates that procedures be implemented to determine “the status of aliens detained” there as well.\(^{31}\) These procedures, established and submitted to Congress by the Secretary of Defense,\(^{32}\) essentially determined whether or not the alien detainee was an “enemy combatant.” The DTA also added to § 2241, a limited judicial review of the CSRT determinations, to be carried out exclusively by the United States Court of Appeals for the District of Columbia Circuit.\(^{33}\)

However, a year later in 2006, the Supreme Court decided another influential case: *Hamdan v. Rumsfeld*.\(^{34}\) Among other things, the Court held that the DTA’s provisions did not apply to the numerous habeas petitions pending at the time of its enactment.\(^{35}\) In direct response


\(^{29}\) See Id., §§ 1002-1006.

\(^{30}\) See 28 U.S.C. § 2241(e)(1) (as amended by DTA, § 1005(e)(1)) (“[N]o 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 Guantánamo Bay, Cuba . . . .”).

\(^{31}\) DTA, § 1005(a)(2)(A).

\(^{32}\) DTA, § 1005(a)(1)(B).

\(^{33}\) DTA, § 1005(a)(1).

\(^{34}\) See 28 U.S.C. § 2241(e)(2) (as amended by DTA, §1005(e)(1)). (“[T]he 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 Combatant Status Review Tribunal that an alien is properly detained as an enemy combatant.”).


\(^{36}\) See Hamdan, at 575-75.
a few months later, Congress enacted the Military Commissions Act of 2006 (“MCA”). In addition to explicitly declaring that the jurisdiction-stripping provision applied retroactively, MCA § 7(a) further refined the federal habeas statute. As amended, § 2241 now made clear that no court would have jurisdiction over any alien detainee’s habeas petition, regardless of location, if they had been determined to be an “enemy combatant or [were] awaiting such determination.” In regards to judicial review, MCA § 7(a) still maintained the previous judicial review, limited in scope to the CSRT determinations.

B. Setting Standards for the Suspension Clause’s Reach

Although Rasul extended statutory habeas rights to the detainees at Guantánamo, Congress hastily took them away. To assess whether Congress’ legislative preclusion was lawful, and thus a constitutional invocation of the Suspension Clause, the pertinent question was whether alien detainees held outside the United States were even entitled to limited protection of the Constitution. Two Supreme Court decisions have been influential guides for determining the extraterritorial reach of the Suspension Clause: Johnson v. Eisentrager and Boumediene v. Bush. Although each case is scrutinized in a compare-and-contrast manner by the Al Maqaleh court, as

37 MCA, Pub. L. No. 109-336, 120 Stat. 2600 (2006); see also Hamdan, at 636 (“Nothing prevents the President from returning to Congress to seek the authority he believes necessary.”) (Breyer, J., concurring); Boumediene v. Bush, 128 S.Ct. 2229, 2243 (“If this ongoing dialogue between and among the branches of Government is to be respected, we cannot ignore that the MCA was a direct response to Hamdan’s holding that the DTA’s jurisdiction-stripping provision had no application to pending cases.”).

38 See MCA, § 7(b) (clarifying that the jurisdiction-stripping amendments “shall take effect on the date of the enactment of this Act, and shall apply to all cases, without exception, pending on or after the date of the enactment of this Act which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention of an alien detained by the United States since September 11, 2001.”).

39 28 U.S.C. § 2241(e)(1) (as amended by MCA, § 7(a)) (“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 United States to have been properly detained as an enemy combatant or is awaiting such determination.”).

40 See supra, note 34.
is discussed later, it is important to understand the preliminary framework of their respective analysis.

1. Johnson v. Eisentrager

Although occurring decades before 9/11 and the subsequent detainee issues, Johnson v. Eisentrager\textsuperscript{41} questioned whether habeas rights should be extended to detainees at the post-World War II prison in Landsberg, Germany.\textsuperscript{42} In their analysis, the court noted numerous practical difficulties that would be faced if awarding habeas protections to the detainees there. For example, the Eisentrager court found troublesome that granting the writ would “require allocation of shipping space, guarding personnel, billeting and rations.”\textsuperscript{43} That providing the right “would hamper the war effort,” “bring aid and comfort to the enemy,” and “diminish the prestige of our commanders.”\textsuperscript{44} The Court also described the difficulties underlying the potential dangers inherent in the prison’s location. Noted recently, the Supreme Court stated that “the [Eisentrager] Court was right to be concerned about judicial interference with the military’s efforts to contain ‘enemy elements, guerrilla fighters, and were-wolves’” and other “security threats from a defeated enemy.”\textsuperscript{45} Other than the practical concerns, the Eisentrager Court noted that each detainee:

(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.\textsuperscript{46}
Taking each factor into consideration the Court ultimately concluded that the detainees should not receive the privilege of habeas corpus.47

2. Boumediene v. Bush

On the other end of the spectrum and just a short time ago, the Supreme Court again undertook an analysis in Boumediene v Bush48 to determine the reach of the Suspension Clause.49 This time, the detainees petitioning for habeas corpus were just off the United States coast, at the Guantánamo Bay detention facility. The significance of Boumediene is unprecedented as it granted constitutional rights to non-U.S. citizens that had never stepped foot on American soil and had been declared “enemy combatants” by the U.S.50 Boumediene’s extensive opinion outlined the chronological history of the habeas writ and dissected the limited case law, including Eisentrager, to establish a more functional approach to the Suspension Clause inquiry.

Decided in 2008, Boumediene was the next forceful word to the intra-branch “dialogue” that had commenced after 9/11. With the MCA provisions applying, Boumediene examined the circumstances at Guantánamo Bay to conclude not only that the Suspension Clause extended to the facility at the southern point in Cuba, but that the jurisdiction-stripping provision of MCA § 7(a), as applied to these detainees, was an unconstitutional suspension of writ. Declaring that “questions of extraterritoriality turn on objective factors and practical concerns, not formalism,”51 the Boumediene Court constructed a test as the proper guide:

47 Id.
48 Boumediene, 128 S.Ct. 2229.
49 Id.
50 Id.
51 Id. at 2258. see Reid v. Covert, 354 U.S. 1 (1958); see also “The Insular Cases”: Delima v. Bidwell, 182 U.S. 1 (1901); Dooley v. United States, 182 U.S. 222 (1901); Armstrong v.
At 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

Following Boumediene, it was clear that not all questions were answered. Although habeas petitions have been continuously filed by now constitutionally protected Guantánamo detainees,53 the U.S. has faced transcending burdens involving the inherent repatriation and disposition issues—from both habeas relief due to lacking evidence54 and the President’s order to close Guantánamo by early 2010.55 And more recently, focus has turned to the escalated Afghanistan conflict, and relevant here, the detention center at Bagram.56 Al Maqaleh v. Gates,57 set out as the first application of the factors enunciated in Boumediene.58 The issue: whether the Suspension Clause extends to the detainees held, amidst a theater of war, in Bagram’s detention facility.

52 Id. at 2259.
58 Id.
II. AL MAQALEH V. GATES

Al Maqaleh v. Gates involves four detainees petitioning for a writ of habeas corpus, challenging their detention at the Bagram detention facility located 40 miles north of Kabul in Afghanistan. Although fundamentally different facts are involved, including in no small part the surrounding active hostilities, essentially the same outlying question that was asked in Boumediene is repeated: “whether foreign nationals, apprehended and detained in distant countries during a time of serious threat to our Nation’s security, may assert the privilege of the writ and seek its protections.”\(^{59}\) This paper argues no—that Bagram is significantly different than Guantánamo Bay, and the Al Maqaleh court erred by concluding otherwise.

A. The Four Detainees at Bagram

Fadi Al Maqaleh is a 27 year-old Yemeni citizen who was taken into U.S. custody in 2003.\(^{60}\) He claims that he was detained outside of Afghanistan, but does not specify where.\(^{61}\) His father filed the habeas action on behalf of his son in September of 2006.\(^{62}\) Amin Al Bakri is a 40 year-old Yemeni citizen and was taken into U.S. custody while in Thailand in December 2002.\(^{63}\) His father also filed the habeas petition on his behalf.\(^{64}\) Redha Al Najar is 44 years old and has been detained for more than six years.\(^{65}\) He is a Tunisian citizen and was apprehended

\(^{60}\) Joint Brief for Petitioners-Appellees, at 2, Al Maqalah v. Gates, Docket Nos. 09-5265, 09-5255, 09-5277 (D.C. Cir. 2009) [hereinafter Appellees Brief].
\(^{61}\) Appellees Brief, at 2.
\(^{62}\) Id.; But see Declaration of Col. James W. Gray, Commander of Detention Operation (swearing under oath that Fadi Al Maqaleh was captured in Zabul, Afghanistan).
\(^{63}\) Id. at 3.
\(^{64}\) Id.
\(^{65}\) Id.
in 2002 while in Pakistan.\textsuperscript{66} Al Najar’s brother filed his habeas petition in December of 2008.\textsuperscript{67} Haji Wazir is a citizen of Afghanistan and has been a detainee since 2002 when he was captured in Dubai.\textsuperscript{68} Assuming Al Maqaleh’s assertion that he was captured in “not Afghanistan,” three of the four detainees were captured outside Afghan borders and then taken into the territory. Further, all petitioners, minus Wazir, maintain citizenship of a country different than the one they are being held in.\textsuperscript{69}

Of the numerous military facilities being operated in Afghanistan, the detainees are located at the largest: Bagram Airfield.\textsuperscript{70} In particular, among other multi-national installations within Bagram Airfield the petitioners are currently being held in the detention facility operated by U.S. forces.\textsuperscript{71} Although the U.S. controls the overall security at Bagram Airfield, many other nations are also present and each has its respective control over their individual compounds.\textsuperscript{72} The nations present are either part of the “American-led military coalition” or the International Security Assistance Force (ISAF) of the North Atlantic Treaty Organization (NATO).\textsuperscript{73} ISAF consists of 41 countries and represents approximately 38,000 non-U.S. troops currently deployed in Afghanistan,\textsuperscript{74} 20,000 of which are headquartered at Bagram Airfield.\textsuperscript{75} Under the United Nations Security Council Resolutions, ISAF’s mission is to “support the Afghan government in

\textsuperscript{66} Id.
\textsuperscript{67} Id.
\textsuperscript{69} Id.
\textsuperscript{70} See Brief for Respondents-Appellants, at 5, Al Maqalah v. Gates, Docket Nos. 09-5265, 09-5255, 09-5277 (D.C. Cir. 2009) [hereinafter Government/Appellant Brief].
\textsuperscript{71} Government/Appellant Brief, at 6.
\textsuperscript{72} Id.
\textsuperscript{73} Id., at 7
\textsuperscript{75} Government/Appellant Brief, at 7.
the maintenance of security in Afghanistan.” The current lease the U.S. and Afghanistan entered into regarding Bagram was in 2006 and stipulates that “all facilities and land located at Bagram Airfield [are] for use by the United States and Coalition Forces for military purposes.” The lease also states that Afghanistan “is the sole owner of the premises” and “has the right without any restrictions, to grant the use of the premises.” The government contends that approximately 600 “of the thousands of individuals detained have been subject to long-term detention under the AUMF in accordance with the laws of war”—four of which petitioned to invoke the Suspension Clause.

B. An Unworkable Application of the Boumediene Factors

Although the Al Maqaleh v. Gates “calls for the first application of the multi-factor functional test crafted by the Supreme Court in Boumediene,” the court thought it prudent to make an alteration, separating the three explicit factors into six of their own:

Boumediene concluded that “at 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.”

For the sake of analysis, these three factors can be subdivided further 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)

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77 Government/Appellant Brief, at 7.
78 See Id. at 7.
79 Id. at 9; see also supra, notes 21-22 and accompanying text.
81 Al Maqaleh, at 207-08.
the practical obstacles inherent in resolving the petitioner’s entitlement to the writ.\(^8\)

At first glance, the dissection seems logical given the grammatical formulation expressed in *Boumediene*, however when the unique circumstances defining each factor are given weight in the balancing schema, the corresponding differences from *Boumediene*’s application are apparent. Further, as is seen in the *Al Maqaleh* opinion, by subjectively applying its own presumptive judgment against the underlying principle emphasized by *Boumediene*—that “questions of extraterritoriality turn on objective factors and practical concerns”\(^3\) — the court applies the factors in a manner inconsistent with direct precedent and without due consideration for the Executive’s historical authority.\(^4\)

1. **Citizenship**

At the onset, it should be noted that despite its abrupt separation of the *Boumediene* factors, the court then reconfigures its analytical framework by grouping together first what it believes are the factors of lesser weight (citizenship, status, and site of apprehension) and then addressing the remaining “primary drivers” (site of detention, adequacy of process, and practical

\(^8\) Id. at 214-15 (quoting *Boumediene* v. Bush, 128 S.Ct. 2229, 2259 (2008)).


\(^4\) Ironically, throughout its opinion, the *Al Maqaleh* court frequently emphasizes the importance of deferring to the Executive’s judgment on certain matters, yet in the sometimes the very same paragraph, belittles the parallel branch’s assertions, substituting them with unsubstantiated conclusions. To illustrate: “[The separation-of-powers doctrine] requires, as well, that the Judiciary accord proper deference to the political branches, particularly during conflicts abroad where the Executive must retain ‘substantial authority to apprehend and detain those who pose a real danger to our security,’ ” *Al Maqaleh*, at 208 (quoting *Boumediene*, at 2277); “[T]he political branches are entitled to a ‘healthy deference . . . in the area of military affairs,’ ” Id. at 217 (quoting Rostker v. Goldberg, 453 U.S. 57, 66 (1981)).
obstacles) within individual sections.\footnote{See Al Maqaleh, at 218 (“It is evident from the rather cursory analysis of these three factors that the remaining three factors—site of detention, adequacy of process, and practical obstacles—were the primary drivers of the Supreme Court’s decision in Boumediene.”).} For the sake of clarity, this paper addresses the factors in this manner as well.

The first factor the court took under consideration was the citizenship of the detainees.\footnote{Al Maqaleh, at 217-18.} Noting that, “[l]ike the petitioners in Boumediene, none of the [Bagram] petitioners . . . are U.S. citizens,”\footnote{Id. at 218.} the Al Maqaleh court reiterated that “U.S. citizenship helps petitioners whereas foreign citizenship does not.”\footnote{Id. at 218-19.} The court did mention however, that a detainee’s citizenship could also play a role under the “practical obstacles” factor due to the possibility of political friction.\footnote{See Al Maqaleh, at 219, FN. 10 (“A detainee’s citizenship can also create friction with a host government. The Court discusses this aspect of citizenship under the ‘practical obstacles’ factor.”).} Although this argument is further developed later in the opinion, Boumediene undertook no such inquiry of the “citizenship” factor in this context. All that should be taken from the defining precedent is that citizenship alone is not determinative to the extraterritorial reach of the Constitution, and that not being a U.S. citizen weighs against the petitioner.\footnote{See Boumediene, at 2256-57 (noting the citizenship-as-a-factor discrepancies between In re Ross, 140 U.S. 453 (1891), and Reid v. Covert, 351 U.S. 487 (1956), the Court clarified that citizenship was not wholly determinative of the Constitution’s extraterritorial reach); cf. Reid, 354 U.S. at 75 (“[W]hat Ross and the Insular Cases hold is that the particular local setting, the practical necessities, and the possible alternatives are relevant to a question of judgment . . . ”).} As it created “citizenship” as a factor unto itself, the Al Maqaleh court appropriately concluded that it “weigh[ed] against a finding that [the petitioners] may invoke the protections of the Suspension Clause.”\footnote{Al Maqaleh, at 219.} Ironically, as will be discussed below, “citizenship” proved to be dispositive in the court’s overall analysis. As the distinguishing attribute between the detainees was Wazir’s
Afghan citizenship, the court concluded that the other three “may invoke the protection of the Suspension Clause but that [he] may not.”

2. **Status**

Regarding the “status” factor, the applicable inquiry turns upon the classification given to the detainees, namely as “enemy combatants.” The court’s purpose for sequestering the “status” factor is puzzling seeing as the *Al Maqaleh* court itself undertook no analysis of the factor, and undermined its value in the overall comparative balance. Not surprisingly the Bagram petitioners contested their classification as “enemy combatants,” but of course this did not tip the constitutional scales in their favor. It would be absurd to allow a petitioner’s mere assertion to affect the analysis. If something of value was taken from this factor, the opinion seems to suggest that the court used it to bolster the importance and therefore the respective weight of the “adequacy of process” factor. As the court stated, “the breadth of the definition of

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92 *Id.* at 233.

93 Although the government subsequently refined their definition of “enemy combatant,” the court adhered to their previous proposition. *Id.* at 219, FN.11. Thus, the court recognized “enemy combatant” as follows: “At a minimum, the President’s power to detain includes the ability to detain as enemy combatants those individuals who were part of, or supporting, forces engaged in hostilities against the United States or its coalition partners and allies. This includes individuals who were part of or directly supporting Taliban, al-Qaida, or associated forces, that are engaged in hostilities against the United States, its coalition partners or allies. This also includes any persons who have committed a belligerent act or supported hostilities in aid of enemy forces.” *Id.* at 219. Dissolving the “enemy combatant” designation, the Obama administration presented the following on Mar. 13, 2009: “The President has the authority to detain persons that the President determines, planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, and persons who harbored those responsible for those attacks. The President also has the authority to detain persons who were part of, or substantially supported, Taliban or al Qaida forces or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act, or has directly supported hostilities, in aid of such enemy forces.” See, e.g., Hamilily v. Obama, 616 F. Supp. 2d 63 (D.D.C 2009); cf. Military Commissions Act of 2009, Pub. L. No. 111-84 (2009) (defining “unprivileged enemy belligerents”).

94 *See Id.* at 219 (“[T]his Court, like the Supreme Court in *Boumediene*, finds little in the ‘status of the detainee’ factor to counsel in favor of or against extension of the Suspension Clause.”).
‘enemy combatant’ utilized by [the government] underscores the need for a meaningful process to ensure that detainees are not improperly classified as enemy combatants.”  

While true, it should also be noted that “breadth” the Executive yields is derived from an equally broad delegation of authority under the AUMF.  

3. Site of Apprehension  

Arguably the most substantial departure from the Boumediene factors is the Al Maqaleh court’s interpretation of the “site of apprehension” factor. Indeed the court observed forthright that Boumediene only consisted of a minimal and “rather cursory analysis” of this factor.  

However, what the Al Maqaleh court misunderstood was that the prong’s focus turned on whether the apprehension was made within sovereign U.S. territory. The extent of Boumediene’s analysis on this factor is contained in only two sentences:  

[R]elevant to this analysis, the detainees here are similarly situated to the Eisentrager petitioners in that the sites of their apprehension . . . are technically outside the sovereign territory of the United States. As noted earlier, this is a factor that weighs against finding they have rights under the Suspension Clause.  

Instead of following this guideline, the Al Maqaleh court continues astray, declaring that “the site of apprehension plays a more important, albeit more subtle role” here, than for the Guantánamo Bay detainees. To substantiate this claim, the court compares “Bagram detainees captured in Afghanistan” with “Bagram detainees who, like petitioners [here], were captured elsewhere.”  

The court goes on by concluding that the detainees here, would “have a stronger claim to habeas rights through the application of the Suspension Clause than would Bagram detainees captured in
Afghanistan.”101 Again, no such comparison was ever indicated by Boumediene, nor are any detainees fitting the description of the former situation involved in this litigation. Continuing, the Al Maqaleh court attempts to justify its assertions by reiterating the need to curtail the Executive’s ability to turn the Constitution off and on as it pleases. The point is well-served, as under the court’s theory the Executive could potentially render any of its detainees to a facility where the Suspension Clause is less likely to reach, and “[s]uch rendition resurrects the same specter of limitless Executive power the Supreme Court sought to guard against in Boumediene.”102 However, the court misconstrues the practicalities of its presumption. The Al Maqaleh opinion fails to consider the possibility that rendition may not be evidence of the Executive’s strategy to control the Constitution’s extraterritorial jurisdiction. On the contrary, it is entirely reasonable—and quite understandable—to believe that detainees may be transferred to different locations based on administrative necessity or perhaps to consolidate operations in a more centralized location. This scenario seems probable here, where Bagram Airfield is the largest military facility in the area and likely contains the adequate resources and security measures needed to house detainees. Further, it is unlikely that an adequate detention facility exists in every country that could possibly be used one day to hold a detainee. It is entirely untenable to subject the military to scheme where they must decide, either to keep an individual in the country he was detained in, or else transfer him and thus move him closer to the Constitution’s reach. These problems are further compounded by an issue involving one of the Bagram detainees here. Petitioner Al Maqaleh claims, absent any supporting evidence, that he was apprehended outside Afghanistan’s borders.103 Despite a sworn declaration stating the

101 Id. at 221.
102 Id. at 220.
103 See Id. at 209.
contrary,\(^{104}\) the court has accepted as true the detainee’s assertions due to the requisite standard under a motion to dismiss.\(^{105}\) The concern of preventing the Executive from engaging in limitless power is important, however, the analysis the *Al Maqaleh* court makes, and its resulting conclusion, does not take into account realistic concerns and disrupts the balance established by the precisely formulated factors in *Boumediene*.

4. **Site of Detention**

“The touchstone of the site of detention factor is the ‘objective degree of control’ the United States has over Bagram.”\(^{106}\) In *Boumediene*, the court undertook this analysis by comparing Guantánamo to the best available measurement: Landsberg Prison, the facility at the center of the *Johnson v. Eisentrager* habeas determination.\(^{107}\) In *Al Maqaleh*, the court examined the two most relevant cases, *Boumediene* and *Eisentranger*, and based its analysis as if each of the two decisions represented competing poles. Noting the similarities and differences of each of the facilities, the court inquired to “both the degree and duration of U.S. ‘control’ at Bagram to determine where Bagram [fell] on the Guantánamo-Landsberg spectrum.”\(^{108}\) At the outset, the court made clear the difficulty in objectively applying this formulation. “Comparing

\(^{104}\) See supra, note 62.

\(^{105}\) See *Al Maqaleh*, at 210-11 (“A motion to dismiss for lack of subject matter jurisdiction in habeas cases, like jurisdictional motions in other civil cases, is subject to review under the standards of the Federal Rules of Civil Procedure.” Additionally, “[a]t the stage when dismissal is sought, a petitioner’s habeas petition must be construed liberally, and the petitioner should receive benefit of all favorable inferences that can be drawn from the alleged facts.”); see also EEOC v. St. Francis Xavier Parochial Sch., 117 F.3d 621, 624 (D.C. Cir. 1997).

\(^{106}\) Id. at 221 (quoting Boumediene v. Bush, 128 S.Ct. 2229, 2252 (2008).

\(^{107}\) See *Boumediene*, at 2260-61 (“[T]here are critical differences between Landsberg Prison, circa 1950, and the United States Naval Station at Guantánamo Bay in 2008,” however, “[i]n every practical sense Guantánamo is not abroad; it is within the constant jurisdiction of the United States.”).

\(^{108}\) Id. at 221-22.
the objective degree of control the United States has exercised at the sites of detention separated by time and space is necessary and exercise in rough approximation.”

Indeed there are key differences between all three of the facilities, each exemplifying a uniqueness in character. In regards to the contrasting points between Guantánamo and Bagram, the court articulated many: (1) Contrary to “the U.S. lease at Guantánamo, the Bagram lease provides the United States with assignment and reversion authority”; (2) A Status of Forces Agreement (SOFA) “governs . . . U.S. presence in Afghanistan, and the very existence of a SOFA is a manifestation of the full sovereignty of the state on whose territory it applies”; (3) There is an enormous amount of “non-U.S. presence at Bagram—in addition to the U.S. allies who operate out of the base, a sizable population of Afghan workers” are constantly present; (4) “The Guantánamo lease provides the United States with complete jurisdiction and control over the military base” whereas at Bagram, “[c]riminal jurisdiction over Afghan workers or over allied personnel is beyond U.S. authority”; (5) Unlike Guantánamo, where occupation has been constant for over a century, the U.S. presence at Bagram began during the 2001 military operations there; and (6) The U.S. presence at Bagram is indefinite.

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109 Id. at 224.
110 Id. at 222.
111 Id. (internal quotations omitted); cf. Friedrich v. Friedrich, 983 F.2d 1396, 1401 (6th Cir. 1993) (“A military base is not sovereign territory of the United States.”).
112 Id. See also infra, PART II.A. The Four Detainees at Bagram; On the other hand, Guantánamo is confined to U.S personnel, with only a handful of Cuban workers and a
113 Id. (internal quotations omitted).
114 Id. at 223 (citing SOFA ¶ 7). Additionally, under the SOFA, the U.S. and Afghanistan may not be involved with civil claims against one another. Id. (citing SOFA ¶ 9).
115 See Id. at 224 (“[T]he United States has been at Bagram for less than a decade.”); see also Boumediene v. Bush, 128 S.Ct. 2229, 2258 (describing the history of Guantánamo bay and noting that “the United States continued to maintain the same plenary control it had enjoyed since 1898.”).
116 See Al Maqaleh, at 224-24 (noting that the U.S. “has declared that it only intends to stay until the current military operations are concluded and Afghan sovereignty is fully restored”). Additionally, although it had not occurred at the time the Al Maqaleh ruling was made, President Obama recently announced his Afghanistan military strategy. In pertinent part, President Obama stated: “And as Commander-in-Chief, I have determined that it is in our vital national interest to send an additional 30,000 U.S. troops to Afghanistan. After 18
Although substantially fewer in number, the court did find differences between Bagram and Landsberg Prison as well: (1) “[I]t is the United States, not the U.S. allies, that detains people” at the Bagram detention facility; 117 (2) The post-World War II declaration in Germany does not provide any exclusive powers to the U.S.; 118 and (3) the “Agreements on Germany four years later established that the United States and its allies would work together in exercising their retained powers over the three western zones.” 119

Taking these factors together, the Al Maqaleh court concluded that in regards to the “objective degree of control,” Bagram was “much closer to Guantanamo.” 120 But that in regards to the duration, “Bagram appears to be closer to Lansberg than Guantanamo.” 121 Furthermore, while the court said that the factor did “not favor petitioners to quite the extent” that Boumediene attributed to the Guantánamo detainees, it noted that it was “still fair to say that the United States has a high objective degree of control.” 122

As articulated earlier, the inherent problem here is with the factor itself. The Al Maqaleh court’s goal from the beginning was to determine the “objective degree of control.” 123 A thorough and complex compare-and-contrast analysis is wholly unnecessary to determine that the U.S. has “a high objective degree of control” over Bagram. As the court made clear early on, “[s]uch operational control over Bagram is unsurprising because . . . ‘that’s basically true of any

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117 Al Maqaleh, at 224.
118 Id. at 223.
119 Id.
120 Id. at 225.
121 Id.
122 Id.
123 As the court began its analysis: “The touchstone of the site of detention factor is the ‘objective degree of control’ the United States has over Bagram.” Id. at 221 (quoting Boumediene v. Bush, 128 S.Ct. 2229, 2252 (2008)).
military facility.’” So the only plausible next step is to make a comparison involving the only relevant jurisprudential standards. However, therein lays the next problem. A court is going to be hard-pressed to find enough concrete similarities to a post-World War II, Allied-Force-controlled prison to tip the scale away from further extending the Suspension Clause’s reach. And presumably, if Al Maqaleh v. Gates is affirmed as is, how will this new contender be associated with future application of the Boumediene factors? Perhaps implemented into a Lansberg-Bagram spectrum, effectively shortening the theoretical void the Suspension Clause is held between? Regardless, unlike its application of other factors, the Al Maqaleh court made an appropriate analysis under the “site of detention” factor.

5. Adequacy of Process

Carrying on the tradition of the Landsberg-Guantánamo spectrum, the Al Maqaleh court examined each of the status determination procedures at issue in Eisentrager and Boumediene. “Once those two points of comparison [were] established, the court [compared] the process used to make the status determinations at Bagram.” The opinion in Al Maqaleh first described, as was done in Boumediene, the process used in post-World War II Germany to determine whether the detainee was an “enemy alien”:

The Eisentrager petitioners were [1] charged by a bill of particulars that made detailed factual allegations against them. To rebut the accusations, they were entitled to [2] representation by counsel, [3] allowed to introduce evidence on their own behalf, and [4] permitted to cross-examine the prosecution’s witnesses.

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124 Id. at 222 (quoting the government-respondent at oral arguments).
125 Al Maqaleh, at 226.
126 Id. at 226 (quoting Boumediene, 128 S.Ct. at 2259-60 (internal citations omitted).
Next, the *Al Maqaleh* court examined the relevant CSRT procedures used at Guantánamo Bay prior to being declared an unconstitutional suspension of the privilege to habeas corpus. In pertinent part, the following contains the *Boumediene*’s findings on the inadequacies of the CSRTs:

Although the detainee is [1] assigned a “Personal Representative” to assist him during CSRT proceedings, . . . that person is not the detainee’s lawyer or even his “advocate.” [2] The Government’s evidence is accorded a presumption of validity. [3] The detainee is allowed to present “reasonably available” evidence, but his ability to rebut the Government’s evidence against him is limited by the circumstances of his confinement and his lack of counsel at this stage. And although the detainee can [4] seek review of his status determination in the Court of Appeals, that review process cannot cure all defects in the earlier proceedings.128

And relevant to the Bagram detainees, the *Al Maqaleh* court summarized:

The [1] initial “enemy combatant” determination is made “in the field.” For detainees at Bagram, the initial determination is [2] reviewed within 75 days, and then [3] [reviewed] every six months thereafter. [4] The reviewing body is the Unlawful Enemy Combatant Review Board (“UECRB”), a panel of three commissioned officers. [5] The UECRB reviews “all relevant information reasonably available,” and [6] detainees have the opportunity to make a written statement. [7] The UECRB then makes a recommendation by majority vote to the Commanding General as to the detainee’s status. [8] There is no recourse to a neutral decision-maker.129

As is immediately apparent, and was conceded by the government, the UECRB is substantially limited, even in comparison to the inadequate CSRT procedures. The *Al Maqaleh* court was correct to find that “the adequacy of process factor strongly supported extension of the Suspension Clause . . . even more strongly” than in *Boumediene*.130

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127 See also, infra, PART I.A., From 9/11 to the Military Commissions Act of 2006 (describing the history of the litigation and statutory enactments surrounding the CSRT’s implementation).
128 *Al Maqaleh*, at 226-27 (quoting *Boumediene*, at 2260) (internal citations omitted).
129 *Id.*
130 *Id.* The court also made clear that it “need not determine how extensive process must be to stave off the reach of the Suspension Clause to Bagram. It suffices to recognize that the UECRB process at Bagram falls well short of what the Supreme Court found inadequate at Guantanamo.” *Id.* at 227; see also *Boumediene*, 128 S.Ct at 2260.
It should be noted however, that since *Al Maqaleh* was decided, the UECRB process has been refined and arguably improved—in no small part due to its blatant failure to pass the first stage of the Suspension Clause analysis. The new policies, implemented in July of 2009, more closely reflect the CSRT’s procedures, however its upcoming review at the D.C. Circuit may prove it to be short-lived, sending the Department of Defense back to the drawing board once again.\(^{131}\) The procedures designated under the Detainee Review Board (DRB) provides that a U.S. military officer will be assigned as the detainee’s “personal representative” and “shall act in the best interests of the detainee.”\(^{132}\) The personal representative will be responsible for gathering and presenting evidence reasonably available in the light most favorable to the detainee.\(^{133}\) Additionally the DRB provides that all detainees will receive interpreters, “timely notice of the basis of their detention, [and] unclassified summaries of the supporting facts” against them.\(^{134}\) The DRB personnel will further be governed by the procedures “in Army Regulation 190-8, as supplemented with additional procedures.”\(^{135}\) Among the additional procedures, the military boards will provide a “reasonable investigation into any exculpatory information the detainee offers and notice to the detainee of the purpose of the hearing, an opportunity to present information, and the right to attend open sessions.”\(^{136}\)

Although improvements are seen, the DRB still lacks any method of judicial review by an art. III court. The DTA provided for judicial review, though limited, to the CSRT process and it was still held to “fall well short” of what was adequate.\(^{137}\) Considering the nature of Bagram,\(^{137}\) for a descriptive chart comparing the Army Regulation 190-8 procedures (which are in part applied to the new Bagram DRB) and the CSRT procedures used at Guantánamo Bay, see [http://www.defense.gov/news/Jul2007/CSRT%20comparison%20-%20FINAL.pdf](http://www.defense.gov/news/Jul2007/CSRT%20comparison%20-%20FINAL.pdf).\(^{137}\)

\(^{131}\) For a descriptive chart comparing the Army Regulation 190-8 procedures (which are in part applied to the new Bagram DRB) and the CSRT procedures used at Guantánamo Bay, see [http://www.defense.gov/news/Jul2007/CSRT%20comparison%20-%20FINAL.pdf](http://www.defense.gov/news/Jul2007/CSRT%20comparison%20-%20FINAL.pdf).

\(^{132}\) See Government/Appellant Brief, at 11.

\(^{133}\) Id.

\(^{134}\) Id.

\(^{135}\) See *infra*, note 131.

\(^{136}\) See Government/Appellant Brief, at 11-12.

the practical difficulties may allow some flexibility, but it may be more probable that a reviewing judge may find that a blanket preclusion of the branch responsible for implementing the writ’s protections is too inadequate.

6. Practical Obstacles

The final factor the Al Maqaleh court analyzed under the auspices of Boumediene, was “the practical obstacles involved in extending the Suspension Clause to Bagram.” According to this paper, the court in Al Maqaleh failed, by far, to give proper deference to the Executive branch’s expertise and assertion regarding operational necessities, judgments, and difficulties. To begin, the court highlights the underlying fact that should have explicitly framed each of its determinations under this factor—that Bagram is located in a theater of war. Citing to Boumediene’s guidance, the Al Maqaleh court reiterated that “arguments might ‘have more weight’ if [the facility] ‘was located in an active theater of war.’” Further showing that the court was well aware that the hostilities were in fact a reality and not a mere lingering probability, was its statement that Bagram “is under constant threat by suicide bombers and other violent elements.” However, as this paper argues, the court did not take the circumstances as serious as warranted and in any event, substantiated its judgment with conclusory determinations.

The Al Maqaleh court proceeds to first undermine the circumstances by concluding that if an allegedly adequate review process was provided elsewhere, then it could have likewise been available at Bagram. As the court saw it, “[i]f such a ‘rigorous adversarial process’ was provided

139 Id. at 228. (quoting Boumediene, at 2262).
140 Id. (citing to as an example, Bomber Strikes Outside Main U.S. Base in Afghanistan, VOICE SM. PRESS RELEASES & DOCUMENTS, 2009 WLNR 4173359 (Mar. 4, 2009).
at a hastily-constituted military tribunal in post-war China, then it strains credulity to believe that it is impractical to provide meaningful process to detainees held at a large, secure military base, like Bagram, under complete U.S. control.”\textsuperscript{141} On its face, the court neglects to remember that as it determined earlier, Bagram is not “under complete U.S. control.” Further, the court substitutes its judgment for the military officials facing the conflict first-hand and ignores the inherent difficulties of the “active theater of war” it had just spoken of.

Next, the court jumps into another hasty conclusion without considering the practical difficulties the government presented. According to the \textit{Al Maqaleh} court, any evidentiary or review board difficulties “are significantly mitigated today by technological advances.”\textsuperscript{142} The court again surmises that because certain procedures have been implemented in Guantánamo Bay, they can and should be implemented at Bagram, despite the hostilities right outside its doors.

Another conclusion made by the \textit{Al Maqaleh} court, and one that proved dispositive for one of the detainees, was that there could be political friction with Afghanistan for only one detainee.\textsuperscript{143} After its entire analysis, the court declared that because Wazir was a citizen of Afghanistan, his potential release “could easily upset the delicate diplomatic balance the United States has struck with the host government.”\textsuperscript{144} The first incorrect assumption the court makes is that releasing any of the other detainees \textit{won’t} cause friction. On the contrary, it is much more plausible to believe that the Afghanistan government will be extremely concerned if a court half the world away orders the release of an individual whom the current U.S. military forces assisting their country has designated as an “enemy combatant” and would much rather keep

\textsuperscript{141} \textit{Id.}
\textsuperscript{142} \textit{Id.}
\textsuperscript{143} See \textit{Id.} at 229-230.
\textsuperscript{144} \textit{Id.} at 230.
locked up. The practical difficulty in this scenario is just as real as the one the court outlines. Further, by allowing citizenship of the host country to be the determinative factor creates additional practical obstacles in and of itself. Under the court’s conclusion, the Suspension Clause’s reach will be in part based on the citizenship of the detainee as it relates to the country of detention. This is not aligned with any of the underlying principles found in Boumediene, or for that matter, any extraterritorial constitutional issue decided. Additionally, this conclusion could incentivize the Executive to hold detainees in countries that share their citizenship in order to create the possible chance of a friction should the detainee wish to test the legality of his imprisonment.

III. CONCLUSION

This paper examined the first application of the extraterritorial test enunciated in Boumediene v. Bush regarding the reach of the Suspension Clause to the detainees at the Bagram detention facility in Afghanistan. Although the factors are an adequate multi-factor test, the D.C. District Court was fundamentally wrong in its application to the facts under Al Maqaleh v. Gates. As the case is now under appeal with the D.C. Circuit, this paper argues that the decision will be reversed and will likely be litigated at the Supreme Court. Once there, it is likely that the Boumediene factors will be further clarified in their application, and the case will be remanded back for a new analysis. Although the jurisprudence has only just begun to substantially develop in regards to extraterritorial rights for non-U.S. detainees, the very fundamental framework of the Constitution plays heavily