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## *Al Maqaleh* and the Diminishing Reach of Habeas Corpus

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Rehan Abeyratne\*

## *Al Maqaleh* and the Diminishing Reach of Habeas Corpus

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## I. INTRODUCTION

On March 23, 2015, the United States Supreme Court granted certiorari and summarily disposed of *Al Maqaleh v. Hagel*.<sup>1</sup> This short, unremarkable order brought an end to almost a decade of litigation on behalf of detainees at Bagram Air Base, Afghanistan. This order has significant and potentially dangerous consequences. It leaves in place a D.C. Circuit precedent that effectively permits the Executive to determine how far and to whom the writ of habeas corpus will reach.

The *Al Maqaleh* litigation consolidated several habeas corpus petitions filed on behalf of Bagram detainees. It began in 2006 when petitioner Fadi al Maqaleh filed a writ of habeas corpus.<sup>2</sup> Al Maqaleh is a Yemeni citizen who alleged that he was captured outside Afghanistan in 2003.<sup>3</sup> Other petitioners' cases were later consolidated with this petition. These include the cases of Redha al Najjar, a Tunisian citizen, who alleges capture in Pakistan, and Amin al Bakri, a Yemeni citizen, who claims he was arrested while on a business trip to Thailand.<sup>4</sup> Both allege that they were captured in 2002,<sup>5</sup> and they filed habeas corpus petitions in 2008.<sup>6</sup> Significantly, all three detainees claimed they were captured outside Afghanistan—away from any battlefield—and had been extraordinarily rendered to Bagram to face indefinite and prolonged detention.<sup>7</sup>

The U.S. Government moved to dismiss these petitions for lack of jurisdiction under the Military Commissions Act of 2006 (MCA).<sup>8</sup> In

1. *Al Najjar v. Carter*, 135 S. Ct. 1581 (2015), *vacating as moot* 738 F.3d 312 (D.C. Cir. 2013).

2. *Al Maqaleh v. Gates (Al Maqaleh I)*, 604 F. Supp. 2d 205, 209 (D.D.C. 2009).

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.* Extraordinary rendition is a doctrine under which the President claims inherent authority to capture and transfer individuals to third countries to face interrogation and, in some cases, torture. See Louis Fisher, *Extraordinary Rendition: The Price of Secrecy*, 57 AM. U. L. REV. 1405, 1406 (2008); Margaret L. Satterthwaite, *Rendered Meaningless: Extraordinary Rendition and the Rule of Law*, 75 GEO. WASH. L. REV. 1333, 1336 (2007).

8. Military Commissions Act of 2006 § 7(a), Pub. L. No. 109-366 (2006) (“No court, justice, or judge shall have jurisdiction to hear” a habeas petition seeking the release “of an alien detained by the United States who has been determined . . . to have been properly detained as an enemy combatant or is awaiting such determination.”); *Al Maqaleh I*, 604 F. Supp. 2d, at 207. Congress enacted the MCA in response to the Supreme Court’s decision in *Hamdan v. Rumsfeld*, 548 U.S. 557

the 2008 case *Boumediene v. Bush*, the U.S. Supreme Court held the MCA unconstitutional for suspending the writ of habeas corpus to detainees at Guantanamo Bay, Cuba.<sup>9</sup> Justice Kennedy's majority opinion set forth a three-factor test to determine the reach of the Suspension Clause as applicable to detainees held outside U.S. territory.<sup>10</sup> These factors are:

- (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 of where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner's entitlement to the writ.<sup>11</sup>

The principal question presented in the *Al Maqaleh* litigation—whether the Suspension Clause reached petitioners at Bagram—turned on the interpretation and application of this three-factor test. In 2009, Judge John D. Bates of the U.S. District Court for the District of Columbia issued the first major opinion in *Al Maqaleh*.<sup>12</sup> It focused on the jurisdictional question as to whether the Suspension Clause applied to detainees at Bagram. Concluding that the Bagram petitioners “are virtually identical” to detainees in Guantanamo under the *Boumediene* factors, Judge Bates dismissed the government's motion to dismiss for lack of jurisdiction.<sup>13</sup> In May 2010, a three-judge panel of the U.S. Court of Appeals for the District of Columbia Circuit unanimously reversed.<sup>14</sup> Then-Chief Judge David B. Sentelle interpreted the second factor (site of apprehension and detention) and the third (practical obstacles) “overwhelmingly in favor” of the United States to dismiss the petitions.<sup>15</sup> The petitioners then returned to the District Court to present amended petitions containing new evidence that they argued would tip the *Boumediene* analysis in their favor.<sup>16</sup> The District Court, bound by the D.C. Circuit's decision, construed the *Boumediene* factors narrowly and dismissed the amended petitions.<sup>17</sup> The D.C. Circuit upheld this decision in (another) unanimous opinion

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(2006), which held that the jurisdiction-stripping provisions of the Detainee Treatment Act of 2005 did not apply to cases pending before Article III courts. The MCA retroactively applied these DTA provisions to all pending cases. See *Boumediene v. Bush*, 553 U.S. 723, 738 (2008) (“[T]he MCA was a direct response to *Hamdan*'s holding that the DTA's jurisdiction-stripping provision had no application to pending cases.”).

9. *Boumediene*, 553 U.S. at 723.
10. The Suspension Clause provides, “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.
11. *Boumediene*, 553 U.S. at 766.
12. See *Al Maqaleh I*, 604 F. Supp. 2d 205.
13. *Id.* at 208–09.
14. See *Al Maqaleh v. Gates (Al Maqaleh II)*, 605 F.3d 84 (D.C. Cir. 2010).
15. *Id.* at 97–99.
16. See *Al Maqaleh v. Gates (Al Maqaleh III)*, 899 F. Supp. 2d 10 (D.D.C. 2012).
17. *Id.* at 13.

authored by Judge Karen LeCraft Henderson.<sup>18</sup> Petitioners then filed a writ of certiorari before the U.S. Supreme Court in August 2014.<sup>19</sup> When the justices reached the case, however, none of the petitioners was in U.S. custody.<sup>20</sup> The Supreme Court therefore dismissed their petitions as moot and vacated the judgment of the D.C. Circuit.<sup>21</sup>

This Article examines the legal landscape surrounding the extra-territorial reach of the writ of habeas corpus following the Supreme Court's disposition of *Al Maqaleh*. It argues that the two D.C. Circuit opinions in this case misconstrued Supreme Court precedent and reached erroneous conclusions. On three issues in particular, the D.C. Circuit's legal conclusions are flawed.

First, the court misinterpreted the second *Boumediene* factor, which pertains to the site of apprehension and site of detention. Both D.C. Circuit opinions focus exclusively on the site of detention, ignoring the fact that all three of these detainees claim to have been apprehended outside Afghanistan and extraordinarily rendered to Bagram. Moreover, the court misread *Eisentrager*, a 1950 Supreme Court case considering the writ of habeas corpus in the context of German nationals detained following World War II, and *Boumediene* to confer primacy on U.S. sovereignty over the detention facility.<sup>22</sup> This marginalizes other aspects of the *Boumediene* three-factor analysis such as the objective degree of control over the facility and the indefinite nature of petitioners' detention.

Second, the D.C. Circuit misconstrued the practical obstacles factor as a separation of powers issue as opposed to a functional concern with extending the writ to Bagram. Judge Henderson's opinion for the D.C. Circuit is especially problematic in this regard.<sup>23</sup>

Third, and most worrisome, both D.C. Circuit opinions dismiss (without serious consideration) petitioners' claim that the Executive manipulated the site of detention—by choosing to hold petitioners at Bagram rather than at Guantanamo Bay—to escape the reach of

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18. See *Al Maqaleh v. Hagel (Al Maqaleh IV)*, 738 F.3d 312 (D.C. Cir. 2013).

19. Petition for Writ of Certiorari, *Al Najjar v. Carter*, 135 S. Ct. 1581 (2015) (No. 14-6575).

20. See Josh Gerstein, *U.S. Sends Two Prisoners to Yemen from Afghanistan*, POLITICO (Aug. 26, 2014), <http://www.politico.com/blogs/under-the-radar/2014/08/us-sends-two-prisoners-to-yemen-from-afghanistan-194510> [https://perma.unl.edu/T4WH-GHY5]; Sudarshan Raghavan, *U.S. Closes Last Detainee Site in Afghanistan as Troop Pullout Advances*, WASH. POST (Dec. 11, 2014), [https://www.washingtonpost.com/world/united-states-closes-last-detainee-site-in-afghanistan-as-troop-pullout-advances/2014/12/11/e238f10a-8140-11e4-9f38-95a187e4c1f7\\_story.html](https://www.washingtonpost.com/world/united-states-closes-last-detainee-site-in-afghanistan-as-troop-pullout-advances/2014/12/11/e238f10a-8140-11e4-9f38-95a187e4c1f7_story.html) [https://perma.unl.edu/YT44-4HTU].

21. See *Al Najjar v. Carter*, 135 S. Ct. 1581 (2015), *vacating as moot* 738 F.3d 312 (D.C. Cir. 2013).

22. See *Boumediene v. Bush*, 553 U.S. 723 (2008); *Johnson v. Eisentrager*, 339 U.S. 763 (1950).

23. See *Al Maqaleh IV*, 738 F.3d at 329–35.

habeas corpus.<sup>24</sup> A Senate Intelligence Committee's report on the CIA's detention and interrogation program published in December 2014 subsequently confirmed that senior officials in the Bush Administration ordered detainee transfers specifically to avoid habeas jurisdiction.<sup>25</sup> For these reasons, this Article argues that it is crucial that *Al Maqaleh* be abrogated. *Al Maqaleh* should not bind future courts tackling the difficult questions of how far and to whom the writ of habeas corpus should reach.

The Article proceeds in four parts. Part II provides factual background and a detailed summary of the major opinions in the *Al Maqaleh* litigation. Part III examines the site of apprehension prong of the *Boumediene* factors and argues that it should have played a more substantial role in the D.C. Circuit's jurisdictional analysis. It also critically examines the D.C. Circuit's formalistic approach to the site-of-detention factor. Part IV looks at the practical obstacles factor, tracing its development from *Eisentrager* through *Boumediene*. Part V looks at executive manipulation of writ jurisdiction and explains the gradual shift from Guantanamo Bay to Bagram Air Base as the principal detention site—a shift motivated, at least in part, by a desire to evade habeas corpus. The Article concludes that *Al Maqaleh* has unconstitutionally altered *Boumediene*'s test for the extraterritorial application of habeas corpus by empowering the Executive to “switch the Constitution on or off at will.”<sup>26</sup>

## II. AL MAQALEH: BACKGROUND AND PROCEDURAL HISTORY

### A. Facts of the Case

The petitioners in the *Al Maqaleh* litigation all alleged similar facts. Fadi al Maqaleh, a citizen of Yemen, was captured outside Afghanistan in approximately 2003.<sup>27</sup> Because Bagram detainees did not have access to counsel, the exact details of his arrest and detention are not known. Al Maqaleh's family only discovered that he was in U.S. custody through the International Committee of the Red Cross (ICRC).<sup>28</sup> In a letter to his father, al Maqaleh stated that he was U.S.

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24. *See id.* at 335–37; *Al Maqaleh v. Gates (Al Maqaleh II)*, 605 F.3d 84, 98–99 (D.C. Cir. 2010).

25. *See* SENATE SELECT COMMITTEE ON INTELLIGENCE, COMMITTEE STUDY OF THE CENTRAL INTELLIGENCE AGENCY'S DETENTION AND INTERROGATION PROGRAM (2014) [hereinafter SSCI REPORT], <http://www.intelligence.senate.gov/sites/default/files/documents/CRPT-113srpt288.pdf> [<https://perma.unl.edu/VK6L-3Q49>].

26. *Boumediene*, 553 U.S. at 765.

27. *See Al Maqaleh v. Gates (Al Maqaleh I)*, 604 F. Supp. 2d 205, 209 (D.D.C. 2009).

28. Joint Brief for Petitioners-Appellees at 2, *Al Maqaleh II*, 605 F.3d 84 (D.C. Cir. 2010) (No. 09-5265).

custody but included no information about his capture.<sup>29</sup> Al Maqaleh's habeas corpus petition initially alleged only that he was seized outside Afghan territory.<sup>30</sup> Subsequent amended petitions alleged that he was initially detained at Abu Ghraib prison in Iraq and transferred to Bagram in 2004 or 2005.<sup>31</sup> Al Maqaleh also alleged that he was detained in one or more CIA "black sites" and subjected to torture and other forms of cruel, inhumane, and degrading treatment.<sup>32</sup>

Redha al Najjar, a Tunisian citizen, resided in Karachi, Pakistan when he was captured in or around May 2002.<sup>33</sup> His petition alleges that plain-clothed Pakistani and French men took him from his home, in front of his wife and children.<sup>34</sup> The petition further alleges that, following his arrest, al Najjar was "disappeared" for approximately one and a half years.<sup>35</sup> In this period, he claims to have been placed in one or more CIA "black sites" and, like al Maqaleh, subjected to torture and other unlawful interrogation techniques.<sup>36</sup>

Amin al Bakri is a Yemeni citizen.<sup>37</sup> His petition alleges capture in Bangkok, Thailand on or around December 30, 2002.<sup>38</sup> It further alleges that he was a precious stones and shrimps merchant on a business trip when he was "disappeared by the United States."<sup>39</sup> Al Bakri's fate was unknown to his family until six months after his disappearance. At that time, they received a postcard through the ICRC in his handwriting informing them that he was detained in Bagram.<sup>40</sup>

29. Second Amended Petition for Writ of Habeas Corpus at 5, *Al Maqaleh v. Gates* (*Al Maqaleh III*), 899 F. Supp. 2d 10 (D.D.C. 2012) (No. 06-1669).

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

31. Second Amended Petition for Writ of Habeas Corpus, *supra* note 29, at 4. The U.S. Government contested whether Al Maqaleh was captured outside Afghanistan. It presented sworn declarations from military officials stating that he was captured in Zabul, Afghanistan. *See, e.g., Al Maqaleh II*, 605 F.3d at 87 (citing a sworn declaration from Colonel James W. Gray, Commander of Detention Operations).

32. Second Amended Petition for Writ of Habeas Corpus, *supra* note 29 at 4–5. Black sites were covert prisons established by the CIA in several countries including Afghanistan. Torture and other interrogation techniques that were illegal under both U.S. and international law were practiced at these sites. *See Layla Nadya Sadat, Ghost Prisoners and Black Sites: Extraordinary Rendition under International Law*, 37 CASE W. RES. J. INT'L L. 309, 315 (2006).

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

34. First Amended Petition for Habeas Corpus at 4–5, *Al Najjar v. Obama* (D.D.C. Apr. 4, 2011) (No. 08-2143).

35. *Id.* at 5.

36. *Id.*

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

38. Amended Petition for Habeas Corpus and Complaint for Declaratory and Injunctive Relief at 4, *Al Bakri v. Obama*, 660 F. Supp. 2d 1 (D.D.C. 2009) (No. 08-1307).

39. *Id.* "Disappeared" in this context refers to extraordinary rendition. *See supra* text accompanying note 7.

40. *Id.* at 4–5.

In that six-month period, the petition claims that al Bakri suffered injuries and serious abuse in CIA “black sites.”<sup>41</sup>

It is worth noting some important similarities among the three petitioners. First, all three allege that they were captured outside Afghanistan, away from any battlefield, and that none of the petitioners are citizens of Afghanistan. Second, they were all held virtually *incommunicado* at Bagram. Despite numerous requests from their U.S.-based attorneys, petitioners were never allowed to meet with or even speak on the telephone with legal counsel.<sup>42</sup> As a result, petitioners’ attorneys never operated with a full account of the factual circumstances surrounding their capture and detention. What little information emerged about their situation was pieced together from communications with family members. Through the ICRC, petitioners were periodically allowed to send messages and speak on the phone with their families.<sup>43</sup> Third, and most disturbingly, all these petitioners claim to have endured torture and other cruel, unusual, and degrading treatment in contravention of international law both at CIA “black sites” and at Bagram.<sup>44</sup>

## B. The Four Major Opinions

### 1. *Al Maqaleh I*

In April 2009, Judge Bates of the U.S. District Court for the District of Columbia issued the first major decision in the *Al Maqaleh* litigation (“*Al Maqaleh I*”).<sup>45</sup> His memorandum opinion ruled on the Government’s motion to dismiss the consolidated habeas petitions for lack of jurisdiction. In this procedural posture, petitioners had the burden of establishing the court’s jurisdiction, but their petitions would be construed liberally with all factual inferences weighed in their favor.<sup>46</sup> The principal issue for the court was whether the Suspension Clause of the U.S. Constitution applied to detainees at Bagram Air Base.<sup>47</sup>

Judge Bates’s opinion begins with a detailed overview of precedents pertaining to the extraterritorial reach of the Suspension Clause.<sup>48</sup> He correctly identified that, in this long line of cases,

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41. *Id.* at 5.

42. *See* Joint Brief for Petitioners-Appellees, *supra* note 28, at 5–6.

43. *Id.* at 2–5.

44. *See id.* at 5 (describing, inter alia, how several detainees have died as a result of inhumane treatment at U.S. detention facilities around the world while detainees at Bagram were threatened with dogs, photographed in “shameful and obscene positions,” and “placed in cages with a hook and a hanging rope from which they were blindfolded and hung for days.”).

45. *See* *Al Maqaleh v. Gates (Al Maqaleh I)*, 604 F. Supp. 2d 205 (D.D.C. 2009).

46. *Id.* at 211.

47. *Id.* at 207.

48. *Id.* at 214–17.

*Boumediene* is unique. As he put it, “[N]o case was so on point as to allow the [*Boumediene*] Court simply to apply established precedent. Instead, the Court constructed a new framework to address the specific question it faced.”<sup>49</sup> The specific question in *Boumediene*, according to Judge Bates, “is no different” from the issue posed in *Al Maqaleh*, and therefore “the analysis . . . must focus first and foremost on *Boumediene*.”<sup>50</sup>

In *Boumediene*, the Supreme Court held that section 7 of the MCA, which stripped federal courts of jurisdiction over habeas petitions from detainees at Guantanamo Bay, was an unconstitutional suspension of the writ.<sup>51</sup> The court noted, “[A]t least three factors are relevant in determining the reach of the Suspension Clause.”<sup>52</sup> Judge Bates subdivided them into six factors:

- (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 and site of detention; and (6) the practical obstacles inherent in resolving the petitioner’s entitlement to the writ.<sup>53</sup>

As a threshold matter, Judge Bates had to decide whether the *Boumediene* factors should be applied categorically to all detainees.<sup>54</sup> This is what the Government proposed. In its view, for instance, the site of apprehension factor turned only on whether detainees were captured in American territory; if they were not, the Court should end its inquiry and construe that factor in the Government’s favor.<sup>55</sup> Judge Bates rejected this categorical approach because, in his view, “*Boumediene* contemplated a more nuanced analysis” that focused on “objective factors and practical concerns.”<sup>56</sup> Crucially, he noted that the Government’s approach could have problematic consequences. It would allow the executive to “switch the Constitution on or off at will” and therefore nullify one of the core purposes of the writ—to provide a judicial check on executive detention practices.<sup>57</sup> In this vein, Judge Bates proposed a seventh factor: the period of detention without adequate review.<sup>58</sup> He noted that, as of 2009, petitioners had all been detained for more than six years and therefore “whatever ‘reasonable period of time’ the Executive was entitled had long since passed.”<sup>59</sup>

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49. *Id.* at 214.

50. *Id.*

51. *Boumediene v. Bush*, 553 U.S. 723, 792 (2008).

52. *Id.* at 766.

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

54. *Id.*

55. *Id.*

56. *Id.* at 216 (quoting *Boumediene*, 553 U.S. at 764).

57. *Id.* (quoting *Boumediene*, 553 U.S. at 765).

58. *Id.*

59. *Id.* (quoting *Boumediene*, 553 U.S. at 795).

In applying the *Boumediene* factors, Judge Bates carefully weighed the competing arguments on both sides. With respect to citizenship, the fact that none of the petitioners were U.S. citizens weighed against them, just as it did with the *Boumediene* petitioners.<sup>60</sup> Petitioners argued that the court should further make the distinction between citizens of friendly and belligerent nations.<sup>61</sup> Hence, the fact that petitioners were Yemeni and Tunisian—and not Afghan or Iraqi—should be construed in their favor. Judge Bates rejected this approach on the grounds that the Authorization for Use of Military Force (AUMF) applied to a terrorist “enemy” more broadly (including organizations or persons) and not to specific nations.<sup>62</sup>

The “status of the detainee” factor did not clearly favor either side.<sup>63</sup> However, Judge Bates found that petitioners’ “enemy combatant” designation was so broad that it required “meaningful process” to ensure that they were not improperly classified.<sup>64</sup> The process afforded to Bagram detainees at the time was the Unlawful Enemy Combatant Review Board (UECRB).<sup>65</sup> Comprised of three commissioned officers, the UECRB reviewed every detainee’s status within seventy-five days of capture and every six months thereafter.<sup>66</sup> The United States conceded that the process afforded to Bagram detainees to challenge their status was less rigorous than the Combatant Status Review Tribunals (CSRTs) that the *Boumediene* Court had found inadequate.<sup>67</sup> Some of the most glaring deficiencies included: no legal representation for detainees (or even access to a “personal representative” as the CSRTs permitted); no opportunity for detainees to testify in person or to rebut evidence against them; and no supervisory or appellate body empowered to review UECRB status determinations.<sup>68</sup> Thus, Judge Bates concluded that the “adequacy of process” factor weighed heavily in favor of petitioners—even more heavily than in *Boumediene*.<sup>69</sup>

The site of apprehension factor weighed against petitioners’ entitlement to the writ because petitioners were captured outside the United States.<sup>70</sup> But Judge Bates pointed out a subtle distinction between Guantanamo Bay and Bagram Air Base. While all detainees at

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60. *Id.* at 217–18.

61. *Id.* at 218.

62. *Id.*; see Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, 115 Stat. 224, 224 (2001).

63. *Al Maqaleh I*, 604 F. Supp. 2d at 219.

64. *Id.* at 219–20.

65. *Id.* at 227.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.* at 220.

Guantanamo were rendered there from third countries, this was not the case at Bagram. Located in an active theater of war, Bagram mostly comprised detainees captured in Afghanistan, many of whom were Afghan citizens.<sup>71</sup> However, the petitioners in this case were third-country nationals who alleged that they had been rendered to Bagram from other, non-battlefield locations. Judge Bates noted that the site of apprehension was therefore more important in this case than in *Boumediene*.<sup>72</sup> Nonetheless, he concluded that petitioners could not be materially distinguished from their *Boumediene* counterparts, as they were all captured outside the United States.<sup>73</sup>

The site of detention and practical obstacles factors required the most explanation. Both pertained to the nature of Bagram Air Base and the American presence there. The site of detention analysis turned on the “objective degree of control” that the United States exerted over Bagram and the duration of its presence there.<sup>74</sup> Specifically, the district court had to determine whether Bagram was more akin to Guantanamo Bay or Landsberg Prison—the site of detention at issue in the post-World War II case *Johnson v. Eisentrager*.<sup>75</sup>

In *Eisentrager*, the Supreme Court declined to extend the writ to 21 German nationals imprisoned at an Allied facility in Germany, after a Military Commission in China convicted them.<sup>76</sup> The Government consistently argued that Bagram was analogous to Landsberg, which was jointly controlled by Allied forces and had only existed for five years when the Court decided *Eisentrager*.<sup>77</sup> By contrast, it pointed out that the United States had an exclusive lease over Guantanamo Bay for more than 100 years.<sup>78</sup> In comparison, as of 2009, the United States had occupied Bagram for less than a decade and the Government maintained that it had no long-term interest in maintaining the base.<sup>79</sup> Judge Bates agreed with the Government on the question of duration. However, he found the “objective degree of control” over Bagram was closer to Guantanamo.<sup>80</sup> This was based on subtle, but important, differences in the legal agreements governing Landsberg and Bagram. At Landsberg, the four Allied representatives (the United States, UK, France, and Soviet Union) had joint con-

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71. *Id.*

72. *Id.* at 220–21.

73. *Id.* at 221.

74. *Id.* at 221–22.

75. *Id.*

76. *See Johnson v. Eisentrager*, 339 U.S. 763, 790–91 (1950).

77. Brief for Respondents-Appellants at 33–38, *Al Maqaleh v. Gates (Al Maqaleh II)*, 605 F.3d 84 (D.C. Cir. 2010) (No. 09-5265).

78. *Id.* at 32.

79. *Id.* at 33–34; *Al Maqaleh I*, 604 F. Supp. 2d at 224–25.

80. *Al Maqaleh I*, 604 F. Supp. 2d at 224–25.

trol over the facility, and any action required unanimous consent.<sup>81</sup> The lease governing Bagram, however, gave the United States exclusive control over the premises.<sup>82</sup> This exclusive control extended to the Bagram Theater Internment Facility where petitioners were held.<sup>83</sup> Thus, the United States, not its allies, detained individuals at Bagram and did not require the approval or consent of any other country in its decision making with respect to detainees.

The final factor for Judge Bates to consider was “practical obstacles inherent in resolving . . . [petitioners’] entitlement to the writ.”<sup>84</sup> *Boumediene* specifically contemplated that this factor would weigh more strongly in the Government’s favor if detainees were housed within an active theater of war.<sup>85</sup> However, as Judge Bates observed, the petitioners in *Eisentrager* received a “rigorous adversarial process to test the legality of their detention” in China following the Japanese surrender in 1945.<sup>86</sup> If this was possible in the aftermath of World War II, it “strains credulity” to believe that a similar process would not be possible in a secure American military base.<sup>87</sup>

The Government raised two further “practical” concerns: (1) that gathering evidence and providing access to counsel would prove difficult in a war zone; and (2) that extending the writ to petitioners would cause friction with the Afghan government.<sup>88</sup> On the first point, Judge Bates conceded that *Eisentrager* had been concerned about the practical difficulties of producing petitioners in the United States for habeas corpus proceedings.<sup>89</sup> However, he stated that technological advances such as “real-time video-conferencing” would obviate the need to physically produce petitioners in an American courtroom.<sup>90</sup> In addition, he noted that because petitioners were apprehended outside Afghanistan, much of the evidence would be located in third-countries, away from hostilities.<sup>91</sup>

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81. *Id.* at 223–24.

82. *Id.* at 224; Accommodation Consignment Agreement for Lands and Facilities at Bagram Airfield ¶ 9, U.S.-Afg., Sept. 26, 2006, DACA-AED-5-06-6559 (stating that “the United States shall have exclusive, peaceable, undisturbed and uninterrupted possession” of Bagram Airfield).

83. *Al Maqaleh I*, 604 F. Supp. 2d at 224. Detainees were transferred to a larger facility known as the Detention Facility in Parwan (DFIP) in late 2009. It was also located within Bagram Airfield. *See Al Maqaleh v. Gates (Al Maqaleh III)*, 899 F. Supp. 2d 10, 17 n.2 (D.D.C. 2012).

84. *Boumediene v. Bush*, 553 U.S. 723, 766 (2008).

85. *Id.* at 770.

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

87. *Id.*

88. *Id.* at 228–29.

89. *Id.* at 228.

90. *Id.*

91. *Id.* at 228–29.

On the second point, Judge Bates simply pointed out that al Maqaleh, al Najjar and al Bakri are not citizens of Afghanistan, meaning that no Afghan court had jurisdiction to hear their cases and that they would not be transferred to Afghan custody.<sup>92</sup> Thus, it was unlikely that habeas proceedings for these detainees would create tension with Afghan authorities.<sup>93</sup> Judge Bates ended his discussion of this factor with an important observation: “The only reason these petitioners are in an active theater of war is because respondents brought them there.”<sup>94</sup> This echoes the concern voiced earlier in the opinion regarding the Executive’s ability to manipulate or evade writ jurisdiction “merely by deciding who will be held where.”<sup>95</sup>

On balance, Judge Bates found that when the *Boumediene* factors were applied to *Al Maqaleh*, they weighed in petitioners’ favor.<sup>96</sup> Finding no adequate legislative substitute for habeas corpus, the court held MCA section 7(a), the habeas-stripping provision, unconstitutional and denied the Government’s motion to dismiss with respect to these three petitioners.<sup>97</sup>

## 2. *Al Maqaleh II*

The United States appealed the judgment in *Al Maqaleh I* to the D.C. Circuit Court of Appeals. A panel comprised of then-Chief Judge Sentelle, Judge Tatel, and Judge Edwards heard arguments in January 2010 and issued its decision in May (*Al Maqaleh II*). The judgment reviewed the relevant precedents on the extraterritorial application of the writ,<sup>98</sup> highlighting *Boumediene*’s rejection of formalism or any bright-line test in favor of an approach based on “objective factors and practical concerns.”<sup>99</sup> The court noted, however, that there must be a limiting principle to prevent the writ from extending to any United States military facility in the world. As Judge Sentelle put it, “the petitioners seem to be arguing that the fact of United States control of Bagram under the lease of a military base is sufficient to trigger [extraterritorial application] . . . we reject this extreme understanding.”<sup>100</sup>

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92. *Id.* at 230.

93. *Id.*

94. *Id.* at 230–31.

95. *Id.* at 216.

96. *Id.* at 231–32.

97. *Id.* at 235. Haji Wazir, an Afghan citizen, was also a petitioner in this consolidated litigation. Judge Bates declined to hold MCA section 7(a) unconstitutional in his case, citing the possibility of friction with Afghanistan if the Suspension Clause was extended to him. *See id.* at 230, 235; Military Commissions Act of 2006 § 7(a), Pub. L. No. 109-366, 120 Stat. 2600, 2635–36 (2006).

98. *Al Maqaleh v. Gates (Al Maqaleh II)*, 605 F.3d 84, 88–94 (D.C. Cir. 2010).

99. *Id.* at 93.

100. *Id.* at 95.

The Court then turned to the *Boumediene* factors. On the first factor—the citizenship, status, and the adequacy of the process used to determine that status—the court found in favor of petitioners. Judge Sentelle, echoing the district court, noted that as enemy aliens, petitioners were no differently situated from Guantanamo detainees in terms of citizenship and status.<sup>101</sup> The court also found that the Unlawful Enemy Combatant Review Board (UECRB) process provided less rights protection than the Combatant Status Review Tribunals (CSRTs) at Guantanamo.<sup>102</sup> Thus, the first factor weighed in favor of petitioners' entitlement to the writ.

On the second factor, the D.C. Circuit departed from the district court's analysis. Judge Sentelle's opinion for the court found that both the site of apprehension and site of detention weighed "heavily in favor of the United States."<sup>103</sup> He stated that all three petitioners were apprehended outside American territory, placing them in a similar position to the petitioners in *Boumediene*.<sup>104</sup> But, in his view, the site of detention at Bagram differed markedly from Guantanamo Bay. For Judge Sentelle, the fact that the leasehold on Bagram was not "permanent" in the way the United States had exclusive control over Guantanamo for over 100 years, coupled with the lack of hostility from the "host country" (Afghanistan), defeated any claim of American de facto sovereignty over Bagram.<sup>105</sup> His opinion therefore concluded that Bagram was more analogous to Landsberg Prison—the site of detention in *Eisentrager*.<sup>106</sup>

The third factor—practical obstacles—tipped the D.C. Circuit's analysis "overwhelmingly in favor" of the Government.<sup>107</sup> Relying heavily on *Eisentrager*, Judge Sentelle stressed that Bagram was located in an active theater of war, where judicial review would "hamper the war effort and bring aid and comfort to the enemy."<sup>108</sup> Indeed, the ongoing hostilities close to Bagram heightened these concerns. *Eisentrager* was decided in 1950, five years after World War II, when threats were limited to "the possibility of unrest and guerilla warfare."<sup>109</sup> An additional practical obstacle was created by "the fact that the detention is within the sovereign territory of another nation."<sup>110</sup> According to Judge Sentelle, petitioners' exercise of habeas jurisdic-

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101. *Id.* at 95–96.

102. *Id.* at 96.

103. *Id.*

104. *Id.*

105. *Id.* at 97.

106. *Id.*

107. *Id.*

108. *Id.* at 98 (quoting *Johnson v. Eisentrager*, 339 U.S. 763, 779 (1950)).

109. *Id.*

110. *Id.* at 99.

tion might disrupt the United States–Afghanistan relationship, which further supported the Government’s position.<sup>111</sup>

The final part of Judge Sentelle’s analysis addressed petitioners’ claim that the Executive sought to evade judicial review by detaining them in an active theater of war. He dismissed this argument as “speculation” that required no determination from the court.<sup>112</sup> Recall that petitioners had been detained in Bagram since 2002 or 2003, while *Boumediene*, which extended the writ to Guantanamo, was decided in 2008. Thus, Judge Sentelle pointed out that if military commanders or other officials chose to “turn off the Constitution” with respect to petitioners, they would have had to predict the outcome in *Boumediene* long before it was decided.<sup>113</sup>

For these reasons, the D.C. Circuit reversed the district court and dismissed all three petitions for lack of jurisdiction. Petitioners requested a rehearing en banc, citing new evidence that undermined the *Al Maqaleh II* judgment.<sup>114</sup> The D.C. Circuit denied the petition for rehearing, but clarified that this denial was “without prejudice to [petitioners’] ability to present this evidence to the district court in the first instance.”<sup>115</sup>

### 3. *Al Maqaleh III*

Petitioners responded to this order by submitting amended habeas corpus petitions in the district court that included newly discovered evidence. The case once again came before Judge Bates, who issued a short opinion in October 2012 (“*Al Maqaleh III*”). The D.C. Circuit’s judgment limited the scope of the inquiry—the question presented to the District Court was “whether petitioners’ new evidence undermines the rationale of the court of appeals’ decision.”<sup>116</sup>

Petitioners presented new evidence in three areas to shift the D.C. Circuit’s *Boumediene* factor analysis in their favor. First, they submitted documents to show that the U.S. Government intended to maintain a long-term presence at Bagram.<sup>117</sup> This pertained to the second *Boumediene* factor—the site of detention. *Al Maqaleh II* had concluded that the American presence in Bagram was more akin to Landsberg than Guantanamo—temporary and likely to end shortly after hostilities ceased.<sup>118</sup> Petitioners argued that even though the U.S.

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111. *Id.*

112. *Id.* at 98–99.

113. *Id.* at 99.

114. Per Curiam Order Denying Petition for Rehearing, *Al Maqaleh v. Gates (Al Maqaleh II)*, 605 F.3d 84 (D.C. Cir. 2010) (No. 09-5265).

115. *Id.*

116. *Al Maqaleh v. Gates (Al Maqaleh III)*, 899 F. Supp. 2d 10, 13 (D.D.C. 2012).

117. *Id.* at 16.

118. *Al Maqaleh II*, 605 F.3d at 96–97.

Government had started to transfer Afghan detainees to Afghan custody, it had no specific plans to transfer non-Afghan detainees.<sup>119</sup> Petitioners contended this was evidence of American intent to detain them indefinitely. Judge Bates dismissed this argument as “mak[ing] little sense.”<sup>120</sup> In his view, this evidence could be read to imply the opposite—that by transferring some detainees, the U.S. Government was demonstrating a good faith effort to eventually transfer (or release) all remaining detainees.<sup>121</sup>

Second, petitioners sought to demonstrate that the practical obstacles involved in extending the writ to them were not as formidable as the D.C. Circuit had concluded. Shortly after *Al Maqaleh II*, the Afghan government began conducting trials for Afghan detainees.<sup>122</sup> While the U.S. Government argued that Afghan authorities solely conducted these trials, Judge Bates found that the U.S. Government facilitated the process by permitting detainees in American custody to stand trial and by “mentoring the Afghan participants.”<sup>123</sup> However, he also found that such trials had no bearing on whether the U.S. Government could conduct habeas proceedings. For one thing, full-blown trials conducted—not merely mentored—by the U.S. government would divert more resources from the battlefield,<sup>124</sup> presenting another “practical obstacle” to habeas proceedings. Further, American-led trials might carry greater security risks and, if conflicts emerged between the judiciary and military, it would be “highly comforting to enemies of the United States.”<sup>125</sup>

Third, petitioners presented new evidence of executive manipulation or evasion of habeas jurisdiction. Citing declarations from former U.S. officials, government documents, and newspaper articles, petitioners argued that detainee transfers from Bagram to Guantanamo decreased sharply following *Rasul v. Bush*, decided in 2004.<sup>126</sup> Moreover, a “reverse flow” of detainees—from Guantanamo to Bagram—was initiated after *Rasul* for the purpose of evading writ jurisdiction.<sup>127</sup> Judge Bates dismissed these allegations of executive manipulation. He pointed out, among other things, that *Rasul* was not a bright-line and that detainees were transferred from Bagram to Guantanamo af-

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119. *Al Maqaleh III*, 899 F. Supp. 2d at 17–18.

120. *Id.* at 18.

121. *Id.*

122. *Id.* at 19.

123. *Id.*

124. *Id.*

125. *Id.* at 20 (internal citations omitted) (quoting *Al Maqaleh II*, 605 F.3d at 98).

126. *Id.* at 21–22; *see also* *Rasul v. Bush*, 542 U.S. 466 (2004) (holding that the existing habeas corpus statute, 28 U.S.C. § 2241, entitled Guantanamo detainees to challenge the validity of their detention in federal court).

127. *Al Maqaleh III*, 899 F. Supp. 2d at 21.

ter the decision was issued.<sup>128</sup> As for the fact that detainee numbers had increased at Bagram, Judge Bates noted the proximity of Bagram to conflict zones as well as the “international publicity and criticism surrounding Guantanamo” that would make Bagram a more logical detention site.<sup>129</sup> Judge Bates also reiterated the D.C. Circuit’s concern that petitioners’ argument had no limiting principle.<sup>130</sup> If the writ were extended to Bagram, it would potentially create “universal habeas jurisdiction, a result far beyond what *Boumediene* contemplated.”<sup>131</sup>

Since this new evidence did not tip the *Boumediene* factor analysis in petitioners’ favor, Judge Bates dismissed their habeas petitions for lack of jurisdiction.

#### 4. *Al Maqaleh IV*

Petitioners appealed this ruling to the D.C. Circuit. A three-judge panel—this time comprised of Judges Henderson, Griffith and Williams—heard arguments in September 2013 and issued a judgment in December (“*Al Maqaleh IV*”).<sup>132</sup> Judge Henderson’s majority opinion hews closely to *Al Maqaleh II* and *III*. She framed the question before the court in very narrow terms: “to determine whether the circumstances underlying *Al Maqaleh II* have changed so drastically that we must revisit it.”<sup>133</sup> The ensuing *Boumediene* factor analysis covered much of the same ground as past opinions, with a few notable exceptions.

The court’s analysis of the first factor—citizenship, status and the adequacy of process—reiterated much of what Judge Sentelle found in *Al Maqaleh II*.<sup>134</sup> The fact that petitioners were aliens and detained pursuant to “enemy combatant” status left them similarly situated to petitioners in *Boumediene*.<sup>135</sup> However, Judge Henderson noted that the “adequacy of process” prong did not weigh as strongly in petitioners’ favor as it had in *Al Maqaleh II* because of procedural improvements at Bagram.<sup>136</sup> The combatant review (UECRB) proceedings

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128. *Id.* at 22.

129. *Id.*

130. *Id.*

131. *Id.* at 23.

132. This judgment also considered whether the writ would extend to two additional detainees at Bagram: Amanatullah and Hamidullah. Because the facts underlying these detainees’ petitions are significantly different and raise separate legal issues, these petitions are beyond the scope of this paper. See *Al Maqaleh v. Hagel (Al Maqaleh IV)*, 738 F.3d 312, 319–323 (D.C. Cir. 2013).

133. *Id.* at 321.

134. *Id.* at 323–24; *Al Maqaleh v. Gates (Al Maqaleh II)*, 605 F.3d 84, 95–96 (D.C. Cir. 2010).

135. *Al Maqaleh IV*, 738 F.3d at 323.

136. *Id.* at 326–27.

had been replaced with Detainee Review Boards (DRBs),<sup>137</sup> a process that permitted detainees to consult with a “personal representative” (who did not necessarily have legal training), call witnesses, submit evidence, and examine exculpatory evidence.<sup>138</sup> Since these minimal protections did not exist within the UECRB process, the court held that this factor weighed less in petitioners’ favor than it did in *Al Maqaleh II*.<sup>139</sup>

On the second factor—the site of apprehension and detention—the court’s analysis centered on the nature and potential duration of American control over Bagram. The court relied on two documents to conclude that the United States had no intention to maintain a long-term presence at Bagram. First, it cited the 2012 Memorandum of Understanding between the United States and Afghan governments, which provided for the transfer of all Afghan detainees to Afghan custody.<sup>140</sup> According to the U.S. Government, this transfer was completed in mid-2013.<sup>141</sup> Second, the court relied on the Enduring Strategic Partnership Agreement (ESPA) between the two governments, which would permit U.S. forces to use Afghan military facilities until 2014.<sup>142</sup> Petitioners argued that even if Afghan detainees were transferred to Afghan authorities, the U.S. Government intended to detain non-Afghan detainees beyond 2014.<sup>143</sup> The court dismissed this argument as inapposite. As Judge Henderson put it, “[t]he indefiniteness of the United States’s control over the place of detention, not over the prisoners, is the relevant issue.”<sup>144</sup>

Judge Henderson’s analysis placed the most emphasis on the practical obstacles factor. She reiterated many of the concerns that animated the *Al Maqaleh II* judgment,<sup>145</sup> including the fact that Bagram is located in an active theater of war and the prospect of habeas corpus trials undermining the prestige and authority of military commanders.<sup>146</sup> However, her opinion ventured further than *Al*

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137. *Id.* at 326.

138. *Id.* at 327.

139. *Id.*

140. *Id.* at 328.

141. See U.S. DEP’T OF DEF., PROGRESS TOWARD SECURITY AND STABILITY IN AFGHANISTAN 139 (July 2013) [hereinafter DOD REPORT JULY 2013], [http://www.defense.gov/Portals/1/Documents/pubs/Section\\_1230\\_Report\\_July\\_2013.pdf](http://www.defense.gov/Portals/1/Documents/pubs/Section_1230_Report_July_2013.pdf) [<https://perma.unl.edu/R65G-2ASN>] (reporting that a 2013 MOU between the U.S. and Afghan governments provided for the transfer of all detainee operations at Bagram to Afghanistan, and that this transfer was completed on March 25, 2013).

142. *Al Maqaleh IV*, 738 F.3d at 328–29; Enduring Strategic Partnership Agreement (ESPA), U.S.-Afg., May 2, 2012 (T.I.A.S. No. 12,702).

143. *Al Maqaleh IV*, 738 F.3d at 328–29.

144. *Id.*

145. See *Al Maqaleh v. Gates (Al Maqaleh II)*, 605 F.3d 84, 97–98 (D.C. Cir. 2010).

146. *Al Maqaleh IV*, 738 F.3d at 329–30 (quoting *Johnson v. Eisentrager*, 339 U.S. 763, 779, 784 (1950)).

*Maqaleh II* to discuss separation of powers concerns. Stressing that the “President alone conducts the nation’s foreign policy” and that the conduct of foreign relations is “largely immune from judicial inquiry or interference,” Judge Henderson effectively ruled that the court lacked the constitutional authority and institutional wherewithal to question the political branches with respect to detention policy.<sup>147</sup> In this vein, she dismissed petitioners’ claims of executive manipulation of writ jurisdiction, finding it “utterly incredible” that the President could have predicted *Boumediene* in advance and chosen to detain individuals at Bagram, rather than at Guantanamo, as a result.<sup>148</sup> *Al Maqaleh IV* therefore dismissed the amended petitions for lack of jurisdiction.

Petitioners filed a petition for a writ of certiorari to the U.S. Supreme Court in August 2014. However, none of the petitioners was in U.S. custody when the justices reached the case in March 2015. More specifically, al Maqaleh and al Bakri had been transferred to Yemeni authorities, while al Najar was in Afghan custody.<sup>149</sup> For that reason, the Supreme Court dismissed the case as moot and vacated the judgment of the D.C. Circuit.<sup>150</sup>

The Supreme Court’s dismissal of this case leaves *Al Maqaleh IV* as the final word on the extraterritorial reach of the writ. As I argue in the following sections, this is a troubling development, for it curtails detainee access to U.S. courts to an extent far greater than *Boumediene* anticipated.

### III. REVISITING THE SITE OF APPREHENSION AND SITE OF DETENTION FACTORS

The D.C. Circuit in *Al Maqaleh* misconstrues the second *Boumediene* factor: “the nature of the sites of where apprehension and then detention took place.”<sup>151</sup> By misreading *Boumediene* and *Eisen-trager* and not accounting for subtle factual peculiarities of Bagram, both D.C. Circuit opinions, *Al Maqaleh II* and *Al Maqaleh IV*, make the site of apprehension practically irrelevant, while construing the site of detention too formalistically.

#### A. Site of Apprehension

On the site of apprehension, neither Judge Sentelle nor Judge Henderson grapples with petitioners’ claim that they were apprehended outside Afghanistan and extraordinarily rendered to Bagram.

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147. *Id.* at 333–35 (internal citations omitted).

148. *Id.* at 335.

149. *See supra* note 20.

150. *Al Najar v. Carter*, 135 S. Ct. 1581 (2015), *vacating as moot* 738 F.3d 312 (D.C. Cir. 2013).

151. *Al Maqaleh v. Gates (Al Maqaleh II)*, 605 F.3d 84, 96 (D.C. Cir. 2010).

Judge Henderson's opinion in *Al Maqaleh IV* does not even mention the site of apprehension in its analysis.<sup>152</sup> In *Al Maqaleh II*, Judge Sentelle's opinion for the court simply stated that petitioners were apprehended outside the United States, which placed them in the same position as detainees at Guantanamo.<sup>153</sup>

This finding elides an important distinction between the two facilities. Whereas detainees at Guantanamo were all captured outside Cuba, Bagram was located in an active theater of war and therefore mostly housed individuals captured on the battlefield in Afghanistan.<sup>154</sup> Petitioners were therefore exceptional at Bagram in a sense that they would not be at Guantanamo—they were captured outside Afghan territory and away from hostilities. This is significant for two reasons.

First, it raises further doubts about petitioners' status. As Judge Bates noted in *Al Maqaleh I*, the Supreme Court did not provide much guidance on the "status" prong of the first *Boumediene* factor.<sup>155</sup> As in *Boumediene*, the *Al Maqaleh* petitioners were designated "enemy combatants"—a broad designation referring to individuals who were "part of, or supporting, forces, engaged in hostilities" against the United States or its allies.<sup>156</sup> The breadth of this definition, coupled with the fact that petitioners challenged their status, led Judge Bates to stress the need for "meaningful process" to guard against wrongful classification.<sup>157</sup> He then concluded that the existing UECRB review process was inadequate, as it provided even fewer protections than the flawed CSRT procedures at issue in *Boumediene*.<sup>158</sup> The D.C. Circuit in *Al Maqaleh II* did not analyze the status factor in any depth, but likewise concluded that the UECRB process did not pass constitutional muster.<sup>159</sup>

However, neither court examined the effect of the site of apprehension on the status of these detainees. Recall that petitioners al Najjar and al Bakri claimed to have been abducted from Pakistan and Thailand, respectively.<sup>160</sup> The Government did not dispute these allegations.<sup>161</sup> Unlike al Najjar and al Bakri, less is known about the

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152. See generally *Al Maqaleh IV*, 738 F.3d 312 (focusing solely on the site of detention in her analysis of the second *Boumediene* factor).

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

154. See Tim Golden & Eric Schmitt, *A Growing Afghan Prison Rivals Bleak Guantanamo*, N.Y. TIMES (Feb. 26, 2006), [http://www.nytimes.com/2006/02/26/international/26bagram.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2006/02/26/international/26bagram.html?pagewanted=all&_r=0) (reporting that Bagram housed roughly 450 Afghan detainees and 40 non-Afghan detainees).

155. *Al Maqaleh v. Gates (Al Maqaleh I)*, 604 F. Supp. 2d at 219 (D.D.C. 2009).

156. *Id.*

157. *Id.* at 219–20.

158. *Id.* at 226–27.

159. *Al Maqaleh v. Gates (Al Maqaleh II)*, 605 F.3d 84, 96 (D.C. Cir. 2010).

160. *Id.* at 87.

161. *Al Maqaleh I*, 604 F. Supp. 2d at 210.

location of al Maqaleh's capture. His original habeas petition alleged only that he was captured outside Afghanistan,<sup>162</sup> while the Government claimed that he was apprehended in Zabul, Afghanistan.<sup>163</sup> However, it came to light that al Maqaleh was initially detained at Abu Ghraib prison in Iraq before being transferred to Bagram in 2004 or 2005.<sup>164</sup> When petitioners asserted this fact in later briefs, the Government did not contest it.<sup>165</sup> Thus, the "enemy combatant" status for all three petitioners is less credible than it would be for those captured in Afghanistan during hostilities. Two petitioners, al Najar and al Bakri, were taken unarmed and far away from hostilities; al Maqaleh's site of apprehension remains unclear, but the fact that he was initially detained at Abu Ghraib strongly suggests that he was captured outside Afghanistan. Thus, the likelihood that these petitioners were wrongfully captured and detained is higher than it would be for most detainees at Bagram.

Beyond raising doubts about the petitioners' status, the apprehension of the petitioners outside Afghanistan—in connection with their subsequent transfer to Bagram—is also significant because this transfer is probative of U.S. Government intent to evade habeas corpus jurisdiction. If petitioners were captured outside Afghanistan and were not Afghan citizens, why were they subsequently transferred to Bagram? One possibility is that by detaining these individuals in an active theater of war, the Government could hold them indefinitely beyond the reach of federal courts. Judge Bates raised this concern in *Al Maqaleh I*, noting that such rendition "resurrects the same specter of limitless Executive power the Supreme Court sought to guard against in *Boumediene*."<sup>166</sup> *Boumediene* stated that it would be a "striking anomaly" to allow the political branches to "switch the Constitution on or off at will" and that the power to determine "what the law is" remains with the judiciary.<sup>167</sup> Here, the U.S. Government could have chosen to detain petitioners at Guantanamo, but chose instead to house them at Bagram. This decision was likely influenced by a calculation that the writ would not extend to Bagram because, among other things, the practical obstacles hindering habeas proceedings in a war zone are far greater.<sup>168</sup> This is precisely the scenario

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162. *Id.* at 209.

163. *Al Maqaleh II*, 605 F.3d at 87 (citing a sworn declaration from Colonel James W. Gray, Commander of Detention Operations).

164. Petitioners' Opposition to Respondents' Motion to Dismiss Amended Petitions for Writs of Habeas Corpus at 22, *Al Maqaleh II*, 605 F.3d 84 (No. 06-1669).

165. *Id.*

166. *Al Maqaleh I*, 604 F. Supp. 2d at 220.

167. *Boumediene v. Bush*, 553 U.S. 723, 765 (2008).

168. *See Al Maqaleh I*, 604 F. Supp. 2d at 231 (weighing the practical obstacles factor in petitioners' favor, inter alia, because petitioners were "only in the Afghan thea-

that *Boumediene* sought to avoid—one in which political actors manipulate the site of detention to evade constitutional protections.<sup>169</sup>

The following sections will address practical obstacles and executive manipulation in greater detail, but it is worth noting here the importance of the site of apprehension in this analysis. If petitioners were captured during hostilities in Afghanistan, their detention at Bagram would raise few, if any, concerns of unchecked executive authority to “decide when and where [the Constitution’s] terms apply.”<sup>170</sup>

## B. Site of Detention

While the D.C. Circuit mostly neglected the site of apprehension, both Judge Sentelle and Judge Henderson’s opinions for the court in *Al Maqaleh II* and *Al Maqaleh IV* discussed the site of detention at length.<sup>171</sup> They found that the United States did not exercise sufficient control over Bagram Air Base to justify extending the writ to detainees there.<sup>172</sup> This conclusion rests on three faulty premises: (1) that *Eisentrager* makes de facto sovereignty an essential factor in the *Boumediene* analysis; (2) that the short duration of the U.S. lease over Bagram determines the degree of American control over the base; and (3) that the lack of U.S. intent to maintain a “permanent” presence at Bagram militates against petitioners.

### 1. *Is Sovereignty a Necessary Condition for Writ Jurisdiction?*

#### a. *De Facto Sovereignty*

In *Al Maqaleh II*, Judge Sentelle analyzed *Eisentrager* in great detail to determine whether the writ extends to detainees outside the sovereign territory of the United States. In fact, *Eisentrager* arguably overshadows *Boumediene* in his opinion. Section II (“the Analysis”) of the opinion begins with an overview of *Eisentrager* and then traces its development as the “governing precedent” on the extraterritorial reach of the writ.<sup>173</sup> Judge Sentelle repeatedly stressed that the Supreme Court has not overruled *Eisentrager*, as *Rasul* and *Boumediene* explicitly denied doing so.<sup>174</sup> Significantly, in both cases, the D.C.

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ter of war because the United States chose to send them there.”); *see also infra* Part V (discussing “executive manipulation of writ jurisdiction”).

169. *See Boumediene*, 553 U.S. at 765–66 (“The test for determining the scope of [the Suspension Clause] must not be subject to manipulation by those whose power it is designed to restrain.”).

170. *Id.* at 765.

171. *Al Maqaleh v. Gates (Al Maqaleh II)*, 605 F.3d 84, 96–97 (D.C. Cir. 2010); *Al Maqaleh v. Hagel (Al Maqaleh IV)*, 738 F.3d 312, 328–329 (D.C. Cir. 2013).

172. *Al Maqaleh II*, 605 F.3d at 97; *Al Maqaleh IV*, 738 F.3d at 328.

173. *See Al Maqaleh II*, 605 F.3d at 88–94.

174. *Id.* at 90, 92.

Circuit had relied on *Eisentrager* to deny habeas corpus jurisdiction to detainees at Guantanamo, only to be reversed by the Supreme Court.<sup>175</sup> *Boumediene* rejected the D.C. Circuit's contention that de jure sovereignty over the detention facility was necessary for entitlement to the writ;<sup>176</sup> Justice Kennedy found instead that a "common thread" uniting the precedents in this area is that "practical concerns, not formalism" must guide the analysis.<sup>177</sup>

Judge Sentelle initially stated in *Al Maqaleh II* that the D.C. Circuit "rejects the proposition" that *Boumediene* would adopt a "bright-line test."<sup>178</sup> However, when the court analyzed the site-of-detention factor, it effectively imposed a bright-line rule. In his opinion, Judge Sentelle said that while de facto sovereignty is "not determinative . . . the very fact that it was the subject of much discussion in *Boumediene* makes it obvious that it is not without relevance."<sup>179</sup> He went on to find that "the notion that de facto sovereignty extends to Bagram is no more real" than it would be for Landsberg Prison in *Eisentrager*.<sup>180</sup>

This move to confer primacy on de facto sovereignty was foreshadowed at oral argument. The U.S. Government had essentially argued that *Boumediene* requires de facto (if not de jure) sovereignty as a precondition for habeas corpus. Judge Tatel, during oral argument for *Al Maqaleh II*, questioned Government counsel vigorously on this point, noting that, in his view, *Boumediene* required balancing of several factors, with no individual factor "being dispositive, one way or the other."<sup>181</sup> At oral argument, Judge Sentelle then framed a question to counsel that revealed his position quite clearly:

Judge Sentelle: If the Guantanamo de facto sovereignty factor is *sine qua non*, the other factors are added there too, but is it the government's position that that is a necessary factor for a habeas [sic] to extend beyond the shores in a *Eisentrager*-type situation?

Mr. Katyal: That is correct.<sup>182</sup>

Later, in an exchange with petitioners' counsel, Judge Sentelle stated that other factors in the *Boumediene* analysis only become relevant "at a different stage in the analysis" if de facto sovereignty was "*sine qua non*."<sup>183</sup>

175. *See id.* at 90–93; *see Boumediene v. Bush*, 553 U.S. 723 (2008); *Rasul v. Bush*, 542 U.S. 466 (2004).

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

177. *See id.* at 755–64.

178. *Al Maqaleh II*, 605 F.3d at 93, 95. Judge Sentelle was referring here to the government's argument that *Boumediene* required de facto or de jure U.S. sovereignty over the detention facility for detainees to obtain habeas jurisdiction.

179. *Id.* at 97.

180. *Id.*

181. Transcript of Oral Argument at 16, *Al Maqaleh II*, 605 F.3d 84 (No. 09-5265).

182. *Id.* at 17.

183. *Id.* at 45.

Thus, in *Al Maqaleh II*, Judge Sentelle merely paid lip service to *Boumediene's* practical, functional approach. In practice, he applied *Eisentrager* formalistically to deny petitioners access to the writ by making sovereignty a necessary condition to any extension of jurisdiction.<sup>184</sup> This about-face undermines the Supreme Court's ruling in *Boumediene*. There is no analysis in *Al Maqaleh II* addressing the sorts of "practical concerns" that animated the Supreme Court's analysis.<sup>185</sup> For instance, the nature of the lease and the objective degree of the United States' control over Bagram—which the district court discussed at length in the *Al Maqaleh I* opinion—are not mentioned at all in Judge Sentelle's site of detention analysis.<sup>186</sup>

I will return to these fact-based determinations shortly, but it is important to first examine whether *Eisentrager*, which plays such an important role in *Al Maqaleh II*, actually held that the writ cannot be extended to aliens outside the sovereign territory of the United States.

b. *Eisentrager's* Holding

*Eisentrager* is factually analogous to *Al Maqaleh* in some respects. The German petitioners in that case, too, were aliens detained outside the de jure territory of the United States.<sup>187</sup> However, unlike the *Al Maqaleh* petitioners, the *Eisentrager* petitioners had been tried by a U.S. Military Commission.<sup>188</sup> They were convicted for violating the laws of war by continuing to engage in hostilities against the United States after Germany's surrender.<sup>189</sup> The question for the Supreme Court was whether petitioners should be permitted to challenge the legality of their "trial, conviction and imprisonment" in federal court.<sup>190</sup>

From Judge Sentelle's analysis in *Al Maqaleh II*, it appears that *Eisentrager* was (1) primarily concerned with extraterritorial jurisdiction and (2) ultimately arrived at the broad conclusion that enemy aliens detained abroad were categorically denied the writ.<sup>191</sup> On closer inspection, however, neither of these characterizations is accurate.

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184. See *Al Maqaleh II*, 605 F.3d at 96–97.

185. See, e.g., *Boumediene v. Bush*, 553 U.S. 723, 793 (2008) ("Practical considerations and exigent circumstances inform the definition and reach of the law's writs, including habeas corpus. The cases and our tradition reflect this precept.").

186. See *Al Maqaleh II*, 605 F.3d at 96–97.

187. *Johnson v. Eisentrager*, 339 U.S. 763, 765–66 (1950).

188. *Id.* at 766.

189. See Stephen I. Vladeck, *Eisentrager's (Forgotten) Merits: Military Jurisdiction and Collateral Habeas*, in *THE HIDDEN HISTORIES OF WAR CRIMES TRIALS* 193, 197–200 (Kevin Jon Heller & Gerry Simpson eds., 2013) (ebook).

190. *Eisentrager*, 339 U.S. at 767.

191. See *Al Maqaleh II*, 605 F.3d at 89 (stating *Eisentrager* held "the writ was unavailable to the enemy aliens beyond the sovereign territory of the United States.").

First, it is not clear that *Eisentrager* was a jurisdictional holding per se. Justice Jackson's majority opinion in *Eisentrager* purports to focus on jurisdiction, but delves into the merits of the German petitioners' claims as well. Indeed, while Parts I and II of the opinion set forth the relevant jurisdictional precedents and the difficulties of extending the writ to Landsberg prison, respectively,<sup>192</sup> Parts III and IV change course. Part III addresses—and rejects—petitioners' claim that they should be immune from military jurisdiction;<sup>193</sup> Part IV responds to specific objections to the jurisdiction of the Military Commission in China that tried and convicted petitioners.<sup>194</sup>

If *Eisentrager* simply held that federal courts did not have jurisdiction to hear petitioners' claims, how can we make sense of Parts III and IV of Justice Jackson's majority opinion? One answer is that *Eisentrager* is really a merits decision that has been misinterpreted as a jurisdictional one. This is what Stephen Vladeck argues in *Eisentrager's (Forgotten) Merits: Military Jurisdiction and Collateral Habeas*.<sup>195</sup> Relying on the case's "hidden history," Vladeck shows that petitioners' main claim before the Military Commission was that it lacked jurisdiction to try them.<sup>196</sup> According to Vladeck, this remained petitioners' principal claim throughout the litigation in U.S. courts, but it was obfuscated by lower court decisions.<sup>197</sup> The district court dismissed the case, holding that *Ahrens v. Clark* prevented federal courts from exercising jurisdiction over extraterritorial habeas petitions on statutory grounds.<sup>198</sup> This was a misreading of *Ahrens*, which explicitly avoided ruling on the extraterritorial application of habeas corpus.<sup>199</sup> *Ahrens* held that federal law only granted habeas jurisdiction to courts within a detainee's "district of confinement."<sup>200</sup> As Vladeck puts it, this is a "choice-of-venue provision for individuals detained *within* the United States."<sup>201</sup> Instead of simply reversing the district court on *Ahrens*, the D.C. Circuit in *Eisentrager* relied on the Suspension Clause to hold that habeas corpus extended to any prisoner in U.S. custody—even those held outside American territory.<sup>202</sup> Thus, the Supreme Court had to focus its attention on this overbroad D.C. Circuit ruling, which required in-depth discussion of

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192. See *Eisentrager*, 339 U.S. at 763–81.

193. See *id.* at 781–85.

194. See *id.* at 785–90.

195. See Vladeck, *supra* note 189.

196. *Id.* at 195.

197. See *id.* at 200–02.

198. *Id.* at 206.

199. *Id.* at 201; see *Ahrens v. Clark*, 335 U.S. 188, 192 (1948).

200. *Ahrens*, 335 U.S. 188, 210 (Rutledge, J., dissenting).

201. Vladeck, *supra* note 189, at 201.

202. *Id.* at 201–02; *Eisentrager v. Forrestal*, 174 F.2d 961, 967 (D.C. Cir. 1949).

the jurisdictional limits of the Suspension Clause.<sup>203</sup> The Court rejected the D.C. Circuit's approach, which is why Justice Jackson's opinion in *Eisentrager* is generally cited for the proposition that federal courts lack jurisdiction over aliens detained abroad.<sup>204</sup>

In Vladeck's view, a better explanation of *Eisentrager*—one that makes sense of Parts III and IV—arises from what was “black-letter law” in 1950: that collateral attacks of military commission rulings were limited to “whether the military had properly exercised jurisdiction.”<sup>205</sup> In this vein, Justice Jackson in *Eisentrager* analyzed the lawfulness of the Military Commission's jurisdiction in Part IV of his analysis, drawing from *Ex Parte Quirin* and *In Re Yamashita*.<sup>206</sup> More specifically, he cited *Yamashita* for the proposition that “correction [of military commission] errors . . . is not for the courts but for military authorities . . . we consider here only the lawful power of the commission to try the petitioner for the offense charged.”<sup>207</sup> Part IV concluded with this statement: “We are unable to find that the petition alleges any fact showing lack of jurisdiction in the military authorities to accuse, try and condemn these prisoners or that they acted in excess of their lawful powers.”<sup>208</sup>

Thus, it appears Justice Jackson in *Eisentrager* reached, and rejected on the merits, the petitioners' claim that the Military Commission lacked jurisdiction over them. This has important implications for how courts should read *Eisentrager*. As Vladeck puts it, “Clearly, *Eisentrager* did not mean to foreclose access to habeas corpus for all non-citizens detained outside the territorial United States.”<sup>209</sup> Rather, it appears to simply stand for the proposition that aliens have no recourse in federal court after conviction by a military commission that properly exercised jurisdiction abroad.<sup>210</sup>

Vladeck's analysis shows quite convincingly that *Eisentrager* has been misread in subsequent cases as a jurisdictional, as opposed to a merits, judgment.<sup>211</sup> But even if we read *Eisentrager* as a primarily

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203. Vladeck, *supra* note 189, at 206.

204. *Id.* at 194 (citing a number of sources that subscribe to this interpretation of *Eisentrager*).

205. *Id.* at 195.

206. *Id.* at 207; *Johnson v. Eisentrager*, 339 U.S. 763, 779–80 (1950), *see generally In re Yamashita*, 327 U.S. 1 (1946) (denying writ of habeas corpus on the grounds that the military commission that convicted Yamashita was lawfully convened and had the authority to proceed with the trial); *Ex Parte Quirin*, 317 U.S. 1 (1942) (upholding military tribunal's jurisdiction over German saboteurs).

207. *Eisentrager*, 339 U.S. at 786–87 (quoting *Yamashita*, 327 U.S. at 8).

208. *Id.* at 790.

209. Vladeck, *supra* note 189, at 209–10.

210. *Id.* at 210. *But cf.* *Burns v. Wilson*, 346 U.S. 137 (1953) (holding that defendants may argue in habeas petitions that military tribunals did not fully consider their constitutional claims).

211. Vladeck, *supra* note 189, at 194–96.

jurisdictional decision, it still does not compel the narrow, formalistic conclusion that enemy aliens detained overseas cannot avail of habeas corpus. At oral argument in *Al Maqaleh II*, Judges Tatel and Sentelle both questioned petitioners' counsel on the contours of *Eisentrager's* holding.

Judge Tatel: The key of *Eisentrager* . . . is never in American history has habeas ever been extended to [enemy aliens detained abroad] . . . Now they mentioned also that they had been tried before military commissions.

Judge Sentelle: We read [*Eisentrager*], and [military trials] is in the background there, but that's not anything that the Court used to turn its decision on. . . . They said, [the German prisoners] don't have habeas because they're beyond the sovereignty of the United States.<sup>212</sup>

Justice Jackson's opinion in *Eisentrager*, however, repeatedly ties the petitioners' status to the fact that they were detained abroad. In Part I of *Eisentrager*, following an exhaustive survey of wartime precedents, Justice Jackson concluded, "[T]he nonresident enemy alien, *especially one who has remained in the service of the enemy*, does not have . . . qualified access to our courts."<sup>213</sup> In Part II of *Eisentrager*, when applying the law to petitioners, Justice Jackson listed six factors that obstructed their access to the writ. As he put it:

We must hold that a prisoner of our military authorities is constitutionally entitled to the writ, even though he (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.<sup>214</sup>

At first glance, this list of factors seems almost exclusively concerned with the extraterritorial aspects of the *Eisentrager* petitioners' case. Five out of the six factors—factor (a) is the exception—concern the foreign sites of apprehension, detention, laws of war violations, and the military commission. However, factors (c), (d), and (e) also pertain to the petitioners' status. That they were held as prisoners of war and were tried and convicted for laws of war violations by a military commission are central to Justice Jackson's analysis.<sup>215</sup> In addition, factor (a), that petitioners are enemy aliens, presumes that their "enemy" status has been determined through an adequate legal process. As Justice Jackson later noted, while courts are open, in limited instances, to resident aliens "of friendly personal disposition," this accommodation is not made for enemy aliens.<sup>216</sup> And, in *Eisentrager*, "these prisoners were actual enemies, active in the hostile service of

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212. Transcript of Oral Argument, *supra* note 181, at 32–33.

213. *Johnson v. Eisentrager*, 339 U.S. 763, 776 (1950) (emphasis added).

214. *Id.* at 777.

215. *Id.* at 777–78.

216. *Id.* at 778.

an enemy power. There is no fiction about their enmity.”<sup>217</sup> In other words, the Military Commission had clearly determined that petitioners were enemy aliens. Petitioners in *Al Maqaleh* contested their status as “enemy combatants” and were never given the opportunity to meaningfully challenge that status.

In contrast, Parts III and IV of the *Eisentrager* judgment proceed to show that the Military Commission had the authority to make this determination,<sup>218</sup> lest there was any doubt about the legality of its exercise of jurisdiction. Thus, even if we were to interpret *Eisentrager* as primarily a jurisdictional ruling, it does not condition jurisdiction solely on the site of detention, while relegating other factors, like the petitioner’s status and the adequacy of process, to the “background.”<sup>219</sup> Rather, these factors are intertwined in Justice Jackson’s *Eisentrager* analysis, and together compelled that writ jurisdiction could not be extended to the German detainees at Landsberg.

## 2. *Conflating Degree and Duration of Control*

The “touchstone” of the site of detention analysis is the “objective degree of control” exercised by the United States over the detention facility.<sup>220</sup> *Boumediene*’s functional approach requires a careful examination of the facts surrounding U.S. control over specific military bases.<sup>221</sup> In *Al Maqaleh*, both the district court in *Al Maqaleh I* and court of appeals in *Al Maqaleh II* framed the issue in relative terms, seeking to determine if Bagram was more akin to Landsberg Prison or to Guantanamo Bay.<sup>222</sup> In *Al Maqaleh I*, the district court undertook this analysis in detail, noting important differences between the lease agreements that governed Landsberg and Bagram.<sup>223</sup> In particular, Judge Bates stressed that while the Allies jointly controlled operations at Landsberg, the United States exercised sole authority over the prison facility at Bagram, including over determinations on whether to detain particular individuals.<sup>224</sup> Judge Bates later noted that the duration of control was also relevant in *Boumediene*, as in that case, the United States had exclusive control over Guantanamo Bay for more than 100 years.<sup>225</sup> However, as he pointed out, “the

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217. *Id.*

218. *See id.* at 781–90.

219. Transcript of Oral Argument, *supra* note 181, at 33.

220. *Al Maqaleh v. Gates (Al Maqaleh I)*, 604 F. Supp. 2d 205, 221 (D.D.C. 2009).

221. *See Boumediene v. Bush*, 553 U.S. 723, 768–69 (thoroughly examining the degree of control exerted by the U.S. over Guantanamo Bay vis-à-vis Landsberg Prison in Germany).

222. *Al Maqaleh v. Gates (Al Maqaleh II)*, 605 F.3d 84, 97 (D.C. Cir. 2010); *Al Maqaleh I*, 604 F. Supp. 2d at 221–26.

223. *Al Maqaleh I*, 604 F. Supp. 2d at 222–24.

224. *Id.* at 223–24.

225. *Id.* at 224–25.

Court must consider future intentions of the United States at Bagram as well.”<sup>226</sup> This is an important aspect of the analysis, especially in the present-day global war against terrorism, where hostilities might continue indefinitely.<sup>227</sup>

The D.C. Circuit, however, rejected this sort of contextual analysis in *Al Maqaleh II*. At oral argument, Judge Sentelle refused to acknowledge that the *Eisenrager* petitioners were under the joint authority of the Allies and therefore not subject to plenary U.S. control. In comparison, the *Al Maqaleh* petitioners were subjected to plenary U.S. control.<sup>228</sup> More importantly, Judge Sentelle’s *Al Maqaleh II* opinion fails to reference the two lease agreements, much less compare the degree of U.S. control over Landsberg and Bagram.<sup>229</sup> Rather, Judge Sentelle simply relied on the fact that the United States had maintained “total control” over Guantanamo Bay for more than 100 years in the face of a “hostile” Cuban government.<sup>230</sup> He contrasted this to the short duration of U.S. control over Bagram (approximately eight years at the time) exercised with the consent of Afghan authorities.<sup>231</sup> This approach conflates the *duration* of control with the much more significant “objective *degree* of control.”<sup>232</sup> It also fails to account for the potential duration of hostilities going forward. Because of the diffuse and asymmetric threat posed by terrorism, U.S. military efforts in Afghanistan had no clear end date.<sup>233</sup> Unsurprisingly, U.S. Government briefs before the D.C. Circuit in 2010 do not mention a date—even a tentative one—by which hostilities might have ended.<sup>234</sup>

The D.C. Circuit in *Al Maqaleh II* therefore erred in treating the short duration of the U.S. presence at Bagram as essentially dispositive. Both the objective degree of control and the potential for a long-

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226. *Id.* at 225.

227. *Id.* (“At Bagram, the United States has declared that it only intends to stay until the current military operations are concluded and Afghan sovereignty is fully restored . . . That promise may be no more than a distant hope given the indefinite nature of our global efforts against terrorism.”).

228. Transcript of Oral Argument, *supra* note 181, at 34, 46.

229. *See generally* *Al Maqaleh v. Gates (Al Maqaleh II)*, 605 F.3d 84 (D.C. Cir. 2010). This comparison was an important aspect of Judge Bates’s analysis in *Al Maqaleh I*.

230. *Id.* at 97.

231. *Id.*

232. *See* *Al Maqaleh v. Gates (Al Maqaleh I)*, 604 F. Supp. 2d 205, 221 (D.D.C. 2009) (emphasis added).

233. *See id.* at 225; *see also* *Hamdi v. Rumsfeld*, 542 U.S. 507, 520 (2004) (“We recognize that the national security underpinnings of the war on terror, although crucially important, are broad and malleable. As the Government concedes, given its unconventional nature, the current conflict is unlikely to end with a formal cease-fire agreement.” (internal citations omitted)).

234. *See* Brief for Respondents-Appellants, *supra* note 77.

term U.S. presence at Bagram should have been given substantial weight in this analysis.

### 3. A “Permanent” U.S. Presence at Bagram

In its *Al Maqaleh* briefs, the U.S. Government disavowed any intention to remain at Bagram permanently.<sup>235</sup> Judge Sentelle took this assertion at face value, noting in *Al Maqaleh II*, “there is no indication of any intent to occupy [Bagram Air Base] with permanence.”<sup>236</sup> Regardless of the veracity of this claim, it fundamentally misconstrues the relevant language in *Boumediene* on this issue. The majority opinion in *Boumediene* never used the term “permanent” or any of its predicates.<sup>237</sup> Rather, on four occasions, the judgment refers to the “indefinite” nature of detention.<sup>238</sup> For our purposes, the most relevant uses of the term relate to *Eisenstrager* and the indefiniteness of U.S. control over Landsberg. As Justice Kennedy stated in *Boumediene* when comparing the United States’ control over Landsberg, Germany to Guantanamo, “The United States’ control over the prison in Germany was neither absolute nor indefinite.” He later noted the United States did not intend to “govern [Landsberg] indefinitely.”<sup>239</sup>

The difference between “permanent” and “indefinite” is substantial. Merriam-Webster’s Dictionary defines permanent as “lasting or continuing for a very long time or forever: not temporary or changing.”<sup>240</sup> In comparison, it defines indefinite as “not certain in amount or length” or “not clear or certain in meaning or details.”<sup>241</sup> In *Al Maqaleh*, it is likely true that the United States had no intention to remain at Bagram *permanently*. There would surely be no need to maintain a presence in Afghanistan if hostilities ended. However, this does not directly bear on the question of whether the U.S. presence at Bagram—and its detention of petitioners—was *indefinite*. The fact that petitioners were held for several years, with no potential date of release or end of hostilities, strongly suggests that their detention was indefinite—both in terms of length and the terms under which they might be released. With respect to the indefinite length of detention, the Supreme Court warned in *Hamdi* that the unconventional, fluid nature of the “war on terror” could result in detention without end. It stated, “If the Government does not consider this unconventional war

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235. *Id.* at 33–36.

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

237. *See* *Boumediene v. Bush*, 553 U.S. 723 (2008).

238. *Id.* at 768, 788.

239. *Id.* at 768.

240. Definition of Permanent, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/permanent> [<https://perma.unl.edu/Z6ZF-H8BJ>].

241. Definition of Indefinite, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/indefinite> [<https://perma.unl.edu/KP8B-6UXU>].

won for two generations, and if it maintains during that time that Hamdi might, if released, rejoin forces fighting against the United States, then . . . Hamdi's detention could last for the rest of his life."<sup>242</sup>

Recall, also, that Judge Bates in *Al Maqaleh I* read an extra factor into *Boumediene*—the length petitioners' detention without adequate process.<sup>243</sup> When *Al Maqaleh I* was released, the petitioners had been detained for at least six years.<sup>244</sup> It is striking that, more than one year later, the D.C. Circuit in *Al Maqaleh II* did not mention the length (or indefiniteness) of petitioners' detention, nor the duration of the U.S. presence at Bagram.<sup>245</sup> Instead, *Al Maqaleh II* misconstrued the underlying language in *Boumediene* to require U.S. Government intent to occupy Bagram with "permanence."<sup>246</sup>

In *Al Maqaleh IV*, Judge Henderson similarly misconstrued *Boumediene's* relevant language. In response to petitioners' claim that they had been detained indefinitely, she wrote, "The Appellants misapprehend the import of the [site of detention] factor . . . the indefiniteness of the United States' control over the place of detention, not over prisoners, is the relevant issue."<sup>247</sup> As in *Al Maqaleh II*, this formalistic reading of one of *Boumediene* belies the interconnectedness of various aspects of the analysis. While it is true that the site of detention analysis is concerned with U.S. control over Bagram, the fact that petitioners were held indefinitely for a decade at this point was relevant to the adequacy-of-process prong of the first *Boumediene* factor.<sup>248</sup> In addition, Judge Henderson appears to use "indefinite" and "permanent" interchangeably in her *Al Maqaleh IV* opinion. For example, in the next paragraph of her opinion, she reiterated Judge Sentelle's finding in *Al Maqaleh II* that the United States "had no intention of remaining in Afghanistan permanently . . . . We took the Government at its word."<sup>249</sup>

Factual circumstances at Bagram changed significantly between 2010 and 2013. In 2012, the United States and Afghanistan entered into a Memorandum of Understanding (MOU) that provided for the transfer of all Afghan detainees and U.S. detention facilities to Afghan

242. *Hamdi v. Rumsfeld*, 542 U.S. 507, 520 (2004).

243. *See Al Maqaleh v. Gates (Al Maqaleh I)*, 604 F. Supp. 2d 205, 216 (D.D.C. 2009); *see also Boumediene v. Bush*, 553 U.S. 723, 795 (2008) ("The Executive is entitled to a reasonable period of time to determine a detainee's status before a court entertains that detainee's habeas corpus petition.").

244. *Al Maqaleh I*, 604 F. Supp. 2d at 216.

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

246. *Id.* at 97.

247. *Al Maqaleh v. Hagel (Al Maqaleh IV)*, 738 F.3d 312, 328 (D.C. Cir. 2013).

248. *See Boumediene*, 553 U.S. at 797 ("Some of these petitioners have been in custody for six years with no definitive judicial determination as to the legality of their detention. Their access to the writ is a necessity to determine the lawfulness of their status, even if, in the end, they do not obtain the relief they seek.").

249. *Al Maqaleh IV*, 738 F.3d at 328 (emphasis added).

authorities.<sup>250</sup> Moreover, the Enduring Strategic Partnership Agreement (ESPA) between the two states gave “U.S. forces continued access to and use of Afghan facilities through 2014.”<sup>251</sup> While Judge Henderson’s *Al Maqaleh IV* opinion conceded that 2014 was not a “sell by” date, she found that it supported the conclusion reached in *Al Maqaleh II*—that there was no indication of U.S. intent to remain at Bagram “with permanence.”<sup>252</sup> As it turned out, the United States ended formal combat operations in December 2014 and transferred petitioners out of its custody at approximately the same time.<sup>253</sup>

Thus, in hindsight, Judge Henderson’s conclusion in *Al Maqaleh IV*—that the site of detention weighed in favor of the Government—seems more defensible than it was in *Al Maqaleh II*, which was decided three years earlier. However, as the final word on the site of detention analysis, *Al Maqaleh IV* leaves much to be desired. It not only repeats and reinforces the error in *Al Maqaleh II* of confusing “indefiniteness” with “permanence,” but Judge Henderson’s *Al Maqaleh IV* opinion also refused to probe into the U.S. Government’s assertions that it did not intend to remain in Afghanistan in the long term.<sup>254</sup> Despite the Government’s best intentions, unforeseen circumstances, such as an enemy surge or withdrawal of allied forces, might have required combat operations to continue long after 2014.<sup>255</sup> Additionally, while the U.S. Government had transferred the Detention Facility in Parwan (DFIP), its main detention facility, and Afghan detainees to Afghanistan in 2013, it had not showed any desire to transfer or release third-country nationals like the *Al Maqaleh* petitioners. In fact, news reports in this period suggested that such detainees would be held separately in U.S. custody for an unspecified period.<sup>256</sup> These reports, coupled with the fact that petitioners had

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250. *Id.*; see DOD REPORT JULY 2013, *supra* note 141, at 5.

251. Enduring Strategic Partnership Agreement (ESPA), U.S.-Afg., art. III, § 6, U.S.-Afg., May 2, 2012 (T.I.A.S. No. 12,704).

252. *Al Maqaleh IV*, 738 F.3d at 329 (quoting *Al Maqaleh v. Gates (Al Maqaleh II)*, 605 F.3d 84, 97 (D.C. Cir. 2010)).

253. See Raghavan, *supra* note 20.

254. See *Al Maqaleh IV*, 738 F.3d at 327–29.

255. In any event, the U.S. maintains a troop presence in Afghanistan and is under pressure to retain that presence. See Nahal Toosi, *Pressure Grows to Keep U.S. Troops in Afghanistan*, POLITICO (Oct. 14, 2015), <http://www.politico.com/story/2015/10/us-troops-in-afghanistan-pressure-to-keep-214795> [<https://perma.unl.edu/EYQ5-EPS5>] (citing an Atlantic Council Report urging the government to maintain approximately 10,000 American troops in Afghanistan).

256. See, e.g., John Knepfel, *The Other Guantanamo: Report Shows Impact of Indefinite Detention*, ROLLING STONE (Sept. 11, 2013) <http://www.rollingstone.com/politics/news/the-other-guantanamo-report-shows-impact-of-indefinite-detention-20130911#ixzz2eg2755Ll> [<https://perma.unl.edu/FLG7-CECG>] (“Despite handing over control [of Bagram], however, the U.S. has continued to hold around 60 individuals under a stated law of war authority . . . . All of the U.S.-held detainees at Bagram are non-Afghans . . . .”); Kevin Sieff, *In Afghanistan, a Second Guanta-*

been detained for ten or eleven years, should have given the court in *Al Maqaleh IV* pause that the government's intentions might not have been as transparent as they claimed. More fundamentally, the judicial role in habeas corpus proceedings is to provide a meaningful check on potential executive abuses of power, not to "[take] the Government at its word."<sup>257</sup>

#### IV. WHEN PRACTICAL OBSTACLES BECOME PRACTICALLY INSURMOUNTABLE

The third *Boumediene* factor used to determine the bounds of habeas jurisdiction is "practical obstacles inherent in resolving the prisoner's entitlement to the writ."<sup>258</sup> In his discussion of this factor in *Boumediene*, Justice Kennedy noted that "[h]abeas corpus proceedings may require expenditure of funds by the government and may divert the attention of military personnel," but he made clear that such concerns are not dispositive.<sup>259</sup> He distinguished *Eisentrager* on the grounds that American forces in post-war Germany were responsible for an enormous rebuilding effort and faced security threats from guerilla and residual enemy forces.<sup>260</sup> These concerns were not present at Guantanamo.<sup>261</sup> Then, as dicta, Justice Kennedy stated, "[I]f the detention facility were located in an active theater of war, arguments that issuing the writ would be 'impracticable or anomalous' would have more weight."<sup>262</sup>

In *Al Maqaleh II*, the D.C. Circuit latched onto this dictum to hold that the practical obstacles prong "weighs overwhelmingly" in favor of the United States.<sup>263</sup> It drew support from *Eisentrager*, which discussed the potential harms of extending habeas jurisdiction to a war zone. These practical obstacles include bringing "aid and comfort to the enemy" and diminishing "the prestige of our commanders, not only with enemies but with wavering neutrals."<sup>264</sup> Specifically, such trials

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*namo*, WASH. POST (Aug. 4, 2013) [https://www.washingtonpost.com/world/in-afghanistan-a-second-guantanamo/2013/08/04/e33e8658-f53e-11e2-81fa-8e83b3864c36\\_story.html](https://www.washingtonpost.com/world/in-afghanistan-a-second-guantanamo/2013/08/04/e33e8658-f53e-11e2-81fa-8e83b3864c36_story.html) [https://perma.unl.edu/B9EA-U5ZQ] ("The Afghan government this year quietly agreed to allow the United States to continue operating its detention center at Bagram for third-country nationals.").

257. *Al Maqaleh IV*, 738 F.3d at 328; *see also* *Boumediene v. Bush*, 553 U.S. 723, 765 (2008) (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)) (noting that it would be a "striking anomaly" to allow "Congress and the President . . . [to] say what the law is.").

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

259. *Id.* at 769.

260. *Id.* at 769–70.

261. *Id.* at 770.

262. *Id.*

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

264. *Id.* at 98 (quoting *Johnson v. Eisentrager*, 339 U.S. 763, 779 (1950)); *see also* *Al Maqaleh v. Hagel (Al Maqaleh IV)*, 738 F.3d 312, 329 (D.C. Cir. 2013) (quoting a

would divert commanders' attention and resources from the battlefield and create a conflict between the judiciary and military that would be "highly comforting to enemies of the United States."<sup>265</sup>

#### A. Overstated Obstacles in *Al Maqaleh*: A Closer Inspection of the Facts

In *Al Maqaleh*, it is not clear that substantial resources would have to be diverted from the war effort, nor that the military's prestige would be damaged if habeas jurisdiction were extended to petitioners. Petitioners represented only a tiny fraction of the Bagram detainee population. Their petitions rested heavily on the fact that they were third-country nationals who had been extraordinarily rendered to Afghanistan to face detention.<sup>266</sup> The vast majority of detainees, however, were Afghan nationals captured during hostilities within Afghanistan.<sup>267</sup> Thus, if habeas were only granted to third-country nationals like petitioners, the resources required would be minimal.<sup>268</sup>

With respect to the "loss of prestige" concern, it is similarly worth noting that U.S. military forces in Afghanistan did not capture these detainees.<sup>269</sup> Rather, petitioners were all captured outside Afghanistan by unknown agents believed to be working for the United States.<sup>270</sup> Moreover, in *Eisentrager*, a Military Commission had been convened to try and convict the German petitioners. In that context, habeas proceedings in federal court would more likely damage the military's reputation and create the sort of judiciary-military conflict that could bring "aid and comfort to the enemy."<sup>271</sup> However, since the *Al Maqaleh* petitioners maintain that irregular forces captured

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similar passage from *Eisentrager* and similarly holding that this factor weighed strongly in the Government's favor).

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

266. See Joint Brief for Petitioners-Appellees, *supra* note 28, at 1-4.

267. See Golden & Schmitt, *supra* note 154.

268. See *Al Maqaleh v. Gates (Al Maqaleh I)*, 604 F. Supp. 2d 205, 229 (D.D.C. 2009) ("The number of detainees who might be entitled to habeas review also factors into the analysis of practical obstacles. Petitioners all claim to have been captured outside Afghanistan."); see also *Boumediene v. Bush*, 553 U.S. 723, 769 (2008) ("Compliance with any judicial process requires some incremental expenditure of resources. Yet civilian courts and the Armed Forces have functioned alongside each other at various points in our history.").

269. See Joint Brief for Petitioners-Appellees at 2-4, *Al Maqaleh v. Gates*, 605 F.3d 84 (D.C. Cir. 2010) (No. 09-5265).

270. Petition for Writ of Certiorari, *supra* note 19 at 5-6.

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

them and because a military commission had not convicted them, these concerns are substantially mitigated in their case.<sup>272</sup>

This fact-specific analysis is precisely what Judge Bates undertook in *Al Maqaleh I*. As he elaborated in great detail, *Boumediene's* functional approach requires that the three-factor test be applied on a detainee-specific basis, not categorically to all Bagram detainees.<sup>273</sup> He also made two additional observations as to why the costs of habeas litigation would not pose serious practical difficulties. First, while *Eisentrager* was concerned with how to physically produce the petitioners in the United States for trial, these concerns are “significantly mitigated today by technological advances,” including video conferencing.<sup>274</sup> Second, gathering evidence, including witness testimony, would not significantly disrupt U.S. operations because these detainees were captured outside Afghanistan.<sup>275</sup> Most of the evidence related to their capture and pre-Bagram activity would therefore be located far away from hostilities.<sup>276</sup>

Thus, in *Al Maqaleh II*, the D.C. Circuit could have ruled narrowly to provide habeas proceedings for only the handful of detainees that fit petitioners’ description. Such a ruling would not apply to Afghan detainees or those captured during hostilities.<sup>277</sup> This would not have significantly diverted resources from the battlefield nor seriously affected the military’s reputation.

However, *Al Maqaleh II* rejected this detainee-specific approach for a categorical one. The opinion does not engage with the peculiar circumstances that gave rise to petitioners’ claim.<sup>278</sup> Few resources would be needed to try third-country nationals, evidence in their cases would likely be found outside Afghanistan, and the military’s prestige would not be affected to the degree envisioned in *Eisentrager*. These facts play no role in Judge Sentelle’s *Al Maqaleh II* analysis.<sup>279</sup> Instead, he simply focused on the fact that Bagram is located in an active theater and categorically foreclosed habeas jurisdiction to all detainees by listing obstacles that generally exist in such situations.<sup>280</sup>

272. See Petition for Writ of Certiorari, *supra* note 19, at 17 (“Petitioners were not captured on the Afghan battlefield, so their habeas cases do not implicate the ‘prestige of our commanders’ in the Afghan theater.”).

273. See *Al Maqaleh I*, 604 F. Supp. 2d at 215–16.

274. *Id.* at 228.

275. *Id.* at 228–29.

276. *Id.* at 230.

277. See *id.* at 235–36 (reserving ruling on the habeas petition of Afghan detainee Hazi Wazir at that time because, inter alia, of the possibility of friction with the Afghan government—a practical obstacle).

278. See *Al Maqaleh v. Gates (Al Maqaleh II)*, 605 F.3d 84, 95–98 (D.C. Cir. 2010).

279. See *id.*

280. *Id.* at 97; see also *Al Maqaleh v. Hagel (Al Maqaleh IV)*, 738 F.3d 312, 329–31 (D.C. Cir. 2013).

This is further evidence of the D.C. Circuit's excessive formalism in *Al Maqaleh II*. As with its insistence that the site of detention is *sine qua non* for jurisdiction,<sup>281</sup> the D.C. Circuit in *Al Maqaleh II* refused to acknowledge that the writ could apply to some detainees at Bagram but not to others. At oral argument for *Al Maqaleh II*, Judge Sentelle made this very clear in an exchange with petitioners' counsel.

Ms. Foster: [This case is] about whether there is jurisdiction over these three petitioners' cases. There might not be jurisdiction over everybody at Bagram.

Judge Sentelle: There can't conceivably be jurisdiction over these three cases unless there's jurisdiction at Bagram.<sup>282</sup>

Under this approach, the D.C. Circuit's concerns about practical obstacles are fully realized. If the writ applies to places, not persons, the costs—both tangible and reputational—are much greater. Indeed, the practical obstacles analysis in *Al Maqaleh II* assumes that if the writ applied to Bagram, it would potentially apply to *all* detainees there. This perhaps explains why the Court held that this factor weighs “overwhelmingly” against extending the writ to Bagram,<sup>283</sup> even though, on its face, petitioners' claim could be limited to a small number of third-country nationals extraordinarily rendered to Bagram.<sup>284</sup>

## B. Practical Obstacles as Separation of Powers Concerns

*Al Maqaleh II*, the first D.C. Circuit opinion, is flawed in its application of the practical obstacles prong to the facts of this case, and the D.C. Circuit's subsequent opinion in *Al Maqaleh IV* misconstrues the relevant law as well. Writing for the court in *Al Maqaleh IV*, Judge Henderson begins her analysis of this factor by reinforcing Judge Sentelle's reasoning in *Al Maqaleh II*. She quotes Justice Kennedy's dictum in *Boumediene* that the conclusion might have come out differently if Guantanamo were located in an active theater of war and the relevant language in *Eisentrager* about the potential risks of holding habeas proceedings in post-war Germany.<sup>285</sup> In *Al Maqaleh IV*, Judge Henderson then deviates from *Al Maqaleh II* to explain why separation of powers considerations further limit writ jurisdiction in war zones.<sup>286</sup>

When *Al Maqaleh IV* was decided in December 2013, the legal landscape at Bagram had changed in important ways since *Al*

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281. See *supra* Part III.B.1.

282. Transcript of Oral Argument, *supra* note 181, at 53.

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

284. See *Al Maqaleh v. Gates (Al Maqaleh I)*, 604 F. Supp. 2d 205, 231 (D.D.C. 2009) (“[F]or detainees at Bagram who are not Afghan citizens and who were not captured within Afghanistan, the practical obstacles are not so substantial as to defeat their invocation of the Suspension Clause.”).

285. *Al Maqaleh IV*, 738 F.3d at 329–32.

286. See *id.* at 333–35.

*Maqaleh II*. One important development was that the United States had transferred control of the principal detention facility at Bagram (DFIP) to Afghanistan in March 2013.<sup>287</sup> It was renamed the Afghan National Detention Facility–Parwan, part of the larger Justice Center in Parwan (JCIP).<sup>288</sup> Petitioners were held at a separate facility at Bagram following this transfer.<sup>289</sup> At the Afghan facility, criminal proceedings had commenced against Afghan detainees.<sup>290</sup> The U.S. assisted in these proceedings by providing guidance to Afghan authorities and aiding in evidence collection. According to petitioners, this showed that the practical obstacles allegedly obstructing habeas proceedings were overstated. After all, if Afghan criminal trials could be conducted for thousands of Afghan detainees<sup>291</sup> within an active theater of war and with American consent and assistance,<sup>292</sup> then a few habeas trials would not significantly divert the U.S. military’s resources or damage its prestige.

In *Al Maqaleh IV*, Judge Henderson summarily dismissed this argument. She stated, “[Petitioners] miss *Eisentrager*’s point. The question is not whether, in the abstract, U.S. armed forces are capable of participating in judicial proceedings.”<sup>293</sup> Rather, according to Judge Henderson, the relevant question is whether such proceedings would divert their attention from, among other things, the “military offensive abroad.”<sup>294</sup> Put otherwise, the JCIP trials are part of the U.S. military offensive; they serve the broader American objective to strengthen the Afghan judicial system. Thus, by diverting resources away from the JCIP trials, habeas proceedings would impair this important military objective.

*Al Maqaleh IV*’s analysis reads the practical obstacles prong too formalistically. In the vein of *Al Maqaleh II*, there is no attempt to determine the costs associated with holding habeas trials for a few third-country nationals and how those costs fit within the broader military objectives.<sup>295</sup> Moreover, while *Eisentrager* was concerned about diverting resources from the battlefield, it was also concerned with the practical difficulties of holding trials in post-war Germany. As Justice Kennedy stated in *Boumediene*, “[T]he [*Eisentrager*] Court was right to be concerned about judicial interference with the military’s efforts

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287. DOD REPORT JULY 2013, *supra* note 141, at 5.

288. *Al Maqaleh IV*, 738 F.3d at 318.

289. *See* Sieff, *supra* note 256.

290. *See* DOD REPORT JULY 2013, *supra* note 140, at 90.

291. *Id.* (stating that JCIP had prosecuted over 3,100 detainees by November 2013).

292. *Al Maqaleh IV*, 738 F.3d at 331.

293. *Id.*

294. *Id.*

295. *See id.* at 331–32; *Al Maqaleh v. Gates (Al Maqaleh II)*, 605 F.3d 84, 97 (D.C. Cir. 2010).

to contain enemy elements, guerrilla fighters, and werewolves.”<sup>296</sup> The fact that Guantanamo faced no such threats substantially contributed to Justice Kennedy’s conclusion in *Boumediene* that there were “few practical barriers to the running of the writ.”<sup>297</sup> Thus, in *Al Maqaleh IV*, the fact that full-blown criminal trials could take place at Bagram should have been factored into the practical obstacles analysis. In particular, in *Al Maqaleh IV*, the D.C. Circuit should have taken notice of the security situation at Bagram that permitted such trials to be administered. Even if Justice Center in Parwan trials were part of the military offensive, the fact that they could be conducted largely without incident suggests that habeas proceedings could be conducted with fewer security risks than were present in *Eisentrager*.

In *Al Maqaleh IV*, Judge Henderson later ventured beyond this formalistic application of the practical obstacles factor to actually change the underlying legal test. In rejecting the argument that the Justice Center in Parwan trials have some bearing on potential habeas litigation, Judge Henderson paid homage to the separation of powers. She declared, “Whether to devote available military resources to the support of the Afghan criminal justice system or to the pursuit of other objectives is the President’s choice to make.”<sup>298</sup> This, in itself, is innocuous—it merely restates black-letter law; the President is commander-in-chief of the armed forces and speaks with “one voice” in articulating United States foreign policy.<sup>299</sup>

However, Judge Henderson proceeded to convert this institutional prerogative into broad deference towards the President and the political branches on jurisdictional questions. In *Al Maqaleh III*, petitioners introduced a letter from the chief of staff to the Afghan president addressed to their counsel.<sup>300</sup> It stated that the government of Af-

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296. *Boumediene v. Bush*, 553 U.S. 723, 769–70 (2008) (quoting *Johnson v. Eisentrager*, 339 U.S. 763, 784 (1950)).

297. *Id.* at 770.

298. *Al Maqaleh IV*, 738 F.3d at 331.

299. *See Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2097–101 (2015). *But cf.* Deborah Pearlstein, *Constitutionality of Congressional Restrictions on Guantanamo Prisoner Transfers*, OPINIO JURIS (Oct. 27, 2015, 1:17 PM) (quoting *United States v. Curtiss-Wright*, 57 S. Ct. 216, 221 (1936)), <http://opiniojuris.org/2015/10/27/constitutionality-of-congressional-restrictions-on-guantanamo-prisoner-transfers> [https://perma.unl.edu/JH72-Z4FN] (noting that *Zivotofsky* calls into question *Curtiss-Wright Export Corp.*, which described “the President as the ‘sole organ’ of the federal government in the field of international relations . . . .”); Peter Spiro, *Three Quick Thoughts on Zivotofsky*, OPINIO JURIS (June 8, 2015, 11:35 AM), <http://opiniojuris.org/2015/06/08/three-quick-thoughts-on-zivotofsky/> [https://perma.unl.edu/7V3Q-WQ6Q] (arguing that *Zivotofsky* scaled back the Executive’s broad assertions of its own authority).

300. *See Declaration of Ramzi Kassem, Exhibit 1: Letter from the Office of the Islamic Republic of Afghanistan* (dated September 19, 2012), *Al Maqaleh v. Gates (Al Maqaleh III)*, 899 F. Supp. 2d 10 (D.D.C. 2012) (No. 06-1669).

ghanistan had no desire to keep foreign nationals on its soil and supported these detainees receiving trials “by a competent court.”<sup>301</sup> This letter challenged the *Al Maqaleh II* finding that habeas proceedings in “the sovereign territory of another nation” might create “practical difficulties” by disrupting the United States’ relationship with Afghanistan.<sup>302</sup> Judge Bates in *Al Maqaleh III* found that the letter was not dispositive of Afghan government intent because, among other things, it was a private letter that did not purport to represent the official position of the Afghan government.<sup>303</sup> In *Al Maqaleh IV*, Judge Henderson agreed with this factual conclusion, but then reiterated her separation of powers concerns more strongly. As she put it, “Trying to divine the letter’s meaning would carry us beyond the bounds of our authority and into the exclusive province . . . of the Executive.”<sup>304</sup>

Continuing the analysis in *Al Maqaleh IV*, Judge Henderson then introduced issues of institutional competence to buttress this separation-of-powers concern. She noted, for instance, that “[f]oreign affairs are complicated and require a political adroitness that courts simply cannot supply.”<sup>305</sup> Because of conflicting statements on the Afghan government’s position on detainee policy—both from within the government and in the media—Judge Henderson concluded that the D.C. Circuit could not decide what that policy was.<sup>306</sup> The risk of getting it wrong and embarrassing the Executive was too great.<sup>307</sup> In response to petitioners’ argument that the Court was abdicating its constitutional duty by failing to inquire into U.S. government policy, Judge Henderson reasserted that foreign relations are “exclusively entrusted” to the political branches and should therefore be “largely immune from judicial inquiry or interference.”<sup>308</sup> She added, “Judicial inquiry into the President’s detention decisions . . . raises grave concerns about encroachment on the President’s authority.”<sup>309</sup>

In effect, *Al Maqaleh IV* inserted the political question doctrine into the *Boumediene* factor analysis.<sup>310</sup> This fundamentally miscon-

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301. *Id.* at 5.

302. *See* *Al Maqaleh v. Gates (Al Maqaleh II)*, 605 F.3d 84, 99 (D.C. Cir. 2010).

303. *Al Maqaleh III*, 899 F. Supp. 2d at 20.

304. *Al Maqaleh v. Hagel (Al Maqaleh IV)*, 738 F.3d 312, 333 (D.C. Cir. 2013).

305. *Id.*

306. *Id.*

307. *Id.*

308. *Id.* at 334.

309. *Id.*

310. *See* Stephen Vladeck, *Two Quick Reflections on Why Al Maqaleh III Matters*, JUST SECURITY (Dec. 24, 2013, 3:03 PM), <https://www.justsecurity.org/5029/quick-reflections-al-maqaleh-iii-matters> [<https://perma.unl.edu/QN6Q-DCWX>] (“Judge Henderson all-but expressly invoked the political question doctrine . . .”). The political question doctrine is a justiciability doctrine that leaves certain issues—including foreign policy—for the political branches to resolve. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 129 (3d ed. 2006).

strues *Boumediene*, which rejected separation of powers formalism in the context of habeas jurisdiction.<sup>311</sup> As discussed, the test for jurisdiction emerging from *Boumediene* is a practical one.<sup>312</sup> The third prong—practical obstacles—is concerned with precisely what it says, *practical* difficulties in extending the writ of habeas corpus. These include concerns with respect to resource allocation, security, and the military’s prestige.<sup>313</sup> Institutional or constitutional concerns, such as the judiciary’s competence or its proper role in matters of foreign relations, are not relevant.

*Al Maqaleh IV* also fails to understand the nature of the political question doctrine and justiciability concerns generally. Whether a case presents a “political question” unsuitable for judicial resolution is a determination on the *merits*.<sup>314</sup> This should not be conflated with the *jurisdictional* question of whether the writ of habeas corpus can be extended to Bagram. Justiciability issues arise only after jurisdiction has been established.<sup>315</sup>

By yielding to the political branches at the jurisdictional stage in *Al Maqaleh IV*, Judge Henderson essentially gives political leaders a *carte blanche*. It appears from her analysis that any Executive invocation of practical difficulties or strained relations with another country is beyond the judicial ken and warrants almost complete deference. That such deference extends even to questions of jurisdiction—such as whether the Suspension Clause applies to Bagram—allows the political branches, not the judiciary, to determine “what the law is.”<sup>316</sup>

## V. EXECUTIVE MANIPULATION OF WRIT JURISDICTION

Underlying the writ petitions in *Al Maqaleh* was the claim that the Executive chose to detain petitioners at Bagram to evade habeas juris-

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For an explanation of the political question doctrine in the habeas context, see Zachary M. Vaughan, *The Reach of the Writ: Boumediene v. Bush and the Political Question Doctrine*, 99 GEO. L. J. 869 (2011).

311. See *Boumediene v. Bush*, 553 U.S. 723, 765 (2008) (“Abstaining from questions involving formal sovereignty and territorial governance is one thing. To hold the political branches have the power to switch the Constitution on or off at will is quite another.”).

312. See *id.* at 793.

313. *Id.* at 769–71.

314. See generally Gwynne Skinner, *Misunderstood, Misconstrued, and Now Clearly Dead: The “Political Question Doctrine” as a Justiciability Doctrine*, 29 J.L. & POL. 427 (2014) (arguing that lower courts have long misused the political question doctrine to avoid reaching the merits on foreign policy-related questions).

315. See Vladeck, *supra* note 310 (noting that Judge Henderson “fundamentally conflates the deference due to the Executive Branch on certain merits questions with the jurisdictional question of whether the Suspension Clause applies at Bagram”).

316. *Boumediene*, 553 U.S. at 765 (internal citations omitted).

diction. This concern does not directly arise from the *Boumediene* factors per se, but from the broader tenor of Justice Kennedy's *Boumediene* majority opinion.<sup>317</sup> If the Executive deliberately chose Bagram for this purpose, it should tilt the second and third *Boumediene* factors in petitioners' favor. As discussed, this would most directly impact the site of apprehension and detention factor.<sup>318</sup> Since petitioners were neither Afghan nationals nor captured in Afghanistan,<sup>319</sup> they could have potentially been detained at Guantanamo and would have therefore been entitled to writ protection. The practical obstacles factor, too, would weigh less strongly in favor of the Government if it turned out that petitioners were moved to Bagram specifically to create the sorts of practical difficulties inherent in an active theater of war.<sup>320</sup>

In *Al Maqaleh II*, the D.C. Circuit conceded that executive manipulation of petitioners' detention site to evade jurisdiction would factor into the *Boumediene* analysis, but declined to find that such evasion occurred in this case.<sup>321</sup> As Judge Sentelle noted, *Boumediene*'s three factors were not exhaustive and therefore executive manipulation "might constitute an additional factor."<sup>322</sup> In *Al Maqaleh II*, the Court found petitioners' arguments on this point to be "unsupported by the evidence" or "by reason."<sup>323</sup> If the Executive had deliberately chosen to "turn off the Constitution," it would have had to anticipate *Boumediene*'s outcome long before the case was decided in 2008.<sup>324</sup>

To be fair, this issue had not been fully briefed in *Al Maqaleh II*. Petitioners, in their Joint Brief, focused largely on the enumerated *Boumediene* factors, which *Al Maqaleh I* had construed in their favor.<sup>325</sup> Executive manipulation was only discussed within these factors, with references to Judge Bates' *Al Maqaleh I* opinion below.<sup>326</sup> However, once *Al Maqaleh II* declared that evasion of writ jurisdiction

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317. *See id.* at 765 ("The Constitution grants Congress and the President the power to acquire, dispose of, and govern territory, not the power to decide when and where its terms apply."); *id.* at 766 (noting that the scope of the Suspension Clause "must not be subject to manipulation by those whose power it is designed to restrain.").

318. *See supra* sections III.A–B.

319. *See id.*

320. *See supra* section IV.A; *Al Maqaleh v. Gates (Al Maqaleh I)*, 604 F. Supp. 2d 205, 230–31 (D.D.C. 2009) *rev'd*, 605 F.3d 84 (D.C. Cir. 2010) ("The only reason these petitioners are in an active theater of war is because respondents brought them there.").

321. *See Al Maqaleh v. Gates (Al Maqaleh II)*, 605 F.3d 84, 98–99 (D.C. Cir. 2010).

322. *Id.* at 99.

323. *Id.*

324. *Id.*

325. *See* Joint Brief for Petitioners-Appellees, *supra* note 28, at 2.

326. *See id.* at 25, 34.

could be an additional factor,<sup>327</sup> petitioners presented evidence in subsequent briefs to show that the Executive chose to detain individuals at Bagram to avoid judicial review.<sup>328</sup>

### A. Evidence of Manipulation

Petitioners first submitted this evidence of executive manipulation of writ jurisdiction to the District Court in *Al Maqaleh III*.<sup>329</sup> Their case for executive manipulation of writ jurisdiction arising out of this evidence proceeded in three parts. First, they referred to government memoranda showing that Bagram was not initially intended as a long-term detention facility. A memo from the U.S. State Department in 2002 referred to Bagram as a “temporary collection center where some detainees stop over en route to their permanent location.”<sup>330</sup> This memo was cited in conjunction with a 2001 memo from the Office of Legal Counsel, which concluded that the writ would not likely extend to Guantanamo.<sup>331</sup> This memo, authored by Deputy Assistant Attorneys General John Yoo and Patrick Philbin, found that the “great weight of legal authority” militated against a finding of federal habeas jurisdiction at Guantanamo, though it conceded that there remained “some litigation risk that a district court might reach the opposite result.”<sup>332</sup>

Second, petitioners cited newspaper articles published from 2006 to 2010 to show that Bagram gradually replaced Guantanamo as the primary long-term detention facility for “enemy combatants.” For instance, a New York Times article stated that the detainee population at Bagram had increased six-fold from 2004 to 2005.<sup>333</sup> This article quoted Bush Administration and military officials as saying that this increase was due, at least in part, to an Administration decision to “shut off the flow of detainees into Guantánamo after the Supreme Court [in *Rasul v. Bush*] ruled that those prisoners had some basic

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

328. See *Al Maqaleh v. Gates*, No. 09-5265 (D.C. Cir. July 23, 2010) (per curiam) (denying petition for rehearing and allowing petitioners to submit new evidence in the first instance before the district court).

329. See *Al Maqaleh v. Gates (Al Maqaleh III)*, 899 F. Supp. 2d 10, 12–13 (D.D.C. 2012).

330. Memorandum to the U.S. Deputy Sec’y of State from Gregory Suchan, Acting Assistant Sec’y for Political–Military Affairs (Jan. 24, 2002), [https://www.aclu.org/sites/default/files/torturefoia/released/t2677\\_2679.pdf](https://www.aclu.org/sites/default/files/torturefoia/released/t2677_2679.pdf) [<https://perma.unl.edu/RUQ9-45KG>].

331. Memorandum from Patrick F. Philbin & John C. Yoo, Deputy Assistant Attorneys Gen., to William J. Haynes II, Gen. Counsel, U.S. Dep’t of Def. (Dec. 28, 2001), <http://nsarchive.gwu.edu/NSAEBB/NSAEBB127/01.12.28.pdf> [<https://perma.unl.edu/RV94-ECTT>].

332. *Id.* at 1.

333. See Golden & Schmitt, *supra* note 154.

due-process rights.”<sup>334</sup> Another article reported that four high-value detainees were transferred from Guantanamo to CIA “black sites” in 2003 so that they could be interrogated without access to legal counsel or to the federal courts.<sup>335</sup>

Third, petitioners submitted sworn declarations from two former U.S. government officials: Colonel Lawrence B. Wilkerson and Glenn Carle.<sup>336</sup> Colonel Wilkerson was, *inter alia*, Chief of Staff to Secretary of State Colin Powell from 2002–05.<sup>337</sup> Colonel Wilkerson confirmed what the Yoo–Philbin memo suggested—that the “deliberate choice” to detain individuals at Guantanamo and Bagram in the early 2000s was “often motivated in significant part by a desire to place detainees outside the jurisdiction of any legal system.”<sup>338</sup> Colonel Wilkerson further attested that while petitioners were likely taken to Bagram initially to collect “actionable intelligence” the subsequent decisions to keep them there “were likely motivated by a desire to evade judicial review of their detention.”<sup>339</sup>

Glenn Carle’s declaration introduced a different perspective: the mistreatment of detainees at Bagram. Carle worked for the CIA for 23 years.<sup>340</sup> From November 2003 until his retirement in March 2007, he served as Deputy National Intelligence Officer for Transnational Threats on the National Intelligence Council.<sup>341</sup> Much of his declaration attests to the mistreatment of detainees in U.S. custody and the wrongful detention of many “innocent civilians.”<sup>342</sup> He also reaffirmed Colonel Wilkerson’s statement that U.S. authorities were likely attempting to evade judicial review when they chose to detain petitioners indefinitely at Bagram.<sup>343</sup>

In *Al Maqaleh III*, Judge Bates examined this evidence carefully before ultimately finding it inconclusive. He pointed out that much of the evidence was not “new.”<sup>344</sup> It pertained to executive policy prior to *Al Maqaleh II*, and the D.C. Circuit had rejected the argument that

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334. *Id.*

335. See Matt Apuzzo & Adam Goldman, *CIA Flight Carried Secret from Gitmo*, BOSTON.COM (Aug. 6, 2010), [http://www.boston.com/news/nation/washington/articles/2010/08/07/ap\\_exclusive\\_cia\\_flight\\_carried\\_secret\\_from\\_gitmo/?page=2](http://www.boston.com/news/nation/washington/articles/2010/08/07/ap_exclusive_cia_flight_carried_secret_from_gitmo/?page=2).

336. See Declaration of Ramzi Kasseem, Exhibit 2: Declaration of Colonel Lawrence B. Wilkerson Dated Sept. 22, 2012, *Al Maqaleh v. Gates (Al Maqaleh III)*, 899 F. Supp. 2d 10 (D.D.C. 2012) (No. 06-1669) [hereinafter Wilkerson Declaration]; Exhibit 3: Declaration of Glenn Carle Dated Sept. 24, 2012, *Al Maqaleh III*, 2899 F. Supp. 2d 10 (No. 06-1669) [hereinafter Carle Declaration].

337. Wilkerson Declaration, *supra* note 336, at ¶ 1.

338. *Id.* at ¶ 12.

339. *Id.* at ¶ 14.

340. Carle Declaration, *supra* note 336, at ¶ 2.

341. *Id.*

342. *Id.* at ¶¶ 8, 11.

343. *Id.* at 14.

344. *Al Maqaleh III*, 899 F. Supp. 2d 10, 21.

the Executive deliberately manipulated the site of detention.<sup>345</sup> Moreover, the Government disputed that a “reverse flow” of detainees—from Guantanamo to Bagram—developed following *Rasul*.<sup>346</sup> Judge Bates noted in *Al Maqaleh III* that some detainees were transferred from Bagram to Guantanamo in September 2004, three months after *Rasul* was decided.<sup>347</sup> He also stated that the U.S. Government might have had other motivations to house detainees at Bagram, including proximity to the Middle East and the “international publicity and criticism” surrounding Guantanamo.<sup>348</sup> As for the Colonel Wilkerson and Carle Declarations, Judge Bates found that they were “largely cumulative of evidence previously submitted” and, in any event, did not attest specifically to the policy determinations made with respect to petitioners. In other words, these Declarations were “really just conjecture.”<sup>349</sup>

*Al Maqaleh IV* went further. There, Judge Henderson added gloss to *Al Maqaleh II*, suggesting that the D.C. Circuit in that case found it “utterly incredible” that the Executive could have predicted *Boumediene’s* outcome in advance.<sup>350</sup> Her opinion held that manipulation could not be read into either the second or third enumerated *Boumediene* factors.<sup>351</sup> *Al Maqaleh IV* then explicitly rejected petitioners’ request to create a new factor to account for executive manipulation.<sup>352</sup> In keeping with the separation of powers theme, Judge Henderson stated that “caution must be our watchword” and that “restraint . . . is appropriate” when choosing to expand *Boumediene’s* reach, particularly when such expansion would take the Court further into the “realm of war and foreign policy.”<sup>353</sup>

Both *Al Maqaleh III* and *IV* hold petitioners to an unreasonably high standard of proof. In *Al Maqaleh IV*, Judge Henderson dismissed petitioners’ arguments as speculative, stressing that no piece of evidence showed “that any official ever considered the reach of the writ in deciding where to detain *them*.”<sup>354</sup> At the district court level in *Al Maqaleh III*, Judge Bates went further, stating that under *Al Maqaleh II* petitioners effectively needed to show a “smoking gun” to prove executive manipulation.<sup>355</sup> Recall, however, that all four major opinions in the *Al Maqaleh* litigation were written at the dismissal stage. They

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345. *Id.*

346. *Id.* at 21–22.

347. *Id.* at 22.

348. *Id.*

349. *Id.* at 22 n.13.

350. *Al Maqaleh v. Hagel (Al Maqaleh IV)*, 738 F.3d 312, 335 (D.C. Cir. 2013).

351. *Id.* at 335–36.

352. *Id.* at 336.

353. *Id.* at 336 n.16.

354. *Id.* at 336.

355. *Al Magaleh v. Gates (Al Maqaleh III)*, 899 F. Supp. 2d 10, 24.

address U.S. Government motions to dismiss for lack of jurisdiction. Under the *Federal Rules of Civil Procedure*,<sup>356</sup> petitioners have the burden of establishing jurisdiction, but their petitions should be construed liberally with “the benefit of all favorable inferences that can be drawn from the alleged facts.”<sup>357</sup>

Cumulatively, with factual inferences drawn in their favor, petitioners’ evidence strongly suggests that jurisdictional concerns factored into detention policy. The transformation of Bagram from a temporary collection center to a long-term detention facility corresponded with the Supreme Court’s extension of habeas corpus to Guantanamo in *Rasul*.<sup>358</sup> To illustrate this transformation, in early 2004, Bagram detained fewer than 100 individuals;<sup>359</sup> by 2006, it housed 630 detainees, compared to 275 at Guantanamo.<sup>360</sup> This trend accelerated after *Boumediene* was decided in 2008. By 2011, the Bagram detainee population had swelled to more than 3,000,<sup>361</sup> while the detainee population at Guantanamo had declined to approximately 170 (from a maximum of around 680).<sup>362</sup> Much of the expansion at Bagram happened during the Obama Administration, as Bagram housed only around 600 detainees when President Obama took office in 2009.<sup>363</sup> This data, combined with the 2001 to 2002 government memoranda and the two sworn declarations, is probative of executive intent to replace Guantanamo with Bagram as the principal detention facility, at least in part to evade habeas jurisdiction. Even if there was no “smoking gun” to affirmatively establish a policy of manipulation that specifically targeted petitioners, this evidence should have sufficed at the motion to dismiss stage. As it turned out, the evidence was deemed insufficient.

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356. See FED. R. CIV. P. 12(b)(1).

357. *Al Maqaleh v. Gates (Al Maqaleh I)*, 604 F. Supp. 2d 205, 211 (D.D.C. 2009) (citing *EEOC v. St. Francis Xavier Parochial Sch.*, 117 F.3d 621, 624 (D.C. Cir. 1997)).

358. See generally *Rasul*, 542 U.S. 466 (extending the existing habeas corpus statute, 28 U.S.C. § 2241, to Guantanamo detainees).

359. See Golden & Schmitt, *supra* note 154.

360. See Tim Golden, *Foiling U.S. Plan, Prison Expands in Afghanistan*, N.Y. TIMES (Jan. 7, 2006), [http://www.nytimes.com/2008/01/07/world/asia/07bagram.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2008/01/07/world/asia/07bagram.html?pagewanted=all&_r=0); *The Guantanamo Docket: A History of the Detainee Population*, N.Y. TIMES [hereinafter *The Guantanamo Docket*], <http://projects.nytimes.com/guantanamo> [https://perma.unl.edu/L99V-5A8R].

361. See Seth Doane & Phil Hirschhorn, *Bagram: The Other Guantanamo?*, CBS NEWS (Nov. 15, 2011), <http://www.cbsnews.com/news/bagram-the-other-guantanamo/> [https://perma.unl.edu/NQX6-DF6L].

362. See *The Guantanamo Docket*, *supra* note 360.

363. See Doane & Hirschhorn, *supra* note 361.

## B. The Senate Select Committee on Intelligence Report

Unfortunately for petitioners, the “smoking gun” revealing a systematic government policy to manipulate habeas jurisdiction emerged too late. The Senate Select Committee on Intelligence (SSCI) *Study of the Central Intelligence Agency’s Detention and Interrogation Program (SCCI Report)* was released December 9, 2014, when *Al Maqaleh* was under consideration by the Supreme Court.<sup>364</sup> The *SCCI Report* is best known for exposing the CIA’s unlawful interrogation practices, its use of “black sites,” and its misrepresentations about these programs.<sup>365</sup> Notably though, it also contains important revelations of the U.S. Government’s manipulation of writ jurisdiction.

Section II(K)(9) of the *SCCI Report* is titled “U.S. Supreme Court Action in the Case of *Rasul v. Bush* Forces Transfer of CIA Detainees from Guantanamo Bay to Country [redacted].”<sup>366</sup> This Section states that, in early 2004, the U.S. Department of Justice and the CIA discussed the possibility that the Supreme Court in *Rasul* might grant five detainees at Guantanamo “habeas corpus rights.”<sup>367</sup> After further discussions among the CIA General Counsel, the Department of Justice, the National Security Council, and the White House Counsel, these five detainees were transferred from Guantanamo to other CIA facilities in April 2004.<sup>368</sup>

The *SCCI Report* also documents a period in early 2005 in which the CIA struggled to find suitable detention facilities for detainees in its custody. In this period, the CIA was looking for an “endgame policy” for its detainees due to “unstable relations with host governments” and problems finding additional host countries. Guantanamo appears to have been a potential destination for these detainees.<sup>369</sup> However, the U.S. Solicitor General cautioned that if detainees were moved to Guantanamo, they might be entitled to file habeas petitions and have the right to an attorney.<sup>370</sup>

This might have been the “smoking gun” that Judge Bates—and implicitly, Judges Sentelle and Henderson—expected the *Al Maqaleh* petitioners to find. While the *SCCI Report* does not specifically name petitioners, it conclusively demonstrates that the CIA, the Depart-

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364. See *SCCI REPORT*, *supra* note 25.

365. See, e.g., Spencer Ackerman, *Senate Report on CIA Torture Claims Spy Agency Lied about ‘Ineffective’ Program*, *GUARDIAN* (Dec. 9, 2014), <http://www.theguardian.com/us-news/2014/dec/09/cia-torture-report-released> [https://perma.unl.edu/PCM5-SZT6]; Jeremy Ashkenas et al., *7 Key Points from the C.I.A. Torture Report*, *N.Y. TIMES* (Dec. 9, 2014), [http://www.nytimes.com/interactive/2014/12/09/world/cia-torture-report-key-points.html?\\_r=0](http://www.nytimes.com/interactive/2014/12/09/world/cia-torture-report-key-points.html?_r=0).

366. *SCCI REPORT*, *supra* note 25, at 140.

367. *Id.*

368. *Id.* at 141.

369. *Id.* at 151.

370. *Id.*

ment of Justice, the Solicitor General, and the White House Counsel were complicit in, or at least aware of, detainee transfers out of Guantanamo to avoid habeas jurisdiction.<sup>371</sup>

## VI. CONCLUSION: THE DIMINISHING REACH OF THE WRIT OF HABEAS CORPUS

When it was decided in 2008, *Boumediene* appeared to be a landmark judgment. The U.S. Government would no longer be able to detain individuals without some basic process and the courts would play a larger role in ensuring that detainee rights were protected.<sup>372</sup> However, the legacy of *Boumediene* has turned out quite differently. The Supreme Court has not granted certiorari to a single detention-related case since that decision.<sup>373</sup> In effect, this has ceded exclusive authority to the D.C. Circuit to oversee U.S. detention policy.<sup>374</sup> Since 2008, the D.C. Circuit has construed *Boumediene* narrowly and in the Government's favor.<sup>375</sup> Indeed, many of the Circuit's judges have openly criticized *Boumediene* and the Supreme Court's failure to "assume direct responsibility for [its] . . . consequences."<sup>376</sup>

*Al Maqaleh* fits within this trend of retrenchment following *Boumediene*. By interpreting the three-factor test formalistically, and often rigidly, the D.C. Circuit has effectively limited *Boumediene*'s holding to the singular situation at Guantanamo. It appears from its reasoning in *Al Maqaleh II* and *Al Maqaleh IV* that the writ of habeas corpus will not extend to any detention facility outside U.S. sovereign control, nor to any facility located in an active theater of war. If sovereignty is *sine qua non* to writ jurisdiction, and practical obstacles operate as a de facto political question doctrine, then the practical, functional approach in *Boumediene* has been lost.<sup>377</sup>

By choosing to view the extension of habeas to Bagram in all-or-nothing terms, the D.C. Circuit essentially predetermined the result in *Al Maqaleh*. The D.C. Circuit determined it was unfeasible to ex-

371. See Stephen Vladeck, *The SCCI Torture Report, Rasul, and Transfers to Avoid Jurisdiction*, JUST SECURITY (Dec. 9, 2014, 12:20 PM), <https://www.justsecurity.org/18151/ssci-torture-report-rasul-transfers-avoid-jurisdiction/#more-18151> [<https://perma.unl.edu/B7H5-JQV8>].

372. See LAURENCE TRIBE & JOSHUA MATZ, UNCERTAIN JUSTICE: THE ROBERTS COURT AND THE CONSTITUTION 241 (2014).

373. *Id.* at 242.

374. See Peter J. Spiro, *Sovereignism's Twilight*, 31 BERKELEY J. INT'L L. 307, 318–19 (2013).

375. See generally BENJAMIN WITTES ET AL., THE EMERGING LAW OF DETENTION 2.0: THE GUANTANAMO HABEAS CASES AS LAWMAKING (2011) (reviewing the D.C. Circuit's jurisprudence on habeas at Guantanamo after *Boumediene*).

376. TRIBE & MATZ, *supra* note 372, at 242 (quoting *Esmail v. Obama*, 639 F.3d 1075, 1078 (D.C. Cir. 2011) (Silberman, J., concurring)).

377. See *Boumediene v. Bush*, 553 U.S. 723, 764 (2008) (“[E]xtraterritoriality questions turn on objective factors and practical concerns, not formalism.”).

tend the writ of habeas corpus to all detainees at Bagram, so it chose not to extend it to anyone. The fact that petitioners were uniquely situated as third-country nationals captured away from any battlefield, played practically no role in the analysis.

The D.C. Circuit also did not seriously consider petitioners' allegations of executive manipulation of writ jurisdiction. Judge Henderson in *Al Maqaleh IV*, for instance, dismissed as "utterly incredible" the notion that the U.S. Government chose to detain individuals at Bagram rather than Guantanamo to avoid judicial review.<sup>378</sup> As a result, the court held that evidence of manipulation would not alter the analysis of either the second or third *Boumediene* factors.<sup>379</sup>

*Al Maqaleh IV* also refused to create a new, additional factor to take such manipulation into account.<sup>380</sup> Judge Henderson expressed the concern that, when "[r]educ[ed] to its core . . . [petitioners'] argument becomes an appeal for universal extraterritorial application of the Suspension Clause."<sup>381</sup> This is, of course, not what petitioners requested, but it is the logical result of the D.C. Circuit's categorical approach.

Thus, *Al Maqaleh IV* sets a dangerous precedent if it remains the last word on the extraterritorial reach of the writ of habeas corpus. *Al Maqaleh IV* upheld *Al Maqaleh II*, which ignored the site of apprehension, misconstrued the site of detention, and overestimated the practical obstacles impeding habeas jurisdiction at Bagram.<sup>382</sup> More problematically, *Al Maqaleh IV* essentially adopted the political question doctrine—which the Supreme Court in *Boumediene* explicitly rejected in the habeas context—to defer to government claims that habeas trials would be impracticable.<sup>383</sup> *Al Maqaleh IV* also refused to consider evidence of executive manipulation as affecting the *Boumediene* factor analysis, even though in *Boumediene* Justice Kennedy repeatedly expressed concern that such manipulation would distort the separation of powers.<sup>384</sup>

When the D.C. Circuit or the Supreme Court revisits these issues in future cases, these courts should question the precedential value of *Al Maqaleh IV*, if not overturn it altogether. The *Boumediene* three-factor test has effectively been replaced by a much more restrictive test arising out of *Al Maqaleh IV*: habeas jurisdiction will not be extended to any facility unless (1) it is under de facto U.S. sovereignty

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378. *Al Maqaleh v. Hagel (Al Maqaleh IV)*, 738 F.3d 312, 335 (D.C. Cir. 2013).

379. *Id.*

380. *Id.* at 336.

381. *Id.*

382. *See id.* at 327–32; *Al Maqaleh v. Gates (Al Maqaleh II)*, 605 F.3d 84, 95–99 (D.C. Cir. 2010).

383. *See Boumediene*, 553 U.S. at 755; *Al Maqaleh IV*, 738 F.3d at 333–35.

384. *See Boumediene*, 553 U.S. at 765–66.

and (2) the Government concedes that there are no serious practical obstacles to the exercise of the writ. The upshot is that the Executive can easily evade habeas jurisdiction under the D.C. Circuit's framework. In a future conflict, the Executive could simply house detainees close to hostilities or in a facility under a short-term lease agreement to avoid judicial review of its detention policies. Thus, the Executive would effectively be empowered to "switch the Constitution on or off at will."<sup>385</sup>

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385. *Id.* at 765.