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SHADOWING THE FLAG: EXTENDING THE HABEAS WRIT BEYOND GUANTÁNAMO

Dawinder S. Sidhu *

ABSTRACT

The writ of habeas corpus activates courts' duty to check arbitrary or unlawful restraints by the Executive on individual liberty. In times of war, courts have been compelled to determine whether the writ is available to individuals held by the Executive outside of the territorial boundaries of the United States. In *Johnson v. Eisentrager*, in which World War II detainees were held in Germany, the Supreme Court answered in the negative, while in *Boumediene v. Bush*, involving post-9/11 detainees housed at Guantánamo, the Court reached the opposite conclusion. Operating within these two guideposts, the U.S. Court of Appeals for the District of Columbia Circuit decided in *al Maqaleh v. Gates* that three detainees held at Bagram Air Base, Afghanistan were not entitled to the constitutional habeas privilege.

The purpose of this Article is to explain why the D.C. Circuit got it wrong. Part I provides an overview of the facts and relevant law that formed the basis for the decision. Part II shows that the court misapplied the basic factors set forth initially by the Court in *Eisentrager* and later clarified in *Boumediene*. Part III contains a proposed framework that reorients and reframes these factors in order to make habeas jurisdiction analyses more workable and consistent with the historical justifications for the writ, separation of powers considerations, and governing case law. Part IV applies this framework to the Bagram petitions and, in doing so, highlights the problematics of the D.C. Circuit's decision. In short, under both existing standards and the suggested new way of looking at questions of wartime habeas jurisdiction, I posit that the petitions should not have been dismissed.

If left to stand, *al Maqaleh* will not only cast the detainees into an indefinite legal abyss, but will place the Executive beyond the courts' traditional constitutional checking duties precisely when the wartime Executive is most tempted to act outside of established law—that is, when judicial review is most critically needed.

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INTRODUCTION

“Security against foreign danger, is one of the primitive objects of civil society,” James Madison wrote in *The Federalist Papers*.¹ Wartime presidents throughout American history have emphasized that security is a first-order responsibility of government. It is a strong unified government, George Washington instructed the citizens of the nascent nation, that serves as the “main pillar in the edifice of your real independence, the support of your tranquility at home, your peace abroad; of your safety”² On the brink of World War I hostilities, Franklin D. Roosevelt declared that the government possessed a “great responsibility” to respond to a “great emergency” abroad, such that the government’s “actions and . . . policy should be devoted primarily—almost exclusively—to meeting this foreign peril.”³ The “post-9/11 Presidents”—George W. Bush and Barack Obama—shared this view on this primary purpose of government, with Bush noting that, “[d]efending our [n]ation against its enemies is the first and fundamental commitment of the [f]ederal [g]overnment,”⁴ and Obama similarly acknowledging that, “[t]his Administration has no greater responsibility than the safety and security of the American people.”⁵

The duty to protect the nation is more than an abstract tenet of political theory, but is felt in real terms by presidents facing the specter of war or terrorism. For example, a former Assistant Attorney General under Bush, who was part of a small core of senior officials charged with crafting and/or approving the Administration’s post-9/11 counterterrorism policies, wrote that the President had the “ultimate obligation” to ensure another attack did not take place, and that, to the extent those policies failed in this singular mission, “the blood of the hundred thousand people who die[d]” would be on his hands.⁶

¹ THE FEDERALIST NO. 41, at 224 (James Madison) (E.H. Scott ed., 1898); *see also* THE FEDERALIST NO. 23, at 126 (Alexander Hamilton) (E.H. Scott ed., 1898) (“The principal purposes to be answered by union[] are these: [t]he common defen[s]e of the members; the preservation of the public peace, as well against internal convulsions as external attacks. . . .”); *Haig v. Agee*, 453 U.S. 280, 307 (1981) (“It is ‘obvious and unarguable’ that no governmental interest is more compelling than the security of the Nation.” (quoting *Aptheker v. Sec’y of State*, 378 U.S. 500, 509 (1964))).

² George Washington, Farewell Address (Sept. 19, 1796), *available at* http://avalon.law.yale.edu/18th_century/washing.asp.

³ Franklin D. Roosevelt, Annual Address to Congress (“Four Freedoms Speech”) (Jan. 6, 1941), *available at* <http://www.ourdocuments.gov/doc.php?flash=old&doc=70&page=transcript>.

⁴ George W. Bush, *Introduction*, THE WHITE HOUSE, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA (2002), *available at* http://www.au.af.mil/au/awc/awcgate/nss/nss_sep2002.pdf.

⁵ THE WHITE HOUSE, NATIONAL SECURITY STRATEGY 4 (2010), *available at* http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf.

⁶ JACK GOLDSMITH, THE TERROR PRESIDENCY 71 (2007) (quoting David Addington, Vice President Dick Cheney’s Chief of Staff).

The wartime President's impulse to safeguard the people is particularly intense and acute, to the point that the Executive may seek to guarantee national security without reference or careful attention to the technical limits imposed by law. "[T]he Constitution has never greatly bothered any wartime President," observed Franklin D. Roosevelt's Attorney General during World War II.⁷ Some prominent scholars have even claimed that the practical necessity of government action in wartime should trump the rule of the law.⁸

The fact remains that the Executive's interest in national security—however heightened, fundamental, or understandable—does not place governmental wartime actions beyond judicial review.⁹ Agitated by legal challenges to its wartime conduct, the Executive historically has had to convince the courts that its national security policies and programs are consistent with the law.¹⁰ For example, Abraham Lincoln had to answer before the courts for unilaterally suspending the writ of habeas corpus during the Civil War,¹¹ Harry Truman was taken to task for trying to ensure private steel was available for military use during the Korean War despite a nationwide strike,¹² and Roosevelt had to defend the government's decisions to subject individuals of Japanese descent to curfews and internment following Pearl Harbor.¹³

⁷ FRANCIS BIDDLE, IN BRIEF AUTHORITY 219 (1962). The tension between national security and the Constitution was perhaps most famously expressed by Abraham Lincoln, who asked rhetorically, "[A]re all the laws, *but one*, to go unexecuted, and the government itself go to pieces, lest that one be violated?" DORIS KEARNS GOODWIN, *TEAM OF RIVALS: THE POLITICAL GENIUS OF ABRAHAM LINCOLN* 355 (2005).

⁸ See RICHARD A. POSNER, *NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY* 70, 158 (2006) (arguing for a general rule in the area of executive national security decision-making by which a "law of necessity" trumps the "law of the Constitution"); see also *id.* at 6 (stating that "rooting out an . . . enemy . . . might be fatally inhibited if we felt constrained to strict observance of civil liberties" protected by the Constitution). For my critique of this view, see Dawinder S. Sidhu, *Wartime America and The Wire: A Response to Posner's Post-9/11 Constitutional Framework*, 20 *GEO. MASON U. C.R. L.J.* 37 (2009). To read others who continue to insist that there is an aspect of executive authority—the Commander-in-Chief function—that cannot be constrained or checked by the other two arms of the federal government, see David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—A Constitutional History*, 121 *HARV. L. REV.* 941, 1019 n.307 (2008) (listing some of the scholarly works supporting this view).

⁹ See *Graham v. Connor*, 490 U.S. 386, 397 (1989) (noting that "good intentions" do not make governmental action constitutional). More detailed discussions of the relationship between executive wartime action and judicial review follow. See *infra* Part III.

¹⁰ This is done, generally, by the Executive's robust assertions of its expansive national security powers and a commensurate view as to the limited role of the courts in connection with active security campaigns.

¹¹ *Ex parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9487).

¹² *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

¹³ *Korematsu v. United States*, 323 U.S. 214 (1944); *Hirabayashi v. United States*, 320 U.S. 81 (1943).

The targets of these Presidents' national security policies were, respectively, individuals rebelling in support of the Confederacy, privately held steel mills, and persons on the West Coast assumed to be sympathetic to the Japanese Empire. In the aftermath of 9/11, the focus of the Executive's wartime apparatus are detainees, generally individuals captured and thought to be part or otherwise supportive of the terrorist regime responsible for the attacks.¹⁴ Continuing the historical relationship between the wartime Executive and the courts, the post-9/11 Presidents and courts have also interacted to determine whether the Executive's national security responses satisfy or are consistent with the law. In the post-9/11 chapter of the interplay between the wartime Executive and courts, the President has most notably had to contend with whether a citizen-detainee properly filed his statutory habeas petition against the custodian of his physical confinement,¹⁵ whether federal courts have jurisdiction to review statutory habeas petitions filed by aliens held at Guantánamo,¹⁶ the process due to a citizen—"enemy combatant" held at Guantánamo,¹⁷ whether the military commissions established by the President to try "enemy combatants" were legally sufficient under the Uniform Code of Military Justice and the Geneva Convention,¹⁸ and the sufficiency of a complaint filed by a detainee alleging that he was subjected to discriminatory security policies created—or at least approved by—high-level government officials.¹⁹

In *Boumediene v. Bush*,²⁰ the Supreme Court resolved whether federal courts had jurisdiction to review constitutional habeas petitions filed by "enemy combatants" situated at Guantánamo.²¹ The writ, the Court noted, is "a vital instrument for the protection of individual liberty."²² While the government argued that habeas is limited to the territorial borders and areas over which the United States retains *de jure* sovereignty, the Supreme Court concluded that the habeas privilege extends to the

¹⁴ See generally OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUST., THE SEPTEMBER 11 DETAINEES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE INVESTIGATION OF THE SEPTEMBER 11 ATTACKS 5 (2003) (defining "September 11 detainees" as "aliens held . . . in connection with the investigation of the September 11 . . . attacks").

¹⁵ *Rumsfeld v. Padilla*, 542 U.S. 426 (2004).

¹⁶ *Rasul v. Bush*, 542 U.S. 466 (2004).

¹⁷ *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

¹⁸ *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

¹⁹ *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009).

²⁰ 553 U.S. 723 (2008).

²¹ *Id.* The statutory habeas writ was created by Congress and is codified at 28 U.S.C. § 2241, as distinct from the constitutional writ, which derives from the Constitution. See U.S. CONST. art. I, § 9, cl. 2 ("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."). For a more detailed discussion of the differences between the two, see Daniel Michael, *The Military Commissions Act of 2006*, 44 HARV. J. ON LEGIS. 473, 481 (2007).

²² *Boumediene*, 553 U.S. at 746–52.

“enemy combatants” at Guantánamo because the United States exercises total, practical control over Guantánamo.²³

Left open by *Boumediene* is the broad question of whether post-9/11 detainees held outside of the territorial United States or Guantánamo are entitled to the constitutional habeas privilege. This Article concerns a decision in which the U.S. Court of Appeals for the District of Columbia Circuit held, in the wake of *Boumediene*, that three foreign detainees at the Bagram Airfield Military Base in Afghanistan were not entitled to constitutional habeas rights and dismissed their petitions on jurisdictional grounds as a result.²⁴

The purpose of this Article is to explain why this case, *al Maqaleh v. Gates*, was wrongly decided. In Part I, I provide an overview of the relevant facts that gave rise to the case and will articulate the governing legal standards for determining whether the detainees at Bagram are entitled to the constitutional habeas privilege. In Part II, I summarize the district court’s and circuit court’s conclusions with respect to this question, and will argue that the D.C. Circuit’s decision was unfaithful to the general legal standards discussed in Part I. In other words, I suggest that the D.C. Circuit, using even these existing legal benchmarks, failed to properly apply the law on its own terms.

In Part III, I propose a new framework that reorients and reframes the established factors that are relevant to questions of habeas jurisdiction in a manner that is not only more workable, but that is more consistent with certain foundational resources: the purposes of the writ, constitutional separation of powers considerations, and legal precedent. Courts may then use this framework when assessing whether the constitutional habeas right extends to detainees located outside of the territorial United States or Guantánamo. In Part IV, I apply this recommended paradigm to the Bagram detainees’ petitions. In doing so, I not only demonstrate how this standard can operate in practice, but also make clear that these petitioners were entitled to the constitutional writ.

This analysis reveals two fundamental legal flaws in the D.C. Circuit’s opinion. First, the panel paid short shrift to the fact that the United States has plenary control over the detainees as they are held at Bagram, even if the United States does not exercise full or exclusive control over the entire, expansive base. Such control, as will be explained in greater detail below, is sufficient for habeas purposes. Second, the panel

²³ *See id.* (suggesting that federal courts may hear a petition for a writ of habeas corpus brought “by a prisoner deemed an enemy combatant . . . when held in a territory, like Guantánamo, over which the Government has total military and civil control”); *id.* at 755–64 (“[E]xtraterritoriality questions turn on objective factors and practical concerns, not formalism.”); *id.* at 769 (holding that the writ extended to the petitioners at Guantánamo because of the “plenary control the United States asserts over the base”). The Court distinguished the present facts from those present in *Eisentrager*, as in that case “the United States’ control over the prison in Germany was neither absolute nor indefinite.” *Id.* at 768.

²⁴ *Al Maqaleh v. Gates*, 605 F.3d 84 (D.C. Cir. 2010). Unless otherwise noted, “*al Maqaleh*” refers to this opinion.

exaggerated the practical problems that would exist were habeas proceedings to take place at Bagram, as the facility itself is heavily fortified and secure, and as it is the government that ultimately and directly bears responsibility for bringing the detainees to this “active theatre of war.”

It is important to disclose at the outset why these legal deficiencies are worth addressing and fixing as a practical matter. The decision effectively excludes the detainees at Bagram, and perhaps other detainees outside of the U.S. and the Guantánamo base, from the historical, ongoing contests between the wartime Executive and the courts, in which the latter can ensure that the former is acting in conformance with the law. To be plain, this is not an argument for always finding in favor of the plaintiffs or petitioners in cases against the wartime Executive; rather, it is a plea for detainees allegedly wrongfully held by the Executive to have the opportunity to challenge their detention. It is an appeal to process, not result. The Constitution follows the flag, and it is the courts that are therefore to act as a shadow wherever that flag may be planted.²⁵

Under the D.C. Circuit’s opinion, these detainees (and others similarly situated) would have no ability to seek relief in the courts—and be subject to indefinite detention as a result—simply on the basis of where the government has decided to imprison them. This is a practical result that offends basic principles of liberty and fairness, and one strains to square it with the core functions of the writ, the constitutional scheme given by the Framers, and the Supreme Court’s precedent.

I. BACKGROUND

A. Essential Facts

This case arises in the aftermath of the terrorist attacks of September 11, 2001.²⁶ The attacks on New York and the Pentagon triggered a military conflict in which the United States pursued, in Afghanistan and elsewhere, terrorists and anyone harboring terrorists.²⁷ Fadi al Maqaleh, Amin al Bakri, and Redha al-Najar are among those who, in this urgent and widespread effort to quell terrorism, were captured by or handed

²⁵ See *Hirota v. MacArthur*, 338 U.S. 197, 204 (1949) (Douglas, J., concurring) (“If an American General holds a prisoner, our process can reach him wherever he is. To that extent at least, the Constitution follows the flag.”).

²⁶ See, e.g., First Amended Petition for Writ of Habeas Corpus ¶ 29, *al Maqaleh v. Gates*, 604 F. Supp. 2d 205 (D.D.C. 2007) (No. 06-01669).

²⁷ See Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (2001) (authorizing the President “to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks . . . or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons”); Military Order of Nov. 13, 2001—Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,831, 57,834 (Nov. 16, 2001) (Presidential order authorizing the detention and trial by military tribunals of noncitizens that the President has “reason to believe” is a member of al Qaeda or is otherwise a terrorist).

over to the United States.²⁸ Al Maqaleh was placed in custody in 2003, while al Bakri and al-Najar were captured in 2002.²⁹ Though none are citizens of Afghanistan and though all were apprehended outside of Afghanistan,³⁰ all three were transferred to and are imprisoned at the Bagram Theater Internment Facility at the Bagram Airfield in Afghanistan.³¹

At Bagram, each was designated by the Unlawful Enemy Combatant Review Board as an “enemy combatant,” defined as “an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners.”³² The three subsequently and separately filed petitions for habeas corpus in the U.S. District Court for the District of Columbia,³³ challenging the factual basis for this status determination and claiming, at bottom, that they did not participate in any terrorist activities or otherwise support terrorists.³⁴

In 2006, Congress passed the Military Commissions Act (MCA), which denied federal courts the ability to hear habeas petitions filed by any alien “determined by the United States to have been properly detained as an enemy combatant.”³⁵ The

²⁸ See *al Maqaleh*, 604 F. Supp. 2d at 209.

²⁹ See *al Maqaleh*, 605 F.3d at 87.

³⁰ See *id.* The detainees are all foreign nationals. *Id.* at 96. Because the facts of the case require and compel only a resolution of habeas jurisdiction as to foreign national detainees, this Article will not explore the habeas rights of American citizens apprehended or detained in the post-9/11 conflict. On the constitutional treatment of citizens and non-citizens alike, see Neal Katyal, *Equality in the War on Terror*, 59 STAN. L. REV. 1365, 1393–94 (2007) (arguing that “[a] two-track system of justice”—one for citizens, the other for aliens—“is so deeply in tension with the American ideal of equality . . . as to caution the greatest of prudence in departing from it”). See also *Ry. Express Agency v. New York*, 336 U.S. 106, 113 (1949) (Jackson, J., concurring) (“Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.”).

³¹ See *al Maqaleh*, 605 F.3d at 87. “Bagram” will be used interchangeably to refer to the detention facility and air base.

³² Memorandum from Paul Wolfowitz, Deputy Sec’y of Def., on Order Establishing Combatant Status Review Tribunal, for Gordon R. England, Sec’y of the Navy, § a (July 7, 2004), available at <http://www.defense.gov/news/Jul2004/d20040707review.pdf>.

³³ See First Amended Petition for Writ of Habeas Corpus, *al Maqaleh v. Gates*, 604 F. Supp. 2d 205 (D.D.C. 2007) (No. 06-01669); Petition for Writ of Habeas Corpus, *al Bakri v. Bush*, 604 F. Supp. 2d 205 (D.D.C. 2007) (No. 08-01307); Petition for Writ of Habeas Corpus, *al-Najar v. Gates*, 604 F. Supp. 2d 205 (D.D.C. 2007) (No. 08-02143). A fourth petition was filed and consolidated with the three others for purposes of the underlying district court order. See Petition for Writ of Habeas Corpus, *Wazir v. Gates*, 604 F. Supp. 2d 205 (D.D.C. Sept. 29, 2006) (No. 06-01697). As this petition was dismissed by the district court and was not part of the appeal, it lies outside of the ambit of this Article.

³⁴ See, e.g., Petition for Writ of Habeas Corpus, *al Bakri*, *supra* note 33, ¶ 25.

³⁵ 28 U.S.C. § 2241(e)(1) (2008); see Janet Cooper Alexander, *Jurisdiction-Stripping in a Time of Terror*, 95 CALIF. L. REV. 1193, 1197 (2007) (“The MCA thus strips habeas protection from lawful resident aliens detained within the United States as well as detainees at Guantánamo and other locations outside the United States.”).

Suspension Clause of the U.S. Constitution provides, however, that “[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”³⁶ Because the MCA is not “a formal suspension of the writ,” it is unconstitutional as to those “enemy combatants” covered by the Suspension Clause and therefore entitled to the writ.³⁷ The United States moved to dismiss the al Maqaleh, al Bakri, and al-Najar petitions, arguing that the petitioners were not so entitled, the MCA thus remains in force and, therefore, the district court lacked jurisdiction over the petitions.³⁸ Resolution of the government’s motion hinged on the question of extraterritoriality—specifically, whether alien “enemy combatants” apprehended and detained outside of the United States may invoke the Suspension Clause and thus seek the protections of the writ, the MCA notwithstanding.³⁹

B. Relevant Precedent

Federal district courts possess the authority, “within their respective jurisdictions,” to review petitions for habeas corpus filed by persons alleging that they are “in custody in violation of the Constitution or laws or treaties of the United States.”⁴⁰ The extra-territorial question—that is, whether a federal court would be able, in cases of federal detention, to issue a habeas writ outside of its “respective jurisdiction”—was not seriously examined by the courts until World War II.⁴¹

In *Ahrens v. Clark*,⁴² handed down in 1948, the Supreme Court ruled that the federal district court for the District of Columbia could not issue writs filed by detainees held at Ellis Island, stating specifically that the “jurisdiction of the District Court to issue the writ in cases such as this is restricted to those petitioners who are confined

³⁶ U.S. CONST. art. I, § 9, cl. 2; see AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 121 (2005) (“In the absence of any such extreme circumstance, courts would remain open to hear all challenges to the lawfulness of executive detentions.”).

³⁷ *Boumediene v. Bush*, 553 U.S. 723, 771 (2008).

³⁸ See Respondents’ Motion to Dismiss, *al Bakri v. Bush*, 604 F. Supp. 2d (D.D.C. 2008) (No.08-01307).

³⁹ See *al Maqaleh*, 604 F. Supp. 2d at 214.

⁴⁰ 28 U.S.C. §§ 2241(a), (c)(3) (2008).

⁴¹ Stephen I. Vladeck, *The Suspension Clause as a Structural Right*, 62 U. MIAMI L. REV. 275, 292 (2008). To be sure, in the “Insular Cases” of 1901–1904, which considered whether and to what extent the Constitution applied to Spanish colonies gained by the United States following the Spanish-American War, the Court determined that the Constitution applies, on its own accord and without the need for congressional action, in full to those territories that were to become states and in part to unincorporated territories. See *Boumediene*, 553 U.S. at 756–59 (discussing *Dorr v. United States*, 195 U.S. 138 (1904); *Hawaii v. Mankichi*, 190 U.S. 197 (1903); *De Lima v. Bidwell*, 182 U.S. 1 (1901); *Dooley v. United States*, 182 U.S. 222 (1901); *Armstrong v. United States*, 182 U.S. 243 (1901); *Downes v. Bidwell*, 182 U.S. 244 (1901)).

⁴² 335 U.S. 188 (1948), *overruled by* *Braden v. 30th Judicial Circuit Court of Ky.*, 410 U.S. 484 (1973).

or detained within the territorial jurisdiction of the court.”⁴³ Thus, the district court was without power to issue the writs since Ellis Island, where the detainees were actually confined, was outside of the court’s territorial jurisdiction. A year later, in *Hirota v. MacArthur*,⁴⁴ the Supreme Court ruled that it lacked jurisdiction over federal habeas petitions filed pursuant to the Court’s original (not appellate) jurisdiction by citizens of Japan who were convicted by a Tokyo war crimes tribunal of crimes against humanity.⁴⁵ It is unclear from the Court’s opinion whether the basis for the decision was that the Court lacked original jurisdiction over the petitioners or, more broadly, whether there was a jurisdictional problem for all federal courts.⁴⁶

While these two cases are of rather dubious precedential value, in 1950 the Court decided a case that, to this day, “remains an important guidepost in this area of law.”⁴⁷ Following the end of the active hostilities in World War II, the Court addressed whether it had jurisdiction over habeas petitions filed by twenty-one German nationals detained in Germany and convicted by American military commissions abroad of violating the laws of war. In *Johnson v. Eisentrager*,⁴⁸ the Court first set the stage for its analysis, noting that “[w]e are cited to no instance where a court, in this or any other country where the writ is known, has issued it on behalf of an alien enemy who, at no relevant time and in no stage of his captivity, has been within its territorial jurisdiction.”⁴⁹ The Court held that constitutional habeas rights did not exist for these petitioners because they were nonresident aliens tried and detained in an Allied prison outside of the sovereign jurisdiction of the United States: “in extending constitutional protections beyond the citizenry, the Court has been at pains to point out that it was the alien’s presence within its territorial jurisdiction that gave the Judiciary power to act.”⁵⁰ Generally, an alien, the Court wrote, “has been accorded a generous and ascending scale of rights as he increases his identity with our society.”⁵¹ In this case, the petitioners lacked completely any physical connection with the territorial United States.⁵² The Court also

⁴³ *Id.* at 192.

⁴⁴ 338 U.S. 197 (1949) (per curiam).

⁴⁵ *Id.*

⁴⁶ See Stephen I. Vladeck, *The Problem of Jurisdictional Non-Precedent*, 44 TULSA L. REV. 587, 594 (2009).

⁴⁷ José A. Cabranes, *Our Imperial Criminal Procedure: Problems in the Extraterritorial Application of U.S. Constitutional Law*, 118 YALE L.J. 1660, 1695 n.172 (2009).

⁴⁸ 339 U.S. 763 (1950).

⁴⁹ *Id.* at 768.

⁵⁰ *Id.* at 771.

⁵¹ *Id.* at 770.

⁵² See *id.* at 777 (stating that in order to hear the petitioners’ case, “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

expressed discomfort with the practical difficulties that would ensue if the petitioners were allowed to contest their detention in a U.S. forum⁵³ and suggested that the enemy would ultimately benefit from the litigation that would, among other things, take American military personnel away from their duties.⁵⁴

In *Burns v. Wilson*,⁵⁵ the Court in 1953 denied the habeas petitions filed by American members of the armed services who had been found guilty of crimes by courts martial in Guam and were detained there in federal custody.⁵⁶ The Court held that it was not their duty, as a civil court, to relitigate the military proceedings, but it was their “limited function . . . to determine whether the military have given fair consideration to each of these claims.”⁵⁷ Because they had, the Court’s inquiry ended there and the petitions were dismissed.⁵⁸ In 1957, the Court in *Reid v. Covert* was confronted with habeas petitions filed by American wives of American soldiers;⁵⁹ the wives were charged with crimes committed abroad and were convicted by courts martial abroad.⁶⁰ The petitioners alleged that they were entitled to protections under the Fifth and Sixth Amendments.⁶¹ The Court accepted their arguments, writing that “[w]hen the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land.”⁶²

the United States.”); *id.* at 778 (“[T]hese prisoners at no relevant time were within any territory over which the United States is sovereign, and the scenes of their offense, their capture, their trial and their punishment were all beyond the territorial jurisdiction of any court of the United States.”).

⁵³ *See id.* at 778–79 (“To grant the writ to these prisoners might mean that our army must transport them across the seas for hearing. This would require allocation of shipping space, guarding personnel, billeting and rations. It might also require transportation for whatever witnesses the prisoners desired to call as well as transportation for those necessary to defend legality of the sentence.”).

⁵⁴ *See id.* at 779 (“The writ, since it is held to be a matter of right, would be equally available to enemies during active hostilities as in the present twilight between war and peace. Such trials would hamper the war effort and bring aid and comfort to the enemy. They would diminish the prestige of our commanders, not only with enemies but also with wavering neutrals. It would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home. Nor is it unlikely that the result of such enemy litigiousness would be a conflict between judicial and military opinion highly comforting to enemies of the United States.”).

⁵⁵ 346 U.S. 137 (1953).

⁵⁶ *Id.*

⁵⁷ *Id.* at 144.

⁵⁸ *Id.* at 144–46. A similar decision was reached in *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 22–23 (1955).

⁵⁹ 354 U.S. 1 (1957).

⁶⁰ *Id.*

⁶¹ *See id.* at 4–5.

⁶² *Id.* at 6.

In 1973, the Court overruled *Ahrens* in *Braden v. 30th Judicial Circuit Court of Kentucky*.⁶³ “[C]ontrary to *Ahrens*,” the Court would later explain, “[a] prisoner’s presence within the territorial jurisdiction of the district court is not an invariable prerequisite to the exercise of district court jurisdiction under the federal habeas statute.”⁶⁴ In the 1990 case of *United States v. Verdugo-Urquidez*,⁶⁵ the Court held that a non-resident alien could not assert Fourth Amendment claims against federal agents for a search of property located in Mexico.⁶⁶ The Court expressly declined to “endorse the view that every constitutional provision applies wherever the United States Government exercises its power,”⁶⁷ and ruled that the Fourth Amendment in particular was not intended to extend to the “activities of the United States directed against aliens in foreign territory or in international waters.”⁶⁸

The Supreme Court’s next consequential forays into extraterritoriality occurred in the aftermath of 9/11. In *Rasul v. Bush*,⁶⁹ fourteen Kuwaitis and Australians—captured during the Afghanistan conflict and detained at Guantánamo without charge or hearing—filed writs of habeas corpus in which they claimed that they did not commit any wrongdoing related to the fighting in Afghanistan.⁷⁰ The question for the Court was whether federal courts had jurisdiction to review statutory habeas petitions filed by aliens held at Guantánamo.⁷¹ Reversing the district court and D.C. Circuit’s rulings to the contrary, the Court clarified that *Eisentrager* does not categorically restrict statutory habeas jurisdiction to situations in which a detainee is located within the territorial jurisdiction of the United States.⁷² Instead, the Court noted, federal courts’ statutory habeas jurisdiction extends to the formal territorial borders and may also reach places over which the United States exercises plenary and exclusive control.⁷³ Applied to Guantánamo, habeas runs because the United States exerts “‘complete jurisdiction and control’ over the Guantánamo Bay Naval Base, and may continue to exercise such control permanently if it so chooses.”⁷⁴ Moreover, the Court made it clear that statutory habeas protections may be sought by foreign nationals—not just American citizens—held abroad in federal custody.⁷⁵

⁶³ 410 U.S. 484, 495–501 (1973).

⁶⁴ *Rasul v. Bush*, 542 U.S. 466, 478 (2004) (internal quotation marks omitted) (explaining the impact of *Braden*).

⁶⁵ 494 U.S. 259 (1990).

⁶⁶ *Id.*

⁶⁷ *Id.* at 268–69.

⁶⁸ *Id.* at 267.

⁶⁹ 542 U.S. 466 (2004).

⁷⁰ *Id.*

⁷¹ *Id.* at 470.

⁷² *See id.* at 478–79.

⁷³ *See id.* at 475; *see also id.* at 482 (noting that, historically, habeas extends to “all other dominions under the sovereign’s control”).

⁷⁴ *Id.* at 480 (citation omitted).

⁷⁵ *Id.* at 481.

In *Boumediene*, which, aside from *Eisentrager*, is the other major guidepost on extraterritoriality and habeas jurisdiction, the Supreme Court considered whether certain detainees held at Guantánamo who contested the basis for their detention and the process that was used to review their status determination “ha[d] the constitutional privilege of habeas corpus, a privilege not to be withdrawn except in conformance with the Suspension Clause.”⁷⁶ Because the MCA—the jurisdiction-stripping legislation passed by Congress—did not formally suspend the writ, the *Boumediene* Court was presented with effectively the same question as the *Eisentrager* Court: “[The] basic premise [here] is that these prisoners are entitled, as a constitutional right, to sue in some court of the United States for a writ of *habeas corpus*. To support that assumption we must hold that a prisoner of our military authorities is constitutionally entitled to the writ”⁷⁷

Despite the identical question, the Court arrived at different conclusions. Unlike the *Eisentrager* Court, the Court in *Boumediene* ruled that the petitioners were shielded by the writ and thereby could invoke the jurisdiction of the federal courts.⁷⁸

The Court began its discussion by providing an overview of the importance and purpose of the writ. “The Framers viewed freedom from unlawful restraint as a fundamental precept of liberty,”⁷⁹ the Court noted. The Framers viewed the “writ [as] a vital instrument for the protection of individual liberty,” such that they took care to specify in the Constitution itself “the limited grounds for its suspension.”⁸⁰ The Suspension Clause, it added, “protects the rights of the detained by affirming the duty and authority of the Judiciary to call the jailer to account.”⁸¹

The Court then turned to its central question: “whether petitioners are barred from seeking the writ or invoking the protections of the Suspension Clause either because of their status, *i.e.*, petitioners’ designation by the Executive Branch as enemy combatants, or their physical location, *i.e.*, their presence at Guantánamo Bay.”⁸² As to the former, the Court noted that “at common law a petitioner’s status as an alien was not a categorical bar to habeas corpus relief.”⁸³ Moreover, the process used to determine the petitioners’ status as “enemy combatants,” the Court stated, “fall[s] well short of the

⁷⁶ *Boumediene v. Bush*, 553 U.S. 723, 732 (2008).

⁷⁷ *Johnson v. Eisentrager*, 339 U.S. 763, 777 (1950).

⁷⁸ *Boumediene*, 553 U.S. at 732–33.

⁷⁹ *Id.* at 739.

⁸⁰ *Id.* at 743.

⁸¹ *Id.* at 745.

⁸² *Id.* at 739. The inquiry as to these two elements corresponds with the first two factors identified by the Court as relevant to a determination as to the reach of the Suspension Clause: “(1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made [and] (2) the nature of the sites where apprehension and then detention took place.” *Id.* at 766.

⁸³ *Id.* at 747.

procedures and adversarial mechanisms that would eliminate the need for habeas corpus review.”⁸⁴

The availability of the writ therefore turned on whether the petitioners’ location precluded their entitlement to the writ. The government argued that habeas is limited to the territorial borders and areas over which the United States retains *de jure* sovereignty, and that it is Cuba that possesses *de jure* sovereignty over Guantánamo.⁸⁵ The Court eschewed this technical standard, rejecting the government’s assertions that “*de jure* sovereignty is the touchstone of habeas corpus jurisdiction.”⁸⁶ Instead, the Court opted for an examination that relied on more functional considerations—“questions of extraterritoriality turn on objective factors and practical concerns, not formalism.”⁸⁷ Indeed, the Court announced that federal courts may hear “a petition for a writ of habeas corpus brought by a prisoner deemed an enemy combatant” held in a territory “over which the Government has total military and civil control.”⁸⁸ The Court found that the United States has plenary control over Guantánamo: “Guantanamo Bay . . . is no transient possession. In every practical sense Guantanamo is not abroad; it is within the constant jurisdiction of the United States,”⁸⁹ whereas in *Eisentrager* “the United States’ control over the prison in Germany was neither absolute nor indefinite.”⁹⁰

In addition to examining whether status and location issues barred the petitioners from asserting the constitutional privilege, the Court looked into whether there were practical obstacles that would preclude habeas proceedings. While the Court in *Eisentrager* identified practical problems that would exist should habeas proceedings take place, the Court in *Boumediene* dismissed notions that “the military mission at Guantanamo would be compromised if habeas corpus courts had jurisdiction to hear the detainees’ claims” and “that adjudicating a habeas corpus petition would cause friction with the host government.”⁹¹

Based on the foregoing, the Court held that the petitioners may invoke the habeas privilege, and that as a result the MCA is unconstitutional as applied to them.⁹²

⁸⁴ *Id.* at 767.

⁸⁵ *See id.* at 753–55.

⁸⁶ *Id.* at 755.

⁸⁷ *Id.* at 764; *see also id.* at 755–64 (explaining why this practical test is supported by previous Supreme Court decisions, including the “Insular Cases” and *Reid v. Covert*, 351 U.S. 487 (1956)); *id.* at 764–66 (same as to separation of powers considerations).

⁸⁸ *Id.* at 746–47.

⁸⁹ *Id.* at 768–69.

⁹⁰ *Id.* at 768.

⁹¹ *Id.* at 769–70. This inquiry corresponded with the third factor enumerated by the Court as relevant to a determination as to the reach of the Suspension Clause: “(3) the practical obstacles inherent in resolving the prisoner’s entitlement to the writ.” *Id.* at 766.

⁹² *See id.* at 771 (“We hold that Art. I, § 9, cl. 2, of the Constitution has full effect at Guantanamo Bay. If the privilege of habeas corpus is to be denied to the detainees now before us, Congress must act in accordance with the requirements of the Suspension Clause. . . . The MCA does not purport to be a formal suspension of the writ Petitioners, therefore, are entitled to the privilege of habeas corpus to challenge the legality of their detention.”).

II. LEGAL ANALYSIS

A. *The Court's Ruling*

Returning to *al Maqaleh* where we last left it, the government moved to dismiss the habeas petitions filed by the detainees at Bagram on the grounds that the MCA had deprived the federal court of the authority to entertain the underlying petitions.⁹³ As with *Eisentrager* and *Boumediene*, the legal question was whether the petitioners were entitled to the habeas writ—if so, the MCA would be unconstitutional as to them because the MCA does not operate as a formal suspension of the writ, as was held in *Boumediene*.⁹⁴

On April 2, 2009, the U.S. District Court for the District of Columbia held that, as with the petitioners in *Boumediene*, the Bagram petitioners were constitutionally entitled to assert the habeas privilege.⁹⁵ Indeed, in the eyes of the district court, the Bagram “petitioners [we]re virtually identical to the detainees in *Boumediene*,” in that “they [we]re non-citizens who were . . . apprehended in foreign lands far from the United States and brought to yet another country for detention . . . determined to be ‘enemy combatants’ . . . the process used to make that determination is inadequate,” and the “‘objective degree of control’ asserted by the United States [at Bagram] is not appreciably different than at Guantanamo.”⁹⁶ While “practical obstacles” to the administration of habeas proceedings were present at Bagram “because Bagram is located in an active theater of war,” the Court noted that “such practical barriers are largely of the Executive’s choosing—[the petitioners] were all apprehended elsewhere and then brought (*i.e.*, rendered) to Bagram.”⁹⁷

On May 21, 2010, the D.C. Circuit reversed, concluding that the MCA lawfully deprived the district court of jurisdiction over the underlying habeas petitions, as the constitutional habeas privilege did not reach the petitioners and thus the petitioners could not invoke the protections of the Suspension Clause.⁹⁸ The court, at the outset, noted that *Eisentrager* and *Boumediene*—the Supreme Court’s major decisions in this area—“controlled” its analysis.⁹⁹ The court rejected what it deemed to be “extreme,” “bright-line” positions offered by both sides: the government’s view that the constitutional habeas privilege exists only where the United States exercises *de facto* sovereignty¹⁰⁰ and the petitioners’ argument that the United States’ lease for the Bagram military base is, by itself, sufficient indicia of American control for jurisdictional purposes.¹⁰¹

⁹³ *Al Maqaleh v. Gates*, 605 F.3d 84, 87 (D.C. Cir. 2010).

⁹⁴ *Id.*

⁹⁵ *Al Maqaleh v. Gates*, 604 F. Supp. 2d 205 (D.D.C. 2009).

⁹⁶ *Id.* at 208–09.

⁹⁷ *Id.* at 209.

⁹⁸ *Al Maqaleh*, 605 F.3d at 99.

⁹⁹ *Id.* at 94.

¹⁰⁰ *Id.* at 94–95.

¹⁰¹ *Id.* at 95.

The court instead delved into the particulars of the petitioners' circumstances. First, with respect to the "citizenship and status" factor, the court found that the petitioners' lack of American citizenship, their status as enemy aliens, and the limited process as to their detention status determination all cut in favor of their possession of constitutional habeas rights.¹⁰² The court, however, found that, in comparison to the bases at issue in *Eisentrager* and *Boumediene*, the second factor, "location," supported the government's position that the United States did not exert control over Bagram such that habeas should run:

While it is true that the United States holds a leasehold interest in Bagram, and held a leasehold interest in Guantanamo, the surrounding circumstances are hardly the same. The United States has maintained its total control of Guantanamo Bay for over a century, even in the face of a hostile government maintaining *de jure* sovereignty over the property. In Bagram, while the United States has options as to duration of the lease agreement, there is no indication of any intent to occupy the base with permanence, nor is there hostility on the part of the "host" country. Therefore, the notion that *de facto* sovereignty extends to Bagram is no more real than would have been the same claim with respect to Landsberg in the *Eisentrager* case. While it is certainly realistic to assert that the United States has *de facto* sovereignty over Guantanamo, the same simply is not true with respect to Bagram.¹⁰³

Third, as to the "practical obstacles" factor, the court stated that "Bagram, indeed the entire nation of Afghanistan, remains a theater of war," which, to the court, "suggest[s] that the detention at Bagram is more like the detention at Landsberg than Guantanamo."¹⁰⁴ The court acknowledged the petitioners' concerns that it is the government that "chose the place of detention" and in doing so may have been attempting to evade judicial review by placing the petitioners in an active theatre of war; however, the court noted that there was no evidence of such deliberate manipulation, and that it defied "reason" to contend that the military would act in anticipation of the possible legal rulings by the courts with respect to jurisdiction.¹⁰⁵

In conclusion, the court wrote, "under both *Eisentrager* and *Boumediene*, the writ does not extend to the Bagram confinement in an active theater of war in a territory under neither the *de facto* nor *de jure* sovereignty of the United States and within the territory of another *de jure* sovereign."¹⁰⁶

¹⁰² *Id.* at 95–96.

¹⁰³ *Id.* at 97.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 98–99.

¹⁰⁶ *Id.* at 98.

B. Central Shortcomings of the Decision

The full breadth of the problems with the panel's ruling will be made plain in Part IV after the proposed framework is explained. For purposes of this Section, I wish to explain how the ruling is misguided even without the benefit of this framework.

The D.C. Circuit held that the Bagram detainees are not entitled to the writ for two reasons: the "location" and "practical difficulties" factors. In particular, the court found compelling its findings that (1) Bagram is a territory not under sufficient control of the United States, and (2) Bagram is in an active theater of war.¹⁰⁷

These two pillars of the court's opinion stand on flimsy ground. First, with respect to the "location" prong of the court's decision, the D.C. Circuit suffers from what may be deemed an "essentialization" problem. In general terms, to "essentialize" is to believe that all things of a certain type must contain specific traits that all things of that type must possess.¹⁰⁸ It is to assume, in other words, "that all examples of that particular thing share the same . . . defining characteristics."¹⁰⁹

In *al Maqaleh*, the panel decided, at bottom, that the Bagram case was more akin to *Eisentrager*, where the detainees were held in the twilight of World War II at a German facility not under the exclusive control of the United States and denied habeas rights, than to *Boumediene*, where the detainees were held at the Guantánamo military base under the plenary control of the United States far removed from a war zone and had their habeas rights recognized.¹¹⁰ The D.C. Circuit's assessment of habeas jurisdiction appears to have turned on a simplistic comparison of the territorial characteristics of Bagram to those present in *Eisentrager* and *Boumediene*. That is—the court examined whether Bagram fit on the *Eisentrager* or *Boumediene* end of the spectrum.

The problem with this approach is that the court assumed that, to reach the *Boumediene*/habeas-granting "end" of that spectrum, Bagram must contain those

¹⁰⁷ *Id.* at 96–98.

¹⁰⁸ See Michelle A. Travis, *Recapturing the Transformative Potential of Employment Discrimination Law*, 62 WASH. & LEE L. REV. 3, 9 (2005).

¹⁰⁹ *Id.*; see also Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857 (1999) (challenging the application of essentialism to constitutional rights and offering an alternative analytical model in which rights and remedies are inextricably linked).

¹¹⁰ See *al Maqaleh*, 605 F.3d at 97 ("[T]he nature of the place where the detention takes place weighs more strongly in favor of the position argued by the United States and against the extension of habeas jurisdiction than was the case in either *Boumediene* or *Eisentrager*. . . . [T]he notion that *de facto* sovereignty extends to Bagram is no more real than would have been the same claim with respect to Landsberg in the *Eisentrager* case. While it is certainly realistic to assert that the United States has *de facto* sovereignty over Guantanamo, the same simply is not true with respect to Bagram. . . . It is undisputed that Bagram, indeed the entire nation of Afghanistan, remains a theater of war. Not only does this suggest that the detention at Bagram is more like the detention at Landsberg than Guantanamo, the position of the United States is even stronger in this case than it was in *Eisentrager*.").

traits that Guantánamo possessed. Applied to the issue of “location,” it means that in the court’s estimation, the degree to which the United States must control the location must be equivalent to that exhibited at Guantánamo, otherwise one remains on the *Eisenrager* side of the equation.¹¹¹ At Guantánamo, the D.C. Circuit noted, the United States “maintained its total control of Guantanamo Bay for over a century, even in the face of a hostile government maintaining *de jure* sovereignty over the property.”¹¹² By contrast, the panel pointed out, “[i]n Bagram, while the United States has options as to duration of the lease agreement, there is no indication of any intent to occupy the base with permanence, nor is there hostility on the part of the ‘host’ country.”¹¹³ This difference proved fatal to the petitioners’ argument as to “control.”

It is unclear, as a constitutional matter, why the Guantánamo traits with respect to “location”—permanent occupation of (or the intent to so occupy) territory—should serve as the benchmark for or otherwise determine whether the Executive has effective control of the petitioners who claim they have been wrongfully detained. Generally, a *custodian* need not have permanent or longstanding control over an entire area in order to have effective control over an individual,¹¹⁴ and, as the Supreme Court noted, it is the *custodian* whom the writ targets and operates against:

The important fact to be observed in regard to the mode of procedure upon this writ is, that it is directed to, and served upon, not the person confined, but his jailer. It does not reach the former except through the latter. The officer or person who serves it does not unbar the prison doors, and set the prisoner free, but the court relieves him by compelling the oppressor to release his constraint. The whole force of the writ is spent upon the [custodian].¹¹⁵

We would not say that a custodian lacks control over prisoners simply because the prison was built only in the last year or two, because the prison may not last in

¹¹¹ Viewed through this lens, there can be little doubt that there are material differences between the level of control exhibited by the United States at Guantánamo and at Bagram, and the panel’s analysis as to control becomes a foregone conclusion.

¹¹² *Al Maqaleh*, 605 F.3d at 97.

¹¹³ *Id.*

¹¹⁴ See, e.g., Sean L. Finan, *Robledo-Gonzales v. Ashcroft: Asserting That the Attorney General Is Not the Custodian of an Alien for the Purposes of a Writ of Habeas Corpus*, 27 AM. J. TRIAL ADVOC. 447, 450 (2003) (citing a line of cases concluding that the proper custodian for a writ of habeas corpus is the official with “immediate control over the individual” detained by virtue of day-to-day management of the detention facility).

¹¹⁵ *Braden v. 30th Judicial Circuit Court of Ky.*, 410 U.S. 484, 495 (1972) (citations omitted). *Rumsfeld v. Padilla* similarly indicates that the custodian is the proper focus of the writ. See 542 U.S. 426, 437–39 (2004) (acknowledging that the President may have “legal control” over a detainee, but it is the jailer who is the detainee’s immediate custodian and thus is the proper respondent for a habeas petition).

perpetuity, or because the state does not also control the whole, surrounding area. Put differently, it would not be said that the prison must be established for decades, the prison must be there for decades to come, or that the prison must be part of a comprehensively held land mass for the custodian to have control over a prisoner. Consistent with the functional approach of *Boumediene*, the custodian in these circumstances possesses control—notwithstanding the nascent nature or uncertain duration of the prison facility itself—over the prisoners.

The *al Maqaleh* court's essentialization required that the United States permanently occupy, or demonstrate intent to permanently occupy, the Bagram land just as the United States has occupied Guantánamo on a lengthy, indefinite basis. The critical question, however, is not whether Bagram mimics Guantánamo in this respect, but rather whether the American custodian has effective control over the detainees at Bagram. The court's focus on the nation's permanent control over land, as opposed to the custodian's stable control over the detainees, is a fundamental error in the D.C. Circuit's reasoning.

There can be little dispute that at Bagram, the United States possesses effective control over the detainees. In a lease agreement, Afghanistan consigned the land and facilities at Bagram for the "exclusive, peaceable, undisturbed and uninterrupted" use by the United States.¹¹⁶ Accordingly, the United States at Bagram "needs the approval of neither its allies nor the Afghan government for its operations there."¹¹⁷ As with Guantánamo, the United States at Bagram "is, for all practical purposes, answerable to no other sovereign for its acts on the base."¹¹⁸ Moreover, the lease provides the United States with the ability to control Bagram as long as it wants; the lease assigns control over Bagram "until the UNITED STATES or its successors determine that the Premises are no longer required for its use."¹¹⁹ In short, there is no doubt that the custodian has sufficient control over the petitioners for purposes of the detention, even if the nation may not have possessed or intended to possess permanent control over the base.

The second factor concerns the "practical obstacles" to habeas running at Bagram.¹²⁰ The *al Maqaleh* court emphasized that Bagram remains in an "active

¹¹⁶ Exhibit 1, Exhibit A to Tennison Declaration ¶ 9, Respondents' Motion to Dismiss First Amended Petition for Writ of Habeas Corpus, *al Maqaleh v. Gates*, 604 F. Supp. 2d (D.D.C. 2008) (No. 06-1669), available at <https://sites.google.com/a/ijnetwork.org/maqaleh-v-gates/test-joint-appendix> (offering, as an exhibit to the Tennison Declaration, the Accommodation Consignment Agreement For Lands and Facilities at Bagram Airfield Between the Islamic Republic of Afghanistan and the United States of America (Sept. 26, 2006) [hereinafter Bagram Lease]).

¹¹⁷ Baher Azmy, *Executive Detention, Boumediene, and the New Common Law of Habeas*, 95 IOWA L. REV. 445, 491 (2010).

¹¹⁸ *Boumediene v. Bush*, 553 U.S. 723, 770 (2008).

¹¹⁹ Bagram Lease, *supra* note 116, ¶ 4.

¹²⁰ *Al Maqaleh v. Gates*, 605 F.3d 84, 94, 97 (D.C. Cir. 2010).

theater of war” in ruling against the petitioners.¹²¹ Though Afghanistan is the location of ongoing hostilities, Bagram itself is “heavily fortified and secure.”¹²² As an example, Bagram has held briefs and tours for media.¹²³ The belief that the base is safe enough for the local press is difficult to square with the view, endorsed by the *al Maqaleh* court, that habeas review would be practically infeasible at the same facility.

Moreover, in 2009 the United States completed construction on a new, sixty-million-dollar detention facility at Bagram.¹²⁴ The facility was designed specifically to allow for hearings during which “inmates are assessed for readiness to be released,” which would be “open to outsiders, including nonprofit groups and journalists,” according to “Brig. Gen. Mark Martins, who is in charge of detention facilities at Bagram.”¹²⁵ The building of a new facility intended to host hearings open to the public demonstrates some measure of stability in the immediate region, and undercuts the notion that habeas proceedings could not take place safely and effectively at Bagram despite the technical reality that the region and nation are witness to active hostilities.

Even assuming that Bagram is too dangerous for habeas proceedings, the court gave insufficient weight to the undisputed fact that it was the government that brought the petitioners from other areas directly to this theatre of war. Quite plainly, the practical difficulties in holding habeas proceedings for the petitioners at Bagram were of the government’s own making. As the district court noted, “[t]he only reason these petitioners are in an active theater of war is because respondents brought them there.”¹²⁶ Judicial review should not be defeated in this self-serving fashion.¹²⁷

To be sure, the panel did not ignore arguments that the government may have taken the detainees to a location in order to evade review, but said nonetheless that allegations of such manipulation were unsupported by evidence and that it defied reason that the government would engage in such legal maneuvering.¹²⁸

Following the decision, however, reports emerged showing that the government intentionally has moved detainees to different locations precisely to preclude, if not complicate, a judicial finding of habeas jurisdiction. An *Associated Press* article, for example, speaks to the government’s conscious sensitivity and affirmative attempts

¹²¹ *Id.* at 98.

¹²² Azmy, *supra* note 117, at 496.

¹²³ See, e.g., Rachel Martinez, *Afghan Media Learn About Close-Air Support*, U.S. AIR FORCE (Jan. 8, 2009), <http://www.af.mil/news/story.asp?id=123130595> (describing a media event at the Bagram Airfield Media Operations Center, which has “hosted multiple Afghan media days in the past year”).

¹²⁴ Alan Cullison, *U.S. Set to Open New Afghan Prison: Pentagon Pledges Improved Transparency and Plans Open Hearings in a Move to ‘Increase Credibility,’* WALL ST. J., Nov. 17, 2009, at A6.

¹²⁵ *Id.*

¹²⁶ See *al Maqaleh v. Gates*, 604 F. Supp. 2d 205, 230–31 (D.D.C. 2009).

¹²⁷ See *Boumediene v. Bush*, 553 U.S. 723, 765 (2008) (noting that the Constitution should not be read to confer upon the Executive a “power to switch the Constitution on or off at will”).

¹²⁸ *Al Maqaleh v. Gates*, 605 F.3d 84, 98–99 (D.C. Cir. 2010).

to shield its detention policies from judicial review.¹²⁹ The reports clearly indicate that the Bush administration moved several detainees from Guantánamo to secret sites specifically to avert the effect of a possible negative Supreme Court ruling in *Boumediene*: “Removing [detainees] from Guantanamo Bay underscores how worried President George W. Bush’s administration was that the Supreme Court might lift the veil of secrecy on the detention program. It also shows how insistent the Bush administration was that terrorists must be held outside the U.S. court system.”¹³⁰

In short, the “location” factor should have cut in favor of the petitioners, as the Bagram facility for detainees is heavily fortified and capable of holding judicial proceedings in the same way that it is capable of holding press briefings and other hearings. And, with respect to the “practical obstacles” factor, not only were these difficulties as to the petitioners the result of the government’s conduct as a descriptive matter, they may have been part of deliberate attempts to preclude habeas relief, as recent reports suggest.

III. PROPOSED FRAMEWORK

Before explaining this new framework, a preliminary note is in order. The Court in *Boumediene* announced that there are, at minimum, three basic factors that are relevant to determining whether jurisdiction exists abroad for purposes of constitutional habeas review: (1) the citizenship status and detainee status of the detainee, and the process used to determine the detainee status (i.e., “status”), (2) where a detainee was apprehended and is held (i.e., “location”), and (3) whether there are any practical difficulties that bar the detainee from asserting his or her habeas rights (i.e., “practical obstacles”).¹³¹

The purpose of this framework is not to modify these factors, but simply to re-orient them in a way that seems to be more consistent with the historical reasons for the writ, the separation of powers principles undergirding the writ, and existing precedent. Moreover, it is believed that this framework offers a more workable system that may be used by courts as detainees continue to seek to assert the constitutional habeas privilege. Such a system may be particularly helpful not just in the post-9/11 context with detainees held at Guantánamo, Bagram, or elsewhere, but in future conflicts involving unforeseen enemies and heretofore peaceful regions of the world

¹²⁹ *To Keep Program Secret, CIA Whisked 9/11 Figures from Gitmo Before Court Ruling*, ASSOCIATED PRESS, Aug. 6, 2010, <http://www.foxnews.com/us/2010/08/06/ap-exclusive-program-secret-cia-whisked-figures-gitmo-court-ruling/>.

¹³⁰ *Id.*

¹³¹ *Boumediene*, 553 U.S. at 766; see also *al Maqaleh*, 605 F.3d at 94 (recounting these three factors). These factors clarify those set forth by the Court earlier in *Eisentrager*. See *Johnson v. Eisentrager*, 339 U.S. 763, 777 (1950).

as well.¹³² More modestly, the framework makes clear why the *al Maqaleh* decision was wrongly decided.

A. *The Purposes of the Writ*

The foundation for this framework is the habeas writ itself. Accordingly, an overview of the historical reasons for the writ is necessary.

The American experiment in government was a reflection of and a reaction to the Framers' experiences with an excessively powerful Crown.¹³³ In the Declaration of Independence, the Framers lodged their grievances against King George III and set forth their reasons for pursuing a separate, free nation.¹³⁴ Most relevant to this Article, they complained that the King "made Judges dependent on his Will alone"; "affected to render the Military independent of and superior to the Civil Power"; "depriv[ed] us, in many Cases, of the Benefits of Trial by Jury"; and "transport[ed] us beyond Seas to be tried for pretended Offences."¹³⁵

The Framers' firsthand understanding of monarchical abuse informed and served as the basis for their cardinal view that the rule of law is above all individuals. Thomas Paine, for example, declared that, "in America THE LAW IS KING. For as in absolute governments the King is law, so in free countries the law *ought* to be King; and there ought to be no other."¹³⁶ Chief Justice John Marshall, writing for the Court in *Marbury*

¹³² Wartime presidents have been known to describe their particular situations as entirely unique and unlike any previous conflicts that have faced the nation. This rhetoric may be used to justify unprecedented responses. *See, e.g.*, Abraham Lincoln, Annual Address to Congress (Dec. 1, 1862), *available at* <http://millercenter.org/scripps/archive/speeches/detail/3737> ("The dogmas of the quiet past are inadequate to the stormy present. The occasion is piled high with difficulty, and we must rise with the occasion. As our case is new, so we must think anew and act anew."). But traditional constitutional principles that were firmly enshrined in the American legal system over two hundred years ago continue to restrain and inform what is proper in our society. It is hoped that this proposed framework, based on these principles, will endure as well and that its usefulness will not be limited to any particular national security context.

¹³³ *See* *INS v. Chadha*, 462 U.S. 919, 960 (1983) ("The Framers perceived that '[t]he accumulation of all powers legislative, executive and judiciary in the same hands, whether of one, a few or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny.' Theirs was not a baseless fear. Under British rule, the Colonies suffered the abuses of unchecked executive power . . .") (quoting *THE FEDERALIST* NO. 47, at 324 (James Madison) (J. Cooke ed. 1961)); 1 WILLIAM BLACKSTONE, *COMMENTARIES* *136 ("To bereave a man of life, or by violence to confiscate his estate, without accusation or trial, would be so gross and notorious an act of despotism, as must at once convey the alarm of tyranny throughout the whole kingdom; but confinement of the person, by secretly hurrying him to gaol, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore a more dangerous engine of arbitrary government.").

¹³⁴ *See* *THE DECLARATION OF INDEPENDENCE* paras. 3–29 (U.S. 1776).

¹³⁵ *Id.* at paras. 11, 14, 20, 21.

¹³⁶ THOMAS PAINE, *COMMON SENSE* 38 (Signet Classics 2003) (1776).

v. Madison,¹³⁷ similarly proclaimed that “[t]he government of the United States has been emphatically termed a government of laws, and not of men.”¹³⁸

The founding generation’s response to the monarchy also defined the actual structure and contents of the Constitution, in which federal power is diffused among three, coequal branches. “The Framers’ inherent distrust of governmental power was the driving force behind the constitutional plan that allocated powers among three independent branches,”¹³⁹ the Court has recognized. “The ultimate purpose of this separation of powers is to protect the liberty and security of the governed,”¹⁴⁰ because, as Madison observed, “there can be no liberty, where the Legislative and Executive powers are united in the same person, or body of magistrates.”¹⁴¹

The tripartite powers of the federal government, once separated, are entrusted with the responsibility to check the actions of the others and thereby release liberty from the constraints of impermissible governmental conduct. The Court emphasized that “the greatest security against tyranny . . . lies . . . in a carefully crafted system of checked and balanced power within each Branch.”¹⁴²

The writ of habeas corpus—“the established, time-honored process in our law for testing the authority of one who deprives another of his liberty”¹⁴³—activates the judiciary’s constitutional duty to check illegal action by the Executive. The writ, the Supreme Court noted, “has remained a critical check on the Executive, ensuring that it does not detain individuals except in accordance with law.”¹⁴⁴ In providing this protection, the writ serves as an essential bulwark of liberty.¹⁴⁵ “[T]he great object” of habeas, the Court has said, “is the liberation of those who may be imprisoned without sufficient cause.”¹⁴⁶ Put differently, “The writ of habeas corpus is the fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action.”¹⁴⁷ Because of its vital role in enabling courts to secure individual liberty unlawfully restricted by the federal government, the Court observed that “[t]here is

¹³⁷ 5 U.S. (1 Cranch) 137 (1803).

¹³⁸ *Id.* at 163.

¹³⁹ *Boumediene v. Bush*, 553 U.S. 723, 742 (2008).

¹⁴⁰ *Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 272 (1991).

¹⁴¹ THE FEDERALIST NO. 47, at 267 (James Madison) (E.H. Scott ed., 1898) (quoting Montesquieu).

¹⁴² *Mistretta v. United States*, 488 U.S. 361, 381 (1989); *see also* *Bowsher v. Synar*, 478 U.S. 714, 722 (1986) (“Even a cursory examination of the Constitution reveals . . . that checks and balances were the foundation of a structure of government that would protect liberty.”).

¹⁴³ *Johnson v. Eisentrager*, 339 U.S. 763, 782 (1950).

¹⁴⁴ *Hamdi v. Rumsfeld*, 542 U.S. 507, 525 (2004) (plurality opinion); *see Boumediene*, 553 U.S. at 765 (referring to the writ as “an indispensable mechanism for monitoring the separation of powers”).

¹⁴⁵ *See Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 95 (1869) (“The great writ of *habeas corpus* has been for centuries esteemed the best and only sufficient defence of personal freedom.”).

¹⁴⁶ *Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 202 (1830).

¹⁴⁷ *Harris v. Nelson*, 394 U.S. 286, 290–91 (1969).

no higher duty of a court, under our constitutional system, than the careful processing and adjudication of petitions for writs of habeas corpus.”¹⁴⁸

This responsibility does not dissolve and is not diluted in wartime situations. In *Ex parte Quirin*,¹⁴⁹ the Court spoke of “the duty which rests on the courts, in time of war as well as in time of peace, to preserve unimpaired the constitutional safeguards of civil liberty,”¹⁵⁰ while in *Ex parte Milligan*,¹⁵¹ the Court noted that “[t]he Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances.”¹⁵² The Court echoed this general proposition in the aftermath of the 9/11 attacks. In *Boumediene*, for example, the Court reinforced that: “The laws and Constitution are designed to survive, and remain in force, in extraordinary times.”¹⁵³ The post-9/11 Court also reaffirmed its obligation to hear habeas petitions in times of war. In *Rasul*, the Court “recognized the federal courts’ power to review applications for habeas relief in a wide variety of cases involving executive detention, in wartime as well as in times of peace.”¹⁵⁴ The rule of law not only persists in wartime, it has been suggested that courts should exercise heightened vigilance in checking executive behavior in times of war.¹⁵⁵

The writ is designed to guard against the same sort of unrestrained overreaching that the Framers feared from the King of England and that may occur with an overly powerful American Executive. “The Great Writ of habeas corpus is the procedural mechanism through which courts have insisted that neither the King, the President,

¹⁴⁸ *Id.* at 292.

¹⁴⁹ 317 U.S. 1 (1942).

¹⁵⁰ *Id.* at 19.

¹⁵¹ 71 U.S. (4 Wall.) 2 (1866).

¹⁵² *Id.* at 120–21; *see also* *United States v. Robel*, 389 U.S. 258, 264 (1967) (“It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties . . . which makes the defense of the Nation worthwhile.”); *Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 426 (1934) (“[E]ven the war power does not remove constitutional limitations safeguarding essential liberties.”).

¹⁵³ *Boumediene v. Bush*, 553 U.S. 723, 798 (2008) (Souter, J., concurring); *see id.* at 797 (“Security subsists, too, in fidelity to freedom’s first principles.”); *id.* at 798 (Souter, J., concurring) (“Liberty and security can be reconciled; and in our system they are reconciled within the framework of the law.”); *see also* *Hamdi v. Rumsfeld*, 542 U.S. 507, 532 (2004) (“It is during our most challenging and uncertain moments . . . that we must preserve our commitment at home to the principles for which we fight abroad.”).

¹⁵⁴ *Rasul v. Bush*, 542 U.S. 466, 474 (2003); *see also* *Hamdi*, 542 U.S. at 535 (disagreeing with “the Government’s assertion that separation of powers principles mandate a heavily circumscribed role for the courts” in a state of war).

¹⁵⁵ *See* NAT’L COMM’N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT 394 (2004) (noting that a “shift of power and authority to the government calls for an enhanced system of checks and balances to protect the precious liberties that are vital to our way of life”); *see also* *Olmstead v. United States*, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting) (“Experience should teach us to be most on our guard to protect liberty when the Government’s purposes are beneficent.”).

nor any other executive official may impose detention except as authorized by law.”¹⁵⁶ The writ is critically important, whether the main power is the King or the American Executive, because, as Alexander Hamilton wrote, “the practice of arbitrary imprisonments, [has] been, in all ages, [one of] the favorite and most formidable instruments of tyranny.”¹⁵⁷ Justice Robert H. Jackson similarly stated that: “Executive imprisonment has been considered oppressive and lawless since John, at Runnymede, pledged that no free man should be imprisoned, dispossessed, outlawed, or exiled save by the judgment of his peers or by the law of the land.”¹⁵⁸

It is an identical claim of wrongful detention at the hands of the Executive—which the Framers experienced and were concerned about in drafting our governing documents—that forms the basis for this case.

B. Extraterritorial Application of the Writ

There is nothing in these foundational principles to indicate that the responsibility of the judiciary to check the Executive and thereby safeguard individual liberty is restricted by geography. Nor is there any sense from them that the potential for the Executive to detain someone unlawfully—which provides the factual predicate necessitating the judiciary’s involvement—does not exist outside the territorial bounds of the United States. And there is nothing that may be reasonably extracted from them that suggests that the Executive may act anywhere in the world, but that the supervisory need for the courts is confined to the borders of the United States. The remainder—or difference between the unbounded reach of executive power and the enclosed power of the courts—offers ample room for executive conduct to devolve into tyranny because the courts are unable to measure such conduct against the rule of law.

To fulfill the full promise of the writ of habeas corpus and identify arbitrary and wrongful imprisonments, the judicial writ must shadow executive conduct. If the Executive summons the powers of its office and the government that it heads to imprison an individual in any part of the world, it subjects the detainee to the authority of the United States, including the oversight of the judicial branch of its federal government. In other words, the courts are awakened or agitated, by necessity, by the Executive to sanitize governmental conduct by way of law. The proposition is quite simple: where the Executive may act, so the courts may follow—otherwise, we condone a situation, intolerable to the Framers, in which Law is King inside the four corners of the United States, but where the American King is Law outside of it.

This understanding of the scope of the habeas writ is supported not only by the historical purposes of the writ and the constitutional tripartite checking scheme, but also by several ancillary arguments.

¹⁵⁶ Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 HARV. L. REV. 2029, 2032 (2007).

¹⁵⁷ THE FEDERALIST NO. 84, at 468 (Alexander Hamilton) (E.H. Scott ed., 1898).

¹⁵⁸ *Rasul*, 542 U.S. at 474 (quoting *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 218–19 (1953) (Jackson, J., dissenting)).

The first points to the common law. Even before the formation of an independent United States, the writ, which the American legal system imported from the Anglo-Saxon tradition, ran extraterritorially. As Sir William Blackstone explained with respect to the writ, “the king is at all times entitled to have an account, why the liberty of any of his subjects is restrained, *wherever that restraint may be inflicted*.”¹⁵⁹ Moreover, at common law “[e]ven those designated enemy aliens,” like the petitioners in *al Maqaleh*, “retained habeas corpus rights to challenge their enemy designation.”¹⁶⁰

The second is a textual argument that the Suspension Clause—which “protects the rights of the detained by affirming the duty and authority of the Judiciary to call the jailer to account”¹⁶¹ and, unless formally suspended, enables the judiciary to serve “as an important judicial check on the Executive’s discretion in the realm of detentions”¹⁶²—is not restricted by territory by the Constitution’s own terms. Because “[t]he Suspension Clause contains no territorial limitation with respect to its scope,” argues Richard A. Epstein, “it’s a perfectly natural reading to say wherever the United States exerts power, there habeas corpus will run.”¹⁶³

The third relates to the transcendence already of territorial barriers concerning the issuance of the writ. While the Supreme Court in *Ahrens* required district courts to issue the statutory habeas writ only if the petitioner was within its territorial jurisdiction,¹⁶⁴ the Court subsequently departed from this restrictive view of jurisdiction to hold that habeas “petitioners’ absence from the district does not present a jurisdictional obstacle to the consideration of the claim.”¹⁶⁵ The Court rejected the

¹⁵⁹ 3 WILLIAM BLACKSTONE, COMMENTARIES *132 (emphasis added); *see also* Alexander, *supra* note 35, at 1235 (“Habeas was not historically limited to persons in custody within England’s sovereign territory.”).

¹⁶⁰ Brief of Bruce A. Ackerman et al. as Amici Curiae Supporting Petitioners at 7, *Hamdan v. Gates*, 550 U.S. 929 (2007) (No. 06-1169) (citing *Lockington’s Case*, Bright. (N.P.) 269 (Pa. 1813)).

¹⁶¹ *Boumediene v. Bush*, 553 U.S. 723, 745 (2008).

¹⁶² *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004).

¹⁶³ Panel Discussion, *Executive Power in Wartime*, 5 GEO. J.L. & PUB. POL’Y 309, 337 (2007).

¹⁶⁴ *See Ahrens v. Clark*, 335 U.S. 188, 190 (1948) (noting that the jurisdictional aspect of a habeas claim under 28 U.S.C. § 452 limits “the district courts to inquiries into the causes of restraints of liberty of those confined or restrained within the territorial jurisdictions of those courts”).

¹⁶⁵ *Braden v. 30th Judicial Circuit Court of Ky.*, 410 U.S. 484, 498 (1973) (citation omitted). While *Braden* concerned a habeas petitioner who was an American citizen, and some have argued that its precedential value should be tied specifically and exclusively to situations involving American citizens, the Court later explicitly invoked *Braden* in support of a finding of jurisdiction over habeas petitions filed by aliens in the aftermath of 9/11. *See Rasul v. Bush*, 542 U.S. 466, 478–79 (2004). *But see id.* at 496–97 (Scalia, J., dissenting) (pointing out, to no avail, that *Braden* addressed “*American citizens*,” and summarizing the majority’s opinion as a holding that the habeas statute, 28 U.S.C. § 2241, extends “to aliens held beyond the sovereign territory of the United States and beyond the territorial jurisdiction of its courts”).

contention that a petitioner's "presence within the territorial confines of the district is an invariable prerequisite" to the statutory habeas writ.¹⁶⁶

The fourth identifies the proper focus of the writ. The focal point of the habeas petition is not the petitioner himself, but rather the government official holding him, namely the custodian. "The writ of habeas corpus does not act upon the prisoner who seeks relief, but upon the person who holds him in what is alleged to be unlawful custody," the Court has explained.¹⁶⁷ Accordingly, "[s]o long as the custodian can be reached by service of process, the court can issue a writ . . . even if the prisoner himself is confined outside the court's territorial jurisdiction."¹⁶⁸ The emphasis on the jailer, rather than the petitioner, for purposes of habeas jurisdiction is in lockstep with the view, advanced thus far in this Article, that because the habeas writ is a means for the courts to check the Executive, and, specifically, to ensure that it detains an individual only in conformance with the law, the writ has the potential to run wherever the Executive is detaining an individual. Indeed, there can be little doubt that the custodian is but an agent of or proxy for the Executive itself¹⁶⁹—the Executive makes the legal decision; the jailer holds the key.¹⁷⁰

The fifth argument recognizes the trend of an increasingly broadening interpretation of habeas jurisdiction. "[T]he general spirit and genius of our institutions has tended to the widening and enlarging of the *habeas corpus* jurisdiction of the courts and judges of the United States," according to the Court.¹⁷¹ An expansive view of the courts' jurisdiction to hear habeas petitions, where geography and sovereignty are without preclusive effect on such jurisdiction, is consistent with this observation.

The sixth enumerates an essential characteristic of the writ: its flexibility. The writ is an "inherently elastic concept"¹⁷² disentangled from formal restrictions.¹⁷³ The

¹⁶⁶ *Braden*, 410 U.S. at 495.

¹⁶⁷ *Id.* at 494–95.

¹⁶⁸ *Id.* at 495.

¹⁶⁹ While habeas operates to require a "jailer to justify the [petitioner's] detention under the law," *Peyton v. Rowe*, 391 U.S. 54, 58 (1968), "[t]he historic purpose of the writ has been to relieve detention by *executive authorities* without judicial trial," *Brown v. Allen*, 344 U.S. 443, 533 (1953) (Jackson, J., concurring) (emphasis added).

¹⁷⁰ See *Rumsfeld v. Padilla*, 542 U.S. 426, 437–39 (2004). In practice, federal district courts should be able to exercise personal jurisdiction over the custodians, likely American military officers or government officials acting in their professional capacities, holding and watching over alien enemy detainees. See, e.g., *Rasul*, 542 U.S. at 483 (noting, in a case involving foreign detainees in post-9/11 conflict, that "[n]o party questions the District Court [sitting in the District of Columbia]'s jurisdiction over petitioners' custodians"). Subject matter jurisdiction would be premised on the habeas writ.

¹⁷¹ *Ex parte Yenger*, 75 U.S. 85, 102 (1868).

¹⁷² *Developments in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1263, 1269 (1970).

¹⁷³ See *Boumediene v. Bush*, 553 U.S. 723, 764 (2008) ("[Q]uestions of extraterritoriality turn on objective factors and practical concerns, not formalism."); see also *Burns v. Wilson*, 346 U.S. 137, 148 (1953) (Frankfurter, J., concurring) ("The right to invoke habeas corpus to secure freedom is not to be confined by any *a priori* or technical notions of 'jurisdiction.'").

seventh takes notice of the globalized world in which we live and within which the Executive may detain an individual. A rule by which habeas can follow the Executive wherever it acts comports with the realities of an increasingly globalized and technologically advanced world in which the Executive can detain—and has detained, as the post-9/11 campaigns demonstrate—individuals thousands of miles from the shores of the United States.¹⁷⁴ Nations will act outside of their territorial borders with greater regularity, frequency, and ease as the world becomes “smaller”—confining judicial review to borders that are readily pierced leaves the rule of law in an outdated and stationary state while the Executive frolics both inside and outside his land and whisks away detainees at his whim.¹⁷⁵ The relevance of the globalized world, marked by technology, is particularly salient today after 9/11.¹⁷⁶ It should render less persuasive any suggestion that habeas be understood only as it was in 1789 or in *Eisentrager*, when technology and resources did not allow for the transnational, global activities that are commonplace today and thus call for evolving and more practically applicable meanings of habeas.¹⁷⁷

“It must never be forgotten,” the Supreme Court wrote in 1939, “that the writ of *habeas corpus* is the precious safeguard of personal liberty and there is no higher duty

¹⁷⁴ See David D. Cole, *Rights over Borders: Transnational Constitutionalism and Guantanamo Bay*, 2007–08 CATO SUP. CT. REV. 47, 61 (2008) (concluding that the Supreme Court’s rejection of habeas, premised on “outmoded claims about sovereignty, territoriality, and rights,” aligns “with a global shift in modern understandings of these concepts” and “ushers U.S. law into the 21st century”).

¹⁷⁵ See *id.*; see also Katyal, *supra* note 30, at 1370 (“In an era where the boundaries of national security and personal liberty are being shaped in all sorts of unforeseen ways due to rapid changes in technology and the modern transportation revolution, the insistence on evenhandedness can at times be more appropriate than the attempts to freeze substantive standards into the Constitution.”).

¹⁷⁶ See Rosa Ehrenreich Brooks, *War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror*, 153 U. PA. L. REV. 675, 676–77 (2004) (“Both international and domestic law take as a basic premise the notion that it is possible, important, and usually fairly straightforward to distinguish between . . . the foreign and the domestic [and] the external and the internal. . . . [T]hese binary distinctions are no longer tenable. In almost every sphere, globalization has complicated once-straightforward legal categories, but this is nowhere more apparent and more troubling than in the realms of armed conflict and national security law. . . . September 11 and its aftermath have highlighted the increasing incoherence and irrelevance of these traditional legal categories.”).

¹⁷⁷ See *INS v. St. Cyr*, 533 U.S. 289, 301 (2001) (“[A]t the absolute minimum, the Suspension Clause protects the writ ‘as it existed in 1789.’”) (quoting *Felker v. Turpin*, 518 U.S. 651, 663–64 (1996)). It seems disputed whether the static 1789 scope of the writ should mandate how the writ is interpreted today. See Daniel J. Meltzer, *Habeas Corpus, Suspension, and Guantánamo: The Boumediene Decision*, 2008 SUP. CT. REV. 1, 15–16 n.62 (2008) (“The year 1789 is a puzzling constitutional baseline” that “may have entered the Court’s decisions though [sic] carelessness” in a 1977 opinion by Chief Justice Warren Burger and been “echoed” in subsequent decisions, such as *St. Cyr*). To the extent the date remains relevant, it appears that the writ applied extraterritorially at common law. See BLACKSTONE, *supra* note 159, at 132.

than to maintain it unimpaired.”¹⁷⁸ In short, geography and sovereignty should not impair the otherwise critical and constitutionally vital purposes of the habeas writ.

C. Limiting Principles

This framework contemplates a “worldwide writ,” one that is not necessarily held back by territorial borders or considerations of formal sovereignty. The concept of a “worldwide writ” was worrisome to the panel in *al Maqaleh*. In Judge David S. Tatel’s exchange with the petitioners’ counsel, for example, he remarked that, “you can extend habeas to Bagram, [but] I don’t see any limiting principle in your view.”¹⁷⁹ Once you have extended it in this fashion, he continued, “you’ve extended it to every military base . . . in the world.”¹⁸⁰ In its eventual opinion, the D.C. Circuit admitted that they were uncomfortable with the prospect of conferring habeas on “noncitizens held in any United States military facility in the world, and perhaps to an undeterminable number of other United States–leased facilities as well.”¹⁸¹ The court complained that petitioners’ counsel failed to soothe the court’s anxiety by providing any meaningful “limiting principle that would distinguish Bagram from any other military installation.”¹⁸²

My proposed framework posits that the habeas writ is assumed to run wherever the United States exerts power, to the extent that it restrains the liberty of another. Therefore, at least theoretically, under this framework, the writ may reach all military bases. Given the possible number of applicable American facilities and the possibility that the writ has the potential to cover the globe, one can appreciate the concerns expressed by Judge Tatel and his brethren. But meditating on the purposes of the writ and the potential for individuals to be detained unlawfully throughout the world, among other ancillary considerations, should soften those concerns.

This is not to say that all aliens apprehended or detained by the United States are automatically entitled to the writ. The assumption that they are so entitled may not be appropriate in light of the specific circumstances of a particular case. To wit: a detainee may not be entitled to the writ where the detainee has already received adequate process, such that the risk of erroneous detention is sufficiently mitigated.¹⁸³ The

¹⁷⁸ *Bowen v. Johnston*, 306 U.S. 19, 26 (1939).

¹⁷⁹ Transcript of Oral Argument at 30, *al Maqaleh v. Gates*, 605 F.3d 84 (D.C. Cir. 2010) (No. 09-5265).

¹⁸⁰ *Id.*

¹⁸¹ *Al Maqaleh*, 605 F.3d at 95.

¹⁸² *Id.*

¹⁸³ *See Boumediene v. Bush*, 553 U.S. 723, 771 (2008) (deciding that the question of whether Section 7 of the MCA unconstitutionally infringes upon the Suspension Clause may be avoided if “Congress has provided adequate substitute procedures for habeas corpus”). To those concerned that this approach would lead to a worldwide expansion of writ, my response would be to highlight the fact that adequate substitute process at the outset would completely obviate the need for habeas review; where such process is made available, the

statutory writ, for example, has been said to be open only to those prisoners to whom “adequate relief cannot be obtained in any other form or from any other court.”¹⁸⁴ If a detainee has received an objective finding by a neutral body that the detention decision is supported by the facts and applicable law, and if the detainee has had a meaningful opportunity to contest the factual predicate for the status determination and the resulting legal conclusions, it generally may be fairly said that adequate process exists.¹⁸⁵

To be sure, adequate process need not be monolithic or robust in all circumstances. Battlefield exigencies, in particular, may call for curtailed process. Apprehending purported enemies is “[a]n important incident to the conduct of war”¹⁸⁶ and a reality of modern warfare. Accordingly, as noted in *Hamdi v. Rumsfeld*, when a detainee is captured on the battlefield, the subsequent proceedings “may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict.”¹⁸⁷ In other words, battlefield captures may allow for only minimal process.¹⁸⁸ It should be noted, however, that the limited procedures tied to battlefield exigencies may no longer be sufficient as time marches on; military and Executive claims to battlefield exigencies lose their force as those exigencies either pass with time or as time bestows on the military and the Executive an expanding and workable window within which to manage and prepare for more demanding process.¹⁸⁹ This enhanced opportunity may give rise to traditional circumstances and thereby standard process.¹⁹⁰

need for a global safeguard in the form of habeas would not be required. In short, the solution is more process, not a geographically limited writ.

¹⁸⁴ *Felker v. Turpin*, 518 U.S. 651, 665 (1996) (citation omitted).

¹⁸⁵ It is unclear what would constitute “adequate process” for alien-detainees. *Boumediene*, which concerned non-citizen detainees, indicated that “the privilege of habeas corpus entitles the prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to ‘the erroneous application or interpretation’ of relevant law,” 553 U.S. at 779 (quoting *INS v. St. Cyr*, 533 U.S. 289, 302 (2001)), but expressly refused to detail what that process would entail, *id.* at 798 (“[O]ur opinion does not address the content of the law that governs petitioners’ detention.”). *Id.* at 779 (“We do not endeavor to offer a comprehensive summary of the requisites for an adequate substitute for habeas corpus.”). The Court’s suggestion in *Hamdi* that “a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government’s factual assertions before a neutral decisionmaker,” *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004), may be instructive in identifying what may serve as adequate process with respect to alien detainees entitled to process, but not necessarily the process demanded by the Fifth Amendment.

¹⁸⁶ *Ex parte Quirin*, 317 U.S. 1, 28 (1942).

¹⁸⁷ *Hamdi*, 542 U.S. at 533; *see id.* at 533–34 (providing examples of limited process that would be legally sufficient given the practical circumstances of the detainee’s apprehension).

¹⁸⁸ *Id.* at 534.

¹⁸⁹ *See, e.g.*, Matthew C. Waxman, *Detention as Targeting: Standards of Certainty and Detention of Suspected Terrorists*, 108 COLUM. L. REV. 1365, 1410 (2008) (“As time passes . . . the balance between humanitarian costs and military necessities that the law of war seeks to mediate tips toward the humanitarian interests. The care due in screening true terrorists from false suspects would rise accordingly.”).

¹⁹⁰ *See Hamdi*, 542 U.S. at 534 (cautioning that traditional process “is due only when the determination is made to *continue* to hold those who have been seized”). Initial capture decisions

Process aside, but relatedly, the recognition of habeas rights may not be proper where practical obstacles do not permit the basic administration of habeas proceedings.¹⁹¹ Not all practical obstacles should have a preclusive effect on habeas proceedings. In this respect, the practical problems identified in *Eisentrager* may be divided into three categories. First, whether the military arm of the government would be drawn away from its critical functions in order to participate in the legal process, whether a safe space exists for the process, and whether the application of habeas to a particular petition would engender conflict with the host country are among the practical considerations that courts generally may find relevant in determining whether a habeas action is appropriate.¹⁹²

Second, the *Eisentrager* Court was troubled by the other practical issues were habeas to run, including “allocation of shipping space, guarding personnel, billeting and rations,” and “transportation for whatever witnesses the prisoners desired to call as well as transportation for those necessary to defend legality of the sentence.”¹⁹³ These burdens—however seemingly costly and onerous at the time—should have less resonance in today’s world, in light of the considerable resources available to the United States and the technological achievements that enable individuals and materials to be transferred from one end of the globe to the other with relative ease and swiftness.

A third category of practical concerns is based on notions that our enemies and others will gain morally or optically from habeas actions. “Such trials,” it was said in *Eisentrager*, “would hamper the war effort and bring aid and comfort to the enemy. They would diminish the prestige of our commanders, not only with enemies but with wavering neutrals.”¹⁹⁴ The resulting “conflict between judicial and military opinion,” the argument went, would be “highly comforting to enemies of the United States.”¹⁹⁵ With due respect to the *Eisentrager* Court, statements relating to whether habeas proceedings would bring “comfort” to the enemy and others appear to be pure speculation; there does not seem to be any evidence to support such guesswork as to our enemies’ feelings. Moreover, to the extent that the United States demonstrates fidelity to its first principles and an unflinching belief in the rule of law even during times of war, a compelling argument can be made that doing so enhances America’s “soft power” and

are governed by the Geneva Conventions. See Michael Petrusic, *Enemy Combatants in the War on Terror and the Implications for the U.S. Armed Forces*, 85 N.C. L. REV. 636, 643 (2007). Accordingly, even in situations in temporal or physical proximity to the battlefield, the rule of law is present.

¹⁹¹ See *Boumediene v. Bush*, 553 U.S. 723, 756–62 (2008) (listing cases in which practical considerations as to granting habeas relief extraterritorially were discussed).

¹⁹² See *id.* at 768–70 (addressing whether these factors relating to practical difficulties were present for certain detainees at Guantánamo); see also *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952) (paying tribute to the “broad powers in military commanders engaged in day-to-day fighting in a theater of war”).

¹⁹³ *Johnson v. Eisentrager*, 339 U.S. 763, 779 (1950).

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

further progress in the battle for hearts and minds.¹⁹⁶ In either case, deciding whether the judicial action of recognizing habeas rights may affect the foreign policy interests of the United States may be a political question beyond the purview of the courts.¹⁹⁷

In assessing the weight of these practical barriers, the courts should be mindful of the overarching fact that the habeas writ is malleable and must adapt to given circumstances in order for its fundamental purposes to be carried out. “The very nature of the writ demands that it be administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected,” the Court has noted.¹⁹⁸

It is true that these limiting principles, or variations thereof, were suggested by the petitioners’ counsel to the D.C. Circuit in *al Maqaleh*.¹⁹⁹ The petitioners’ counsel’s proffers seemed to have at least some appeal to the panel,²⁰⁰ and the court ultimately was not persuaded that these limiting principles were sufficient to guard against the “worldwide writ” concerns that Judge Tatel and his colleagues had.²⁰¹ Perhaps the panel felt it was unable to adopt the limiting principles without clear direction from the Supreme Court.²⁰² If *al Maqaleh* is reviewed by the Supreme Court, or a similar case involving the extraterritorial reach of the writ “goes up” instead, the Justices will have the opportunity to consider and (hopefully) bless these limiting principles as to the scope of habeas rights.²⁰³

¹⁹⁶ See, e.g., Neal Katyal, Lead Counsel for Salim Hamdan, Successes and Challenges in Terrorism Prosecutions: An In-Depth Look at Department of Justice Terrorism Cases, Comments at the American Enterprise Institute (May 24, 2006) (“[I]f we’re going to win the war on terror, we are going to win it through our soft power, we’re going to win it through saying to the world that we actually have a better model than you because in your countries you settle these things through force and fiat, and here we settle them through law, we settle them through law.”); Dawinder S. Sidhu, *Judicial Review as Soft Power: How the Courts Can Help us Win the Post-9/11 Conflict*, 1 AM. U. NAT’L SEC. L. BRIEF 69 (2011) (suggesting that judicial review after 9/11 is a form of American “soft power”).

¹⁹⁷ See *Haig v. Agee*, 453 U.S. 280, 292 (1981) (“Matters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention.”). While “it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance,” *Baker v. Carr*, 369 U.S. 186, 211 (1962), the complexity and sensitivity of the Iraq and Afghanistan conflicts may cut against any suggestion that foreign policy matters in this area do not warrant enhanced judicial deference to the political question doctrine.

¹⁹⁸ *Harris v. Nelson*, 394 U.S. 286, 291 (1969).

¹⁹⁹ See Transcript of Oral Argument at 32, *al Maqaleh v. Gates*, 605 F.3d 84 (D.C. Cir. 2010) (No. 09-5265) (discussing adequate process); *id.* at 36 (discussing practical considerations).

²⁰⁰ *Id.* at 51 (acknowledging the concern that the Government may attempt to avoid habeas review by moving detainees to a site with practical difficulties).

²⁰¹ See *al Maqaleh*, 605 F.3d at 95.

²⁰² See *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989) (“[T]he Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.”).

²⁰³ See *Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533, 535 (1983) (*per curiam*) (“Needless to say, only this Court may overrule one of its precedents. Until that occurs,

This discussion yields the following standard: an individual detained by, and pursuant to the power of, the United States is assumed to possess the ability to challenge the legality of the detention by way of the writ of habeas corpus, unless an individualized determination is made that either adequate process within which to make this challenge, commensurate with the circumstances, exists, *or* practical difficulties preclude the administration of necessary proceedings.²⁰⁴ The writ may be issued by a district court with jurisdiction over the custodian who may produce the petitioner.²⁰⁵

D. Relationship with Eisentrager and Boumediene

This framework departs from, but is not inconsistent with, the Supreme Court's major guideposts on the extraterritorial application of the habeas writ—*Eisentrager* and *Boumediene*. This Section explains how the aforementioned standard aligns with these major precedents.

In *Eisentrager*, the Court emphatically recounted its significant checking function in the constitutional scheme:

A basic and inherent function of the judicial branch of a government built upon a constitution is to set aside void action by government officials, and so to restrict executive action to the confines of the constitution. In our jurisprudence, no Government action which is void under the Constitution is exempt from judicial power.²⁰⁶

The Court's comment on the constitutional value of judicial review did not culminate in the exercise of judicial review; the Court refused to permit the detainees to

[a Supreme Court case] is the law. . . ."); *Jaffree v. Bd. of Sch. Comm'rs*, 459 U.S. 1314, 1316 (1983) (stating that lower courts are "obligated to follow" Supreme Court decisions "[u]nless and until th[e] Court reconsiders" them).

²⁰⁴ This proposed standard should be contrasted with the standard of *Eisentrager* and *Boumediene*, which considers these factors: "(1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner's entitlement to the writ." *Boumediene v. Bush*, 553 U.S. 723, 766 (2008) (distilling these factors from *Johnson v. Eisentrager*, 339 U.S. 763, 777 (1950)).

²⁰⁵ The government has exhibited an interest in having any such habeas cases heard in the District of Columbia. *See* Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2739, 2742 (2005) (vesting exclusive jurisdiction in the District of Columbia to review tribunal decisions for Guantánamo detainees). To the extent that it maintains such an interest when a detainee files a writ in another district, the government may simply seek to remove the case to the District of Columbia. *See Boumediene*, 553 U.S. at 796 ("If, in a future case, a detainee files a habeas petition in another judicial district in which a proper respondent can be served, *see Rumsfeld v. Padilla*, 542 U.S. 426, 435-36 (2004), the Government can move for change of venue to the court that will hear these petitioners' cases, the United States District Court for the District of Columbia.").

²⁰⁶ *Eisentrager*, 339 U.S. at 781.

contest their detention in effect because the detainees had no physical connection with the United States, notwithstanding the fact that they were being held under the power of the United States:

No such basis [for attaching habeas protections to the petitioners] can be invoked here, for these prisoners at no relevant time were within any territory over which the United States is sovereign, and the scenes of their offense, their capture, their trial and their punishment were all beyond the territorial jurisdiction of any court of the United States.²⁰⁷

It is difficult to reconcile the fundamental appreciation for the writ as a vital instrument to check executive action with a self-imposed territorial cabining of that checking function. How do we unhinge this tension?

As noted above, the appropriate legal framework is one grounded in the understanding that the judiciary must safeguard liberty by reviewing executive detention decisions, when geographic or territorial considerations no longer bar the courts from performing their essential functions in the constitutional design, but when adequate process and practical obstacles may limit the circumstances in which the writ runs. Applying this standard, *Eisentrager* denied habeas, and correctly so, because the prisoners at issue were tried before military commissions.²⁰⁸ In other words, they received adequate process, removing the need for habeas as a mechanism for ensuring the lawfulness of the Executive detention. As *Boumediene* noted, “[t]he records from the *Eisentrager* trials suggest that, well before the petitioners brought their case to this Court, there had been a rigorous adversarial process to test the legality of their detention.”²⁰⁹

Admittedly, *Eisentrager* can be construed to stand for much more than the proposition that the prisoners at issue were not entitled to habeas because the risk of erroneous detention had been properly mitigated through sufficient substitute legal proceedings.²¹⁰ As a general matter, the habeas writ permits a petitioner to not only challenge the legal basis for his detention, but also to use the writ as a vehicle to press other constitutional claims.²¹¹ In *Eisentrager*, for example, the petitioners,

²⁰⁷ *Id.* at 778.

²⁰⁸ *See id.* at 766.

²⁰⁹ *Boumediene*, 553 U.S. at 767. *But see* Eric A. Posner, *Boumediene and the Uncertain March of Judicial Cosmopolitanism*, 2008 CATO SUP. CT. REV. 23, 27–28 (2008) (suggesting that the *Eisentrager* petitioners’ having been tried and convicted by military commissions “merely summarizes the factual setting” of *Eisentrager*, and therefore lacks legal relevance).

²¹⁰ *See* Transcript of Oral Argument at 33, *al Maqaleh v. Gates*, 605 F.3d 84 (D.C. Cir. 2010) (No. 09-5265) (indicating that “the holding of *Eisentrager* is a lot more solid than just that they were tried before military commissions in China”).

²¹¹ *See* *INS v. St. Cyr*, 533 U.S. 289, 301–05 (2001) (explaining that the writ is not only “a means of reviewing the legality of Executive detention,” but also a means to answer “pure questions of law,” including constitutional questions).

German nationals, filed a writ not only to contest the legality of their detention, but also to allege specific constitutional violations by the United States Government.²¹² They specifically sought to be “discharged from . . . [their] confinement” and “claimed that their trial, conviction and imprisonment violate[d] Articles I and III of the Constitution, and the Fifth Amendment thereto, and other provisions of the Constitution and laws of the United States and provisions of the Geneva Convention governing treatment of prisoners of war.”²¹³

With respect to these constitutional allegations, the Court placed considerable weight on citizenship in determining whether the Fifth Amendment and other constitutional rights are possessed by alien detainees captured and held abroad with no territorial connection to the United States; “in extending constitutional protections beyond the citizenry,” the Court wrote, “it was the alien’s presence within its territorial jurisdiction that gave the Judiciary power to act.”²¹⁴ The Court explained that as an alien’s relationship with the United States increases, so does his entitlement to constitutional safeguards.²¹⁵ Presence in the United States, for the Court, became a touchstone for such ties between the alien and his ability to invoke and be shielded by specific constitutional guarantees.

Eisentrager can therefore be viewed as addressing two separate questions: first, whether aliens captured and detained abroad are entitled to challenge their detentions by way of the habeas writ; and second, whether aliens lacking any territorial connection to the United States may seek specific protections of the Constitution. The first question was rightly answered in the negative because of the prisoners’ trial by military commission, which obviated the need for habeas review.²¹⁶ The response to the second question may be explained by the limited association between the alien prisoners and the United States, which, in the Court’s view, counseled against their entitlement to constitutional rights.²¹⁷ This bifurcated construction of *Eisentrager* is supported by *Boumediene*, the most apposite precedent on the extraterritorial application of the writ. The Court has noted that “nothing in *Eisentrager* or in any of our other cases categorically excludes aliens detained in military custody outside the United

²¹² This was similarly the case in *Hamdan*, where the petitioner argued not only that his detention was not supported by law, but also that the Executive did not have the constitutional authority necessary for his detention. *Hamdan v. Rumsfeld*, 548 U.S. 557, 567 (2006).

²¹³ *Eisentrager*, 339 U.S. at 767.

²¹⁴ *Id.* at 771.

²¹⁵ *See id.* at 770 (“The alien . . . has been accorded a generous and ascending scale of rights as he increases his identity with our society.”).

²¹⁶ *See Boumediene v. Bush*, 553 U.S. 723, 765–68 (2008).

²¹⁷ As this Article reviews whether the federal courts have jurisdiction to hear the *al Maqaleh* petitioners’ habeas petition only to the extent it challenges the lawfulness of their confinement, it does not comment on the propriety of the *Eisentrager* Court’s ruling with respect to federal jurisdiction over the constitutional challenges. In other words, this Article concerns the first *Eisentrager* question, not the second. *See supra* Part II.

States from the ‘*privilege of litigation*’ in U.S. courts.”²¹⁸ Accordingly, *Eisentrager* cannot be relied upon for the proposition that the habeas jurisdiction of the federal courts—as opposed to substantive constitutional guarantees owed to individuals—is completely unavailable to alien-petitioners held abroad.²¹⁹ In other words, the habeas writ—the floor of rights available to a detainee—generally may be possessed by aliens outside of the United States (but was not in this particular instance due to adequate substitute process) and anything above this baseline depends on the nature of the aliens’ interactions with the United States.

An opposite reading, in which aliens held abroad by the United States are denied habeas rights because they have not been inside of the United States, is foreclosed by *Boumediene* itself. In *Boumediene*, the Court held that the habeas writ runs outside of the territorial borders of the United States to those locations over which the United States exercises plenary control—even when the petitioners have no physical connection to the United States.²²⁰ The *Eisentrager* Court’s observation that “[w]e are cited to no instance where a court, in this or any other country where the writ is known, has issued it on behalf of an alien enemy who, at no relevant time and in no stage of his captivity, has been within its territorial jurisdiction”²²¹ no longer rings true following *Boumediene*.²²² In sum, *Eisentrager* fits within the framework of this Article because the Court properly denied habeas jurisdiction on account of the fact that the petitioners already received adequate process. Further, any suggestion from the case that habeas runs only in the territorial United States, or where a petitioner at relevant moments has been in the United States, cannot be supported.

Boumediene, as with *Eisentrager*, comports with the standard offered in this Article. The petitioners in *Eisentrager* and *Boumediene* were detained pursuant to the power of the United States and were held by the United States, hence the factual predicate for habeas exists in both cases. But whereas in *Eisentrager* the petitioners were provided adequate process that obviated the need for habeas rights, the petitioners in *Boumediene* did not possess an adequate substitute that would enable them

²¹⁸ *Rasul v. Bush*, 542 U.S. 466, 484 (2004) (quoting *al Odah v. United States*, 321 F.3d 1134, 1139 (2003)) (emphasis added).

²¹⁹ *Accord Reid v. Covert*, 354 U.S. 1, 74 (1957) (Harlan, J., concurring) (“I do not think that it can be said that these safeguards of the Constitution are never operative without the United States, regardless of the particular circumstances.”).

²²⁰ *See Boumediene*, 553 U.S. at 765–69.

²²¹ *Johnson v. Eisentrager*, 339 U.S. 763, 768 (1950).

²²² Arguably, *Boumediene* vindicates Justice Hugo Black’s dissent, in which he criticized the majority’s focus on location as the heart of determining when habeas applies. *See Eisentrager*, 339 U.S. at 795 (Black, J., dissenting) (“Does a prisoner’s right to test legality of a sentence then depend on where the Government chooses to imprison him? . . . The Court is fashioning wholly indefensible doctrine if it permits the executive branch, by deciding where its prisoners will be tried and imprisoned, to deprive all federal courts of their power to protect against a federal executive’s illegal incarcerations. If the opinion thus means, and it apparently does, that these petitioners are deprived of the privilege of habeas corpus solely because they were convicted and imprisoned overseas, the Court is adopting a broad and dangerous principle.”).

to meaningfully challenge their detention; the availability of habeas, a “last resort” of recourse under the rule of law, was thus necessary.²²³ The *Boumediene* Court expressly noted that the *Eisentrager* petitioners went through “a rigorous adversarial process to test the legality of their detention” prior to filing the writ;²²⁴ however, the Combatant Status Review Tribunal hearings for Guantánamo detainees “fall well short of the procedures and adversarial mechanisms that would eliminate the need for habeas corpus review.”²²⁵ Moreover, the *Boumediene* Court did not find sufficient any practical difficulties that would preclude the administration of habeas proceedings because the United States was in total control of a base far from a war zone.²²⁶

In *Boumediene*, the Court declined the government’s invitation to limit the reach of the habeas writ to the territorial borders of the United States.²²⁷ The Court was concerned that, if habeas were so restricted, the government could relinquish formal sovereignty over a territory and then “enter[] into a lease that grants total control over the territory back to the United States, [thereby making it] possible for the political branches to govern without legal constraint.”²²⁸ “Our basic charter cannot be contracted away like this,” the Court declared.²²⁹ Similarly, the Court said: “[t]he 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.”²³⁰ The Court therefore concluded that an alien petitioner has habeas rights if he is within the territorial bounds of the United States *and* if he is detained in a territory “over which the Government has total military and civil control.”²³¹

This *Boumediene* standard, although expanding the scope of the habeas writ, is not sufficient. It does not avert the possibility that the Executive may have space within which it can detain individuals outside of meaningful judicial review. Nor does it avert the possibility that the Executive essentially may “contract away” the protection offered by the writ—that is, the freedom from unlawful deprivation of liberty at the hands of the government. In particular, while the government may not, under *Boumediene*, avoid habeas by forfeiting formal sovereignty over a territory and then entering into a lease granting it total control, the government may, under *Boumediene*, skirt habeas by setting up shop in an area it has not occupied for very long or by having other nations on a lease for a territory even though it maintains complete control over the detainees. For example, the United States may, consistent with *Boumediene*, completely control a

²²³ See *Martin-Trigona v. Shiff*, 702 F.2d 380, 388 (2d Cir. 1983) (“A habeas corpus petition is the avenue of last resort, always available to safeguard the fundamental rights of persons wrongly incarcerated.”).

²²⁴ *Boumediene*, 553 U.S. at 767.

²²⁵ *Id.*

²²⁶ See *id.* at 771.

²²⁷ See *id.* at 765.

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ *Id.* at 747, 771.

detention facility on a base whose other facilities (e.g., air fields, mess halls, exercise and training areas, housing) are shared with an ally, and *reple habeas* because the United States does not have plenary control of the overall area.²³²

In light of this possibility, the ability of the detainees to challenge whether they are being held in accordance with the law should not depend on whether the territory or base is exclusively controlled by the United States, but instead should hinge on whether the detainee himself is under the exclusive control of a United States custodian. Put differently, the interest in determining the reach of habeas should not turn on the legal or practical control over specific identifiable regions of land, such as sovereign nations or territories, but rather control over the individuals whose liberty has been arrested, perhaps wrongfully. Doing so would restore the mutuality between the purpose of the writ—to check whether a detainee has been held consistent with the law—and who may assert the writ—a detainee who has been held by the Executive. Location, geography, and sovereignty produce artificial, judicially created filters between the writ and the detainee, though for the detainee himself, being jailed in the territorial United States, in a territory controlled by the United States, or in a facility controlled by the United States is the same—his liberty has been restrained by the United States. These layers of obstruction, once removed, permit the rule of law to be coextensive with executive action with respect to detentions of individuals.

IV. APPLICATION

This proposed framework highlights the problems with the D.C. Circuit’s reasoning and conclusion in *al Maqaleh* with respect to the extraterritorial application of the habeas writ as well as the propriety of the alternative framework proposed in this Article.

The *al Maqaleh* panel found two factors most persuasive in ruling that the petitioners—aliens captured outside of Afghanistan and brought to the Bagram Air Base in Afghanistan—are not entitled to habeas rights. First, according to the panel, Bagram is not under the total practical control of the United States; “while the United States has options as to duration of the lease agreement, there is no [sufficient] indication of any intent to occupy the base with permanence” (i.e., “location”).²³³ Second, according to the panel, practical difficulties prevent habeas from running at Bagram because it is in an “active theater of war,” which the panel said “overwhelmingly” worked against the petitioners’ appeal for habeas (i.e., “practical obstacles”).²³⁴

The panel acknowledged that the government brought the petitioners to the theater of war, but said there was no evidence this was done with intent to evade judicial

²³² This is not to say that the government would necessarily create this situation as a matter of intent. As a practical reality, however, a base in coalition efforts may be shared (and have multiple lessees) even though one particular member, such as the United States, may control a part in order to detain individuals it deems to be enemies.

²³³ *Al Maqaleh v. Gates*, 605 F.3d 84, 97 (D.C. Cir. 2010).

²³⁴ *Id.* at 97–98 (emphasis omitted).

review and that to do so would be inconsistent with “reason.”²³⁵ The court also conceded that the petitioners were afforded less process than that which was found to be inadequate in *Boumediene*.²³⁶ But the court determined that the process factor was outweighed by the control factor and by the fact that the petitioners were situated in an active theater of war.²³⁷

The panel’s decision is wrong in several overarching respects. First, the panel improperly weighed the relevance of the “process,” “location,” and “practical obstacles” considerations, treating the adequacy of process question as just another factor in the overall calculus, rather than as the very reason why habeas exists and is prized in the American constitutional tradition. If an individual is unable to meaningfully challenge the legality of his detention by any other means, the habeas writ serves as the last bastion of hope for the detainee and last possible check on the Executive before the detainee is locked away indefinitely and the executive action attains momentum to degenerate into a possible injustice.²³⁸ The importance of process in assessing whether habeas should be made available was not reflected in the panel’s opinion, as the panel simply and aimlessly discussed it without reference to its significance and as if it were just as critical as the other factors.

The process at issue in this case exhibits the importance of the factor in actuality—that is, the petitioners were afforded very limited process, thus heightening the need and justification for habeas. Admittedly, the panel’s opinion noted that the petitioners had a “stronger” case for habeas based on this factor, but said so because of the relative distance between the petitioners’ process and the process involved in *Eisenstrager* and *Boumediene*²³⁹—not, as the case should have been, because of the distance between the process here and the minimum standards required by the rule of law.

With respect to “location,” the panel’s examination of whether the United States exercised total control over Bagram depended on the terms of a lease agreement between the United States and Afghanistan. Though *Boumediene* eschewed formalism in favor of practical realities in determining whether the United States had control over a given area, the *al Maqaleh* panel looked to a legal document to ascertain whether the United States had control over Bagram.²⁴⁰ The folly of this approach is revealed in the panel’s analysis; in deciding, ultimately, whether the detainees were entitled to habeas and could challenge their imprisonment, the panel simply compared

²³⁵ See *id.* at 99.

²³⁶ See *id.* at 96.

²³⁷ See *id.* at 97.

²³⁸ The necessity of habeas as a last resort for judicial relief is particularly evident in *Boumediene*, as some of the petitioners were detained for “six years . . . without the judicial oversight that habeas corpus or an adequate substitute demands.” *Boumediene v. Bush*, 553 U.S. 723, 794 (2008).

²³⁹ *Al Maqaleh*, 605 F.3d at 96.

²⁴⁰ The panel, at times, shied away from referencing the lease between the United States and the Afghan government as a legal agreement. See, e.g., *id.* at 99 (describing the lease as a “cooperative arrangement”).

the American “leasehold interest” in Guantánamo with the “leasehold interest” in Bagram, noting that the former had been in place for over a century with a hostile lessor, while the latter had only recently been established, without proof that the option to stay indefinitely would be carried out, with an ally lessor.²⁴¹ This ignores the fact that, for all practical purposes, the United States completely controlled the confinement of the petitioners at all relevant times. Indeed, the United States has built an extensive detention facility at the Bagram Airfield and it is undisputed that the United States has total control of this facility within which its detainees are housed—“[t]he detention facility in the Airfield—known as the Bagram Theater Internment Facility—is under the exclusive command and control of the U.S. military.”²⁴² Whether the legal agreement has been in place for limited time or whether it will terminate at some undefined point, whether other nations may access regions surrounding the American compound, and whether Afghanistan is friendly or not, does not change the fact that America practically controls the confinement of the petitioners.²⁴³

With respect to the “practical obstacles,” even agreeing with the panel that the Bagram facility is within an “active theater of war,” it does not follow that the petitioners should be the ones punished for this fact when it was the government that brought them from a non-war zone to a war zone.²⁴⁴ It is true that the panel expressed concern with respect to whether the government intentionally “gamed” the system by transferring the petitioners into a region in which habeas would not run, concluding that there was no evidence of such manipulation.²⁴⁵ But the panel mistakenly indicated that there are only two identifiable situations; either there exists evidence of intent in avoiding habeas, in which case the practical problems associated with a wartime setting would not be used against the petitioners, or there is no such evidence of intent, in which case these practical problems would be so used. This binary approach relies on intent alone and ignores the undisputed fact that it is the government that brought the petitioners to Bagram. It overlooks the fact that the government obtains a windfall from its decision, grounded or not in intent to avoid judicial review, to physically move the petitioners. Whether the transfers were made with the intent to avoid the judiciary’s involvement, they reflect a paradigm in which a detainee’s rights are at the mercy of the government’s geographic maneuverings, instead of one in which it is assumed that the custodian must be called to account before the rule of law.

A further problem with this approach is its workability, or lack thereof, in the future, in that the detainees may, under the panel’s reasoning, secure habeas rights if the detainees prove that the transfer was effectuated to evade judicial review. But, as Steven I. Vladeck points out, “how would the detainee ever prove that?”²⁴⁶ Is it

²⁴¹ See *id.* at 97.

²⁴² See Azmy, *supra* note 117, at 483.

²⁴³ In this sense, the Bagram detention facility effectively is another American Guantánamo detention facility adjacent to a shared, coalition air base.

²⁴⁴ *Al Maqaleh*, 605 F.3d at 97–98.

²⁴⁵ *Id.* at 99.

²⁴⁶ Stephen Vladeck, *Out-of-Theater Capture (or, Why Maqaleh’s Narrow Reasoning Sweeps So Broadly)*, PRAWFSBLAWG (May 21, 2010, 3:08 PM), <http://prawfsblawg.blogs>

presumed that this was done intentionally to avoid habeas? Would temporal proximity between the date of the opinion and the transfer decision alone create a presumption of intent? Rather than enter into this evidentiary thicket related to intent, it would be efficient, and in keeping with equitable considerations, to focus only on the fact that the government was responsible for the detainees' presence in an active war zone. Moreover, the AP report, which came out in 2010 (whereas the detainees in question were removed in 2003) underscores how difficult, if not impossible, it would be for detainees to prove in a timely fashion there was manipulation on the part of the government.²⁴⁷ In any case, there is evidence that the government has moved detainees for the specific purpose of avoiding an unfavorable judicial ruling with respect to habeas jurisdiction.²⁴⁸

At a broader level, the panel's opinion does not mention or incorporate the direction from the Supreme Court that habeas is a flexible, adaptable concept. As a result, it considered the "active theater of war" designation to carry the day, without considering any possibility that habeas proceedings can be adjusted, in accordance with this Supreme Court mandate, such that the essential purposes of the writ may be made available to the petitioners. In *Boumediene*, for example, the Court made clear with respect to practical difficulties that, "[t]o the extent barriers arise, habeas corpus procedures likely can be modified to address them."²⁴⁹ The panel did not entertain whether any adjustments would be possible at Bagram.

Further, in addressing whether habeas running at Bagram would engender problems with the Afghan government, the panel stated that "hostility on the part of the 'host' country" is absent,²⁵⁰ but refused to recognize habeas rights for the detainees because the panel could not "say with certainty what the reaction of the Afghan government would be."²⁵¹ Expressing uncertainty (as opposed to concern linked to some evidentiary basis) as to how the Afghan government would react if habeas were found to run should not serve as a reason for its denial.²⁵²

.com/prawfsblawg/2010/05/outoftheater-capture-or-why-maqalehs-narrow-reasoning-sweeps-so-broadly.html.

²⁴⁷ See ASSOCIATED PRESS, *supra* note 129.

²⁴⁸ *Id.*

²⁴⁹ *Boumediene v. Bush*, 553 U.S. 723, 770 (2008).

²⁵⁰ *Al Maqaleh*, 605 F.3d at 97.

²⁵¹ *Id.* at 99.

²⁵² The speculation as to how the Afghan government would respond to habeas proceedings suggests that the fourth petition filed in the underlying, consolidated action at the district court level, lodged by Wazir, an Afghan citizen, should not have been dismissed. The district court stated, without citation to any evidence or cases, that "[f]or Wazir . . . the United States may be answerable to Afghanistan to some degree. And, as discussed above, it is possible—if not likely—that review of Wazir's habeas petition by this Court could cause friction with the Afghan government." *Al Maqaleh v. Gates*, 604 F. Supp. 2d 205, 230 (D.D.C. 2009). This is so despite the fact that Afghanistan is an ally. Moreover, that the D.C. Circuit cannot speak to how the Afghan government will take habeas proceedings, and that the district court claims "friction" would result, cannot be reconciled, *see id.* at 229; the latter assertion, in any case,

Under the framework proposed in this Article, the petitioners would be assumed to possess habeas rights because they were detained pursuant to the power of the United States and held under the stable and effective control of the United States; even though the Bagram Air Base more generally is shared, Afghanistan is an ally, the lease was created relatively recently, and the lease may not be held in perpetuity. This assumption remains valid because the petitioners have not been afforded adequate process. The assumption is not overcome either by matters of control or practical difficulties at Bagram. Under this framework, the fundamental purposes of the habeas writ would be allowed to flourish, the judiciary's checking function would be activated, and the Executive's action would be sanitized by the rule of law.

CONCLUSION

An appreciation for the writ, the separation of powers scheme, and relevant Supreme Court pronouncements in this field command that the rule of law initially attend any executive action that restrains individual liberty. It so attends because the executive action may be made arbitrarily or in error. It so attends because the Executive may seek to oppress. Any distance between the rule of law and executive action permits a misjudgment to lapse into a miscarriage of justice, and allows singular moments of oppression to degenerate into an unabated contagion of tyranny. To avert the specter of governmental abuse, courts must assume—according to the *Eisenstrager* Court—that the rule of law attaches to the executive decision to detain another, territory notwithstanding.²⁵³

This assumption may not be appropriate in all circumstances. Courts must be mindful of special considerations that inhere in the wartime context. The law adjusts in times of war—it may speak with a “different voice,” but it is not silent.²⁵⁴ Battlefield exigencies may, for example, call for diminished, though legally sufficient process in assessing whether an individual has been properly detained. In addition, practical difficulties may preclude the administration of habeas proceedings. In other words, the assumption that an enemy prisoner has habeas rights may be rebutted by the presence of adequate substitute process or by realities on the ground.

The D.C. Circuit in *al Maqaleh* was unfaithful to the established and my proposed understanding of the scope of the habeas writ. Worse than the legal errors is the practical consequence of the ruling—that is, the D.C. Circuit placed Bagram beyond judicial review and consequently created room between the rule of law and the Executive for abuse to fester, the very abuse that the Framers feared and the very room that the writ was designed to occupy.

is not supported. A credible argument can therefore be made that the Wazir petition should not have been dismissed based on the reasoning employed.

²⁵³ See *Johnson v. Eisenstrager*, 339 U.S. 763, 777 (1950).

²⁵⁴ WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME* 225 (1998).