COMMENT

BOUMEDIENE APPLIED BADLY:
THE EXTRATERRITORIAL CONSTITUTION
AFTER AL MAQALEH V. GATES

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Since 2001, the United States has detained hundreds of foreign nationals at overseas facilities, raising the question of whether the Constitution applies extraterritorially to these detainees. The Supreme Court’s decision in Boumediene v. Bush provided detainees being held at Guantanamo Bay, Cuba, the right to petition for a writ of habeas corpus in federal court. But applying that holding in Al Maqaleh v. Gates, the U.S. Court of Appeals for the D.C. Circuit held that detainees held at Bagram Air Base, Afghanistan, lack the ability to seek habeas relief.

This Comment is principally a response to that decision. I argue that the district court in Al Maqaleh faithfully applied the Boumediene multifactor test for extending habeas extraterritorially in light of the Supreme Court’s functional, pragmatic analysis in that case. By contrast, the D.C. Circuit employed a formalistic analysis and marginalized the separation of powers concern that animated Boumediene. In light of Boumediene, as well as the demands of the modern international system, the D.C. Circuit decision missed the mark, damaging extraterritoriality doctrine with regard to the Great Writ.

This Comment also addresses extraterritoriality in the context of substantive rights. I argue that because the Supreme Court’s current position on substantive rights—most recently articulated in United States v. Verdugo-Urquidez—formally limits such rights to the U.S. national community, it is outdated and conflicts with Boumediene. Since the lower courts have distinguished Boumediene and follow Verdugo-Urquidez, they wrongly continue to deny foreign nationals even basic substantive rights, despite the Supreme Court’s move towards a more expansive application of constitutional protections.

The Supreme Court has therefore left the two halves of extraterritoriality jurisprudence in unfortunate limbo. In light of the doctrinal shift toward functional tests and pragmatism (and away from bright-line rules), the Court should formu-

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late a clear multifactor test for substantive rights. This would eliminate the current inconsistency and provide detainees the modicum of legal review necessary to legitimize U.S. detention policies.

INTRODUCTION

The September 11 terrorist attacks prompted a global military conflict that has produced numerous troubling dilemmas for the legal community. Since 2001, U.S. forces around the world have targeted and killed suspected terrorists as part of the “Global War on Terror” (GWOT), pursuant to the Authorization for Use of Military Force (AUMF).1 They have also captured and detained hundreds of others. Unsurprisingly, many detainees have attempted to obtain relief in the federal courts. As a result, the courts have been faced with the serious question of whether these detainees, who are predominantly noncitizens captured and held in facilities outside the United States, can challenge their detention by petitioning for writs of habeas corpus.

Fadi al Maqaleh, Amin al Bakri, Redha al-Najar, and Haji Wazir are four such detainees being held at Bagram Air Base in Afghanistan. Like many others, they were captured and deemed enemy combatants, a classification that they sought to challenge by petitioning the federal courts for habeas relief. Their efforts to obtain relief were brought to a standstill when the U.S. Court of Appeals for the D.C. Circuit ruled, in Al Maqaleh v. Gates, that the federal district courts lack jurisdiction to adjudicate the habeas claims of detainees held at Bagram. This momentous decision halted the movement toward providing GWOT detainees with the means to challenge their detention. It also produced a troubling precedent for future executive action, suggesting that U.S. agents could kidnap foreign nationals and detain them indefinitely without having to justify their actions before a neutral body.

While scholars have developed theoretical frameworks for extraterritoriality doctrine, there is currently a dearth of legal scholarship applying the D.C. Circuit decision in Al Maqaleh to existing theory. There is also insufficient scholarship situating the case within extraterritoriality jurisprudence generally. This Comment therefore seeks to examine the case (and preceding habeas cases) through the lens of current theory, while also going beyond habeas and examining the case in the context of substantive rights. Finally, this Comment presents a novel defense of functionalism in light of the changed international system and its impact on counterterrorism.

This Comment operates at two levels, examining Al Maqaleh specifically and U.S. extraterritoriality doctrine generally. While I primarily contend that Al Maqaleh was incorrectly decided in light of current doctrine, I also argue that the doctrine must move towards a generally applicable theory to avoid arbitrary and inconsistent judicial decisions and prevent executive abuses of power. Although the Supreme Court has been forced to address the reach of the Suspension Clause, the Court has treated the issue of extraterritoriality in an ad hoc, unclear way; it has yet to formulate a coherent jurisprudential theory. This needs to change.

Part I examines the line of Supreme Court decisions addressing the extraterritorial application of the Suspension Clause and evaluates the Supreme Court’s current doctrine as articulated in Boumediene v. Bush.

2. 605 F.3d 84, 99 (D.C. Cir. 2010).
3. Tina Monshipour Foster, Executive Director of the International Justice Network and lead counsel for the detainees, argued, “This is an extremely disturbing precedent that allows the U.S. government to kidnap someone from any part of the world and never have to justify it, ever.” Peter Finn, Bagram Detainees Lose Appeals Case to Challenge Confinement, WASH. POST (May 21, 2010, 11:06 PM), http://www.washingtonpost.com/wp-dyn/content/article/2010/05/21/AR2010052102005.html.
Part II analyzes how that doctrine has been applied by comparing the district court’s decision in *Al Magaleh* with the D.C. Circuit’s decision: while the district court followed the separation of powers principle animating *Boumediene*, the D.C. Circuit failed to do likewise. After *Boumediene*, the D.C. Circuit’s rationale for not extending habeas is no longer appropriate.

Part III discusses the extraterritorial application of other parts of the Constitution, particularly substantive rights. This distinct line of cases culminates with *United States v. Verdugo-Urquidez*, which formalistically limited the reach of substantive rights based on citizenship and territory. This Part ends by discussing the troubling implications of *Verdugo-Urquidez*, which the lower federal courts continue to cite in denying foreign nationals access even to basic due process protection.

Part IV contends that a functional approach that allows the extension of both substantive and procedural protections must be adopted. I argue that the legal formalism in *Verdugo-Urquidez* is inconsistent with *Boumediene*, and that the Supreme Court should therefore reject *Verdugo-Urquidez* and bring its substantive rights analysis in line with the functional paradigm in *Boumediene*. Although the executive branch has responded to the rising threat of international terrorist networks and other non-state groups by exercising greater power abroad, it has been too slow to observe the constitutionally mandated restraints on that power. This failure denies detainees the modicum of legal review that is essential to legitimizing U.S. detention policy. This Part also discusses the inherent limits to the Constitution’s reach, reassuring skeptics that a “universal Constitution” does not result from a functional approach to extraterritoriality.

I. EXTRATERRITORIALITY AND THE GREAT WRIT

The Supreme Court has addressed the extraterritorial application of habeas review in prior cases, both before and after the onset of the GWOT. This line of decisions culminated with *Boumediene v. Bush*, in which the Court extended the habeas writ to foreign detainees held overseas and formulated a pragmatic multifactor test for use in future detainee habeas cases.  

A. The Road to Boumediene

When the United States began detaining foreign nationals at Guantanamo Bay, Cuba, Congress and the Supreme Court jousted over the availability of habeas review for those detainees. Legal precedent suggested that habeas review would not be permitted at Guantanamo. The Court had first addressed the extraterritorial reach of habeas in *Johnson v. Eisentrager*, where it held that the

7. See 553 U.S. at 766, 771.
writ did not extend to aliens detained outside U.S. sovereign territory (specifically, the Landsberg Prison in the Allied Powers’ postwar occupation zone).8

Without overturning Eisentrager, the Supreme Court ruled in Rasul v. Bush that the habeas statute did apply to the GWOT detainees being held at Guantanamo;9 Eisentrager remained good law because the strict territorial limit applied to the federal habeas statute10 had since been overruled.11 Congress responded to Rasul with the Detainee Treatment Act of 2005 (DTA), which amended the federal habeas statute, stripping the lower federal courts of the power to consider an application for habeas relief filed by or on behalf of any alien detained by the Defense Department at Guantanamo Bay.12 The DTA was challenged in turn; the Court ruled that the DTA did not strip the federal courts of jurisdiction to hear those habeas petitions that were pending at the time the law was enacted.13

Congress again responded by enacting the Military Commissions Act of 2006 (MCA), further amending the habeas statute to apply the jurisdiction-stripping provisions to the petitions of all aliens detained since September 11, 2001.14 This foreclosed all detainee petitions under the habeas statute. But the MCA also forced the Court to address the underlying constitutional question: did the MCA violate the Suspension Clause by stripping the federal courts’ habeas jurisdiction?15

**B. Boumediene: The Constitutional Habeas Question**

The Boumediene petitioners were all foreign nationals captured abroad, deemed enemy combatants, and held at Guantanamo. “Guantanamo Bay is not

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8. See 339 U.S. 763, 768 (1950) (“We are cited to no instance where a court, in this or any other country where the writ is known, has issued it on behalf of an alien enemy who, at no relevant time and in no stage of his captivity, has been within its territorial jurisdiction. Nothing in the text of the Constitution extends such a right, nor does anything in our statutes.”).
10. See Ahrens v. Clark, 335 U.S. 188, 190 (1948) (holding that a federal district court lacks jurisdiction to issue a writ of habeas corpus if the person is not “confined or restrained within the territorial jurisdictions of those courts” at the time the petition is filed).
11. See Braden v. 30th Judicial Circuit Court, 410 U.S. 484, 499-500 (1973) (overruling Ahrens v. Clark by holding that a person may petition in a district outside that of his confinement in situations where a more convenient forum exists).
15. The Suspension Clause reads: “The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.” U.S. CONST. art. I, § 9, cl. 2.
formally part of the United States. And under the terms of the lease between the United States and Cuba, Cuba retains 'ultimate sovereignty' over the territory while the United States exercises 'complete jurisdiction and control.'\textsuperscript{16} While the Court conceded that the United States lacks de jure sovereignty, it concluded that "the United States . . . maintains de facto sovereignty over the territory."\textsuperscript{17} The Court explicitly rejected the government’s argument that "de jure sovereignty is the touchstone of habeas corpus jurisdiction."\textsuperscript{18}

The Court noted that although the \textit{Eisentrager} petitioners were ultimately denied access to the writ, \textit{Eisentrager} had carefully considered the practical implications involved in applying the writ extraterritorially, going beyond a simple determination about the United States’s legal status at Landsberg into a more nuanced inquiry about the "objective degree of control" the United States possessed there.\textsuperscript{19} \textit{Boumediene} identified this as a "common thread" uniting \textit{Eisentrager} and earlier extraterritoriality cases (including the \textit{Insular Cases}\textsuperscript{20} and \textit{Reid v. Covert}\textsuperscript{21}): "the idea that questions of extraterritoriality turn on objective factors and practical concerns, not formalism."\textsuperscript{22} \textit{Boumediene} also emphasized that the government’s contention—that the Constitution does not apply to territory where the United States lacks formal sovereignty—raised "troubling separation-of-powers concerns," which the writ has historically been used to monitor.\textsuperscript{23}

Based on these considerations, \textit{Boumediene} formulated a habeas extraterritoriality test:

\begin{quote}
At least three factors are relevant in determining the reach of the Suspension Clause: (1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner’s entitlement to the writ.\textsuperscript{24}
\end{quote}

Applying the first prong of the test, the Court determined that the detainees were all noncitizens deemed "enemy combatants" by a Combatant Status Re-
view Tribunal (CSRT), but that the detainees contested this classification. In contrast to the Eisentrager detainees, who had been tried for war crimes before a formal military commission, the Boumediene detainees were afforded “far more limited” procedural protections that fell “well short of the procedures and adversarial mechanisms that would eliminate the need for habeas corpus review.”

To evaluate the second prong, Boumediene compared the detention facilities at Landsberg and Guantanamo. Both were located outside U.S. territory, but while the United States possessed plenary and exclusive control over Guantanamo, its control over Landsberg was not similarly absolute. Landsberg fell under the jurisdiction of the combined Allied forces, indicating that “[t]he United States was . . . answerable to its Allies for all activities occurring there.” The United States also did not intend to remain at Landsberg permanently, whereas it maintained an indefinite presence at Guantanamo. The Court therefore concluded: “In every practical sense Guantanamo is not abroad; it is within the constant jurisdiction of the United States.”

Applying the third prong, Boumediene found that although providing the detainees access to the writ might impose daunting practical obstacles, these obstacles were not dispositive. The Court noted that at Landsberg, judicial interference with military efforts posed a far greater danger, due to the potential for conflict with enemy guerilla fighters. The Court also found it unlikely that adjudicating Guantanamo detainees’ habeas petitions would cause friction with Cuba, the host country. But the Court included a very important caveat for future detainee habeas litigation: if adjudicating overseas habeas petitions made friction with the host government more likely, or “if the detention facility were located in an active theater of war, arguments that issuing the writ would be ‘impracticable or anomalous’ would have more weight.”

Nevertheless, in light of the serious separation of powers concerns raised, Boumediene concluded that the Suspension Clause had “full effect at Guanta-

25. See id. at 766-67.
26. Id. at 767.
27. See id. at 768; see also Neuman, supra note 4, at 270-71 (“[T]he Court’s discussion of the geographic scope of the writ at common law in Boumediene[] explain[s] that prudential concerns might equally lead English courts to withhold the writ from Scotland and to extend it to nonsovereign territory.”). Note, however, that the Court deemed “evidence as to the geographic scope of the writ at common law informative, but . . . not dispositive.” Boumediene, 553 U.S. at 748.
28. Boumediene, 553 U.S. at 768.
29. See id. at 768-69.
30. Id. at 769.
31. See id.
32. See id. at 769-70.
33. Id. at 770.
34. Id. (emphasis added).
namo Bay.” 35 Short of a formal suspension of the writ, detainees at Guantanamo could pursue habeas relief in the courts.

II. BOUMEDIENE APPLIED BADLY: AL MAQALEH V. GATES

Although the Supreme Court resolved the habeas question for Guantanamo detainees and provided an extraterritoriality test for the lower courts to apply going forward, that test has been applied badly. Applying the test in Al Maqaleh v. Gates, the D.C. Circuit largely ignored the underlying concerns expressed in Boumediene and denied habeas review for detainees being held at Bagram Air Base. 36

A. Al Maqaleh in the District Court

The Boumediene decision resolved one of the most fundamental GWOT detainee issues: noncitizen detainees held at Guantanamo would be able to pursue constitutional habeas protection, pursuant to the Suspension Clause. But the decision begged the next important question: could detainees at other overseas facilities also pursue habeas relief?

Judge John Bates of the D.C. District Court provided his answer to this question, ruling that three detainees held at the Bagram Air Base in Afghanistan could seek habeas relief. 37 In its opinion, the district court found key similarities between the detainees at Bagram and those at Guantanamo.

Al Maqaleh involved four petitioners, all captured outside U.S. territory and detained at Bagram. 38 Applying the Boumediene test to evaluate whether the Suspension Clause should extend to Bagram, the district court concluded that for three elements—citizenship, status, and the nature of the apprehension site—the Bagram detainees were similar to the detainees at Guantanamo. 39 All

35. Id. at 771. Furthermore, the Court found Congress had not suspended the writ. See id. (“The MCA does not purport to be a formal suspension of the writ; and the Government . . . has not argued that it is.”).
36. See 605 F.3d 84, 98-99 (D.C. Cir. 2010).
37. Al Maqaleh v. Gates, 604 F. Supp. 2d 205, 235 (D.D.C. 2009). Judge Bates ruled that a fourth detainee, Haji Wazir, could not pursue habeas relief because Wazir was an Afghan citizen and adjudicating habeas claims by Afghan citizens held at Bagram created the potential for friction with the host government of Afghanistan. Id. at 230, 235; see also infra note 59 and accompanying text.
38. Al Maqaleh, 604 F. Supp. 2d at 209 (“Fadi al Maqaleh, a Yemeni citizen who was taken into U.S. custody sometime in 2003, filed a petition for a writ of habeas corpus on September 28, 2006. He claims that he was captured beyond Afghan borders but does not specify where. Haji Wazir, an Afghan citizen, filed a habeas petition on September 29, 2006. Wazir was captured in Dubai, United Arab Emirates in 2002 . . . . Amin al Bakri is a Yemeni citizen, captured . . . in Thailand in 2002, who filed a petition seeking habeas review on July 28, 2008. Redha al-Najar filed a habeas petition on December 10, 2008. Al-Najar is a citizen of Tunisia who was captured in Pakistan in 2002.” (footnote and citations omitted)).
39. Id. at 217-21.
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four petitioners were non-U.S. citizens, all were determined to be “enemy combatants,” and all were apprehended outside of U.S. sovereign territory. The court also noted that Boumediene conducted only “cursory analysis” on these three elements and that “the remaining three factors—site of detention, adequacy of process, and practical obstacles—were the primary drivers” of the decision.

1. Detention site

The district court’s analysis of the detention site focused on the “objective degree of control’ the United States has over Bagram.” Comparing Bagram to Landsberg (in Eisentrager) and Guantanamo (in Boumediene), the district court concluded that Bagram fell somewhere in the middle on the Guantanamo-Landsberg spectrum. The lease and Status of Forces Agreement (SOFA) that governed Bagram gave the United States “near-total operational control.” While conceding that formal (de jure) sovereignty remained with Afghanistan and that non-U.S. workers and contractors operated out of the base, the court determined that “the actual control the United States exercises at the Bagram detention facility . . . is practically absolute.” The district court found notably absent at Bagram the most significant check on U.S. power at Landsberg—the sharing of control and jurisdiction with allies. In short, the district court concluded that the site of detention element favored the detainees, though not as strongly as it had in Boumediene.

2. Adequacy of process

The district court next discussed whether there had been “a rigorous adversarial process to test the legality of [the detainees’] detention.” Boumediene found that “the procedural protections afforded to the detainees in the CSRT hearings . . . f[e]ll well short of the procedures and adversarial mechanisms that would eliminate the need for habeas corpus review.” The district court found that Bagram detainees were provided even less process; they had appeared before an Unlawful Enemy Combatant Review Board (UECRB)—a panel of three military officers—and they had no recourse to appeal before neutral decision-

40. Id. at 218.
41. Id.
42. Id. at 221 (quoting Boumediene v. Bush, 553 U.S. 723, 754 (2008)).
43. See id. at 221-26.
44. Id. at 222.
45. Id. at 222-23.
46. See id. at 224.
47. Id. at 225-26.
48. Id. at 226 (quoting Boumediene v. Bush, 553 U.S. 723, 767 (2008)).
49. 553 U.S. at 767.
makers. Because the UECRB process was “plainly less sophisticated and more error-prone” than the CSRT process, the court concluded that “the UECRB process at Bagram falls well short of what the Supreme Court found inadequate at Guantanamo.” This factor strongly favored the detainees.

3. Practical obstacles

_Boumediene_ had expressly stated that practical arguments against the extra-territorial extension of the writ would carry more weight “if the detention facility were located in an active theater of war.” The district court found that in this regard, because it is clearly located in the midst of an ongoing military conflict, “Bagram resembles Landsberg more than Guantanamo.” However, while detention in an active theater posed practical obstacles to the successful adjudication of the writ, several factors mitigated the problem. First, the high level of U.S. control over Bagram would probably prevent disruption of the judicial process. Second, access to new technologies available since _Eisentrager_ rendered the practical obstacles much less daunting to the judicial process.

Third, the district court addressed the potential for political friction produced by adjudicating the habeas claims of the host country’s citizens. Although _Boumediene_ dismissed the likelihood of friction with Cuba, the _Al Maqaleh_ court found the possibility of friction with Afghanistan more likely. If U.S. courts ordered the release of Afghan detainees like Haji Wazir, the Afghan government might resent such action by a foreign government over its nationals. The court therefore ruled that the “practical obstacles” factor compelled a different result in Haji Wazir’s case.

Fourth, and most importantly, the district court noted that although Bagram is located in an active theater of war, the petitioners were only being held at Bagram because the executive branch chose to detain them there. All four petitioners were apprehended outside Afghanistan and were subsequently brought there by U.S. forces; the government could just as well have sent them else-

50. _Al Maqaleh_, 604 F. Supp. 2d at 227.
51. _Id._
52. _Id._
53. 553 U.S. at 770.
54. _Al Maqaleh_, 604 F. Supp. 2d at 228.
55. See _id._
56. _Id._ The court noted, for example, that real-time videoconferencing, which has been used in place of in-court appearance to facilitate the processing of Guantanamo habeas petitions could similarly be used at Bagram. _Id._
57. 553 U.S. at 770.
58. 604 F. Supp. 2d at 229.
59. _Id._ at 230, 235.
60. _Id._ at 230-31.
where, to any facility outside of an active war zone, where the practical obstacles to habeas review would have been less daunting. The court thus recognized that any obstacles resulted from the government’s own actions and refused to penalize the petitioners for those actions.61

4. Balancing the factors

Balancing the factors of the Boumediene test, the district court in Al Maqaleh concluded that with regard to al Maqaleh, al Bakri, and al-Najar, section 7(a) of the MCA (the jurisdiction-stripping provision) was unconstitutional in light of the Suspension Clause; these detainees could seek habeas relief in the federal courts.62

B. Al Maqaleh in the D.C. Circuit

The Bagram detainees’ victory was short-lived: on May 21, 2010, the U.S. Court of Appeals for the D.C. Circuit reversed the district court and dismissed the petitions for lack of jurisdiction.63

On four of six “elements,” the D.C. Circuit agreed with the district court’s analysis. The D.C. Circuit found that the Al Maqaleh petitioners were, like the Boumediene petitioners, (1) noncitizens (2) held as enemy combatants, after being (3) apprehended outside the United States.64 The circuit court also agreed with the lower court that (4) the adequacy of process factor weighed even more in the petitioners’ favor than it had in Boumediene, because “proceedings before the UECRB afford even less protection to the rights of detainees in the determination of status than was the case with the CSRT” process at Guantanamo.65 The D.C. Circuit found that on the latter issue, the petitioners had a strong case for extending the writ to Bagram.66

However, the circuit court disagreed with the district court on the remaining two elements: (5) the nature of the detention site, and (6) “the practical obstacles inherent in resolving the prisoner’s entitlement to the writ,” which “overwhelmingly” weighed against the detainees.67

61. See id.; see also Falkoff & Knowles, supra note 4, at 893 (“[T]he fact that some (undisclosed) number of detainees at Bagram were actually captured outside of Afghanistan and brought to the war zone suggests that government arguments about the impracticability of allowing access to the courts are hyperbolic. Moreover, the transfer of prisoners into a war zone further undermines any suggestion that there is a reasonable relation between the war effort and the need to suspend access to the courts for Bagram detainees.”).
64. Id. at 96.
65. Id.
66. Id.
67. Id. at 97.
The D.C. Circuit held that in contrast to Guantanamo, at Bagram the United States could claim neither de jure nor de facto sovereignty. While the United States arguably possesses de facto sovereignty over Guantanamo, where it has run a military base for over one hundred years in spite of a hostile host country, the United States cannot make as strong a case for de facto sovereignty at Bagram, where its base has been in operation less than ten years and it neither intends to remain permanently nor faces hostility from the host country. In sum, the D.C. Circuit found the de facto sovereignty claim no stronger at Bagram than at Landsberg, another temporary base located on the territory of a cooperative host government.

The D.C. Circuit’s decision relied primarily on the third prong of the Boumediene test: the “practical obstacles” factor. The court concluded that “all of the attributes of a facility exposed to the vagaries of war are present in Bagram” and that these “vagaries” were “similar, if not greater” than those present at Landsberg. Relying on the Boumediene caveat that practical obstacles would have more weight in an active theater of war, the D.C. Circuit concluded that “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.”

The D.C. Circuit acknowledged the district court’s separation of powers concern—that detainees provided with neither rigorous legal process nor habeas review could be deliberately held in active theaters of war to avoid judicial scrutiny—but summarily dismissed it because “that is not what happened here.” The court refused to properly consider the danger of executive manipulation without evidence that such manipulation had already taken place, adopting a position of extreme deference.

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68. Id.
69. Id.
70. See id. The third prong is also part of the six-part analysis in the district court opinion. See Al Maqaleh v. Gates, 604 F. Supp. 2d 205, 227 (D.D.C. 2009).
71. Al Maqaleh, 605 F.3d at 97.
72. Id. at 98.
73. Id.
74. See id. (“We need make no determination on the importance of this possibility, given that it remains only a possibility; its resolution can await a case in which the claim is a reality rather than a speculation.”). The court’s unwillingness to overrule the executive was based largely on its anxiety about the lack of any obvious limiting principle. See Developments in the Law—Extraterritoriality, 124 HARV. L. REV. 1226, 1262 (2011) (“The Al Maqaleh court was very open about its fear that extending the habeas writ to Bagram would result in Boumediene’s rationale extending to military bases all over the world . . . .”). As I argue in
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C. Comparing the District Court and D.C. Circuit Approaches

1. Notable areas of overlap

The district and circuit courts applied the same test from Boumediene, but reached opposing answers to the same ultimate question. Yet these two courts did not entirely contradict each another. On four of the six elements—citizenship, status, process, and apprehension site—neither court found any material difference between the Al Maqaleh and Boumediene detainees: petitioners were noncitizens captured outside the United States who had been deemed “enemy combatants,” albeit through a very error-prone, nonadversarial process. On matters where the two courts arrived at contrary conclusions, they did so by placing analytic importance on different underlying principles, examining the same facts through different lenses.

2. Differences in emphasis: The detention site factor

With regard to the detention site, the district court’s focus was on the objective degree of control, evaluating how U.S. control at Bagram compared to Guantanamo and Landsberg. Examining the lease and SOFA, the district court found that they created an “exclusive use” right that brought Bagram much closer to Guantanamo. Unlike at Landsberg, the U.S. allies did not share jurisdiction over Bagram, and neither the lack of formal sovereignty nor the presence of non-U.S. citizens at Bagram abrogated the U.S. military’s complete control of the base and everything happening within it. The district court reasoned that if Landsberg represented a “shared control” model and Guantanamo represented an “exclusive control” model, Bagram fell much closer to Guantanamo. As such, the “nature of the detention site” weighed in favor of extending similar treatment to detainees at both Guantanamo and Bagram. The court’s ultimate conclusion flowed from its appropriate emphasis on “objective control.”

The D.C. Circuit approached the issue differently, adopting a formalist position and focusing on sovereignty rather than control. The D.C. Circuit evaluated U.S. control only as a means of measuring de facto sovereignty. Guantanamo Bay, while not technically part of the United States, has flown the U.S. flag for over a century, in the face of a hostile de jure sovereign. Bagram is a temporary facility that has existed for less than ten years, with the blessing and cooperation of the de jure sovereign; the claim of de facto sovereignty is much

Part IV, the D.C. Circuit incorrectly concluded that extending the writ to Bagram for these petitioners would implicitly extend it to bases around the world.

75. See Al Maqaleh, 604 F. Supp. 2d at 222.
76. See id. at 222-24.
77. See id.
weaker. The D.C. Circuit concluded that Bagram was similar to Landsberg because the U.S. claim to de facto sovereignty was weak, and this lack of even de facto sovereignty weighed against extension of the writ.78

The flaw in the D.C. Circuit’s framework is that the Supreme Court has indicated that objective control, not sovereignty, should guide the courts. Boumediene plainly stated that “questions of extraterritoriality turn on objective factors and practical concerns, not formalism.”79 The Supreme Court drew attention to the effective day-to-day power that the United States claims over detainees being held at both sites, noting that the United States possesses exclusive and plenary power over Guantanamo detainees and is accountable there to no other countries, in stark contrast to the situation at Landsberg. Where the government maintains exclusive and plenary control (especially where adequate legal process is not provided), habeas review constitutes a necessary safeguard against unchecked executive power.80

The district court’s analysis of Bagram better comports with the Supreme Court’s approach because it avoids drawing a formal sovereignty-based distinction between two situations (Bagram and Guantanamo) where functional U.S. control is basically the same, and entirely unchallenged. The D.C. Circuit did not apply a similarly nuanced analysis, and satisfied itself with a more simplistic inquiry. The D.C. Circuit’s very brief discussion missed the fact that “sovereignty” does not account for the actual power that U.S. forces have over a military base and the resulting vulnerability of detainees held there. Because the D.C. Circuit framed the analysis improperly, it arrived at the wrong answer; its analysis contradicts the Supreme Court’s obvious effort in Boumediene to avoid rigid formalism.

To the detainee, after all, what matters is not the government’s claim of de facto sovereignty over the base in which he is being held, but whether or not he has a meaningful opportunity to challenge his detention before a neutral fact-finder.81 Where the government is in plenary control of the detention facility and the review procedure provided there is wholly inadequate, the writ must extend in order to impose accountability. Recognizing these realities, Boumediene established an “objective control” standard, but the D.C. Circuit failed to apply that standard with any rigor. This failure is particularly surprising in light of the D.C. Circuit’s concession that the Al Maqaleh petitioners received in-

78. See Al Maqaleh, 605 F.3d at 97. The court indicated that although this argument favored the government, it was “not determinative.” Id.
80. See id. at 765 (rejecting the idea that the Constitution has “no effect” in places where the government lacks formal sovereignty but retains “total control,” because such a principle would allow “the political branches to govern without legal constraint”).
81. The Supreme Court has held this opportunity must be provided to citizens detained within U.S. territory. See Hamdi v. Rumsfeld, 542 U.S. 507, 509 (2004). As I argue below, there is little logical reason to arbitrarily limit this principle based on either territorial sovereignty or nationality.
adequate legal process. While both courts perceived the inadequacy of legal review at Bagram, only the district court felt compelled to remedy the problem.

3. Separation of powers: The practical obstacles factor

Although Boumediene contemplated placing greater weight on the practical arguments against habeas review in active theaters of war, it also emphasized avoiding bright-line rules that could invite executive manipulation. The Supreme Court noted that a “formal sovereignty-based test” for determining when the writ should apply raised “troubling separation-of-powers concerns.”

Based on these concerns, Boumediene explicitly rejected the government’s suggestion that habeas extended only to those territories where the United States exercises formal (de jure) sovereignty, since such a rule would allow the government to deny noncitizens habeas simply by surrendering formal sovereignty over territory to a third party while retaining complete control over it.

This danger, however, applies with equal force in Al-Ma‘kal. A bright-line rule declaring all combat zones to be habeas-free poses as much danger of executive abuse as a bright-line rule limiting the availability of habeas to de jure sovereign territory. Both rules share a common problem: when the President can identify an area of U.S.-controlled territory where habeas cannot reach, he is incentivized to move enemy combatants to that location and thereby avoid habeas review. Whether or not the President actually engages in such manipulation, the mere ability to do so is sufficient to raise serious concerns.

Animated by a separation of powers concern that the clear demarcation of habeas-free zones would invite abuse, Boumediene adopted a functional, pragmatic approach. The district court in Al-Ma‘kal followed that approach well, recognizing the separation of powers concerns behind it. Although it recognized that practical obstacles would accompany the extension of the writ into active combat theaters, the district court did not find these obstacles insurmountable and observed that judicial process had been provided in active theaters before.

82. Boumediene, 553 U.S. at 764.
83. Id. at 764-65.
84. Chimène Keitner’s central thesis in a recent article is that domestic courts have remained “surprisingly” devoted to formalistic, territory-based, and nationality-based approaches to extraterritoriality, except when such an approach threatens domestic separation of powers principles. See Keitner, supra note 4, at 58, 108. Viewed through this lens, the separation of powers concern becomes the primary driver of the Boumediene decision to apply habeas extraterritorially, not just one of several equally important motivating principles.
85. See Neuman, supra note 4, at 288 (“[T]he functional approach does not present a binary choice between nonapplicability of a constitutional right and application of the right precisely as it operates in an analogous domestic setting.”).
86. The court cited, as examples, the military tribunal used to try the Eisentrager petitioners in postwar China, as well as military tribunals employed to determine detainee status.
extend the writ into active combat theaters would establish a precedent more dangerous than the risks attending its extension.\textsuperscript{87} Even assuming that the President—in choosing to transfer the \textit{Al Maqaleh} petitioners to Bagram—was not in this case motivated by the desire to avoid habeas review, the district court wisely recognized that creating habeas-free zones around all active theaters of combat would invite future executive abuse.\textsuperscript{88}

This possibility is particularly troubling because each of the \textit{Al Maqaleh} petitioners was captured outside of Afghanistan and brought into the theater of combat. While detaining an enemy combatant captured within the Afghan theater at Bagram might make sense because of its proximity, these petitioners had been apprehended as far away as Dubai and Thailand. The executive decision to transport the petitioners to a place where greater practical obstacles existed suggests the need for judicial scrutiny, not deference.

Although cognizant of this separation of powers problem, the D.C. Circuit marginalized it and never legitimately considered whether the practical obstacles could be overcome.\textsuperscript{89} Instead, the circuit hastily deferred to the executive determination that further judicial review would endanger military prerogatives and imperil relations with the Afghan government.\textsuperscript{90}

The D.C. Circuit failed to address the alarming plight of future detainees, who could similarly be captured beyond—but hauled into—active theaters of war\textsuperscript{91} to be deprived of access to the writ.\textsuperscript{92} Taking \textit{Al Maqaleh} as guidance, a


\textsuperscript{87} See id. at 230-31.

\textsuperscript{88} See id.

\textsuperscript{89} In his opinion, Chief Judge David Sentelle noted that the resolution of possible executive branch manipulation “can await a case in which the claim is a reality rather than a speculation.” \textit{Al Maqaleh v. Gates, 605 F.3d 84, 98 (D.C. Cir. 2010).}

\textsuperscript{90} See id. at 99.

\textsuperscript{91} This idea is particularly dangerous because the executive branch has attempted to define the theater of conflict in the GWOT quite broadly. President Bush outlined his expansive vision of the scope of the conflict shortly after 9/11: “[O]ur war on terror will be much broader than the battlefields and beachheads of the past. This war will be fought wherever terrorists hide or run or plan.” The President’s Radio Address, 37 WEEKLY COMP. PRES. DOC. 1367, 1397 (Sept. 29, 2001) (emphasis added). President Obama’s recent defense of drone strikes echoes a similar strain of thought, endorsing the use of drones to kill suspected militants in Pakistan as part of the offensive against al Qaeda. See Carol E. Lee & Adam Entous, \textit{Obama Defends Drone Use}, WALL ST. J., Jan. 31, 2012, at A2, available at http://online.wsj.com/article/SB10001424052970204652904577193673318589462.html; see also Rosa Ehrenreich Brooks, \textit{War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror}, 153 U. PA. L. REV. 675, 721 (2004) (“The distinction between zones of war and zones of peace . . . is another once clear-cut distinction that no longer seems tenable in light of recent events.”).

\textsuperscript{92} Counsel for the detainees argued to no avail “that reversing [the district court] would mean that the government would be able to evade judicial review of executive detention decisions by transferring detainees into active combat zones, thereby granting the executive the power to switch the Constitution on or off at will.” Charlie Savage, \textit{An Appeals Pan-
future President could order an alien captured anywhere outside the United States to be brought into an active theater of combat, declared an enemy combatant—in a nonadversarial proceeding not held before a neutral arbiter—and detained indefinitely.  

The judiciary would essentially have no means to evaluate the legality of the combatant’s detention, presenting a separation of powers problem just as compelling as that identified in Boumediene.

In conclusion, the district court in Al Maqaleh correctly applied the Boumediene factors and arrived at the appropriate ruling—that the Suspension Clause should apply extraterritorially to the detainees held at Bagram—while the D.C. Circuit’s poor framing of the key issues unfortunately reversed that ruling.

III. THE ARCHAIC APPROACH TO SUBSTANTIVE RIGHTS

Even if the D.C. Circuit had recognized the procedural right of the Bagram detainees to challenge their detention, to obtain relief the detainees would also have had to establish a violation of a substantive constitutional right. In other words, the writ has teeth only if other parts of the Constitution also apply extraterritorially.

A. Early Cases

Early substantive rights cases demonstrate the Court’s strictly territorial approach: even the petitioner’s citizenship was unimportant, since only the ter-


93. This type of executive manipulation is not purely speculative. During the early days of the GWOT, the Bush Administration chose to detain GWOT prisoners at Guantnamo partly because of its tenuous legal status. See Karen Greenberg, THE LEAST WORST PLACE: GUANTANAMO’S FIRST 100 DAYS 19 (2009) (“As Guantanamo’s status rose to the center of the legal and policy discussions, the utter lack of legal clarity began to appear increasingly as an opportunity. Neither U.S. nor international law clearly applied. . . . [T]his anomalous patch of territory was a no-man’s-land for justice.”). The federal courts had also previously held that Guantnamo was not U.S. territory and was therefore beyond their jurisdiction. See Cuban Am. Bar Ass’n v. Christopher, 43 F.3d 1412, 1430 (11th Cir. 1995) (holding that migrants at Guantamano “are without legal rights that are cognizable in the courts of the United States”).

94. Although relief could also be based on a violation of a statute or treaty, because this Comment focuses on the extraterritorial application of the Constitution, my discussion is limited to relief based on a violation of substantive Constitutional rights.

95. See Balzac v. Porto Rico, 258 U.S. 298, 309 (1922) (“It is locality that is determinative of the application of the Constitution . . . and not the status of the people who live in it.”); In re Ross, 140 U.S. 453, 464 (1891) (“The Constitution can have no operation in another country.”). Balzac and the other so-called Insular Cases formalized the “territorial incorporation doctrine.” See supra note 20.
ritorial location of the events giving rise to the suit mattered. Although these early cases exhibit a harsh formalism that is probably unworkable today, the Court also recognized that if the right at issue were a “fundamental personal right” (such as due process) it would have “full application” in territory controlled by the United States.

In *Reid v. Covert*, the Court determined that the Constitution’s protections—at least for citizens—extend concurrently with its powers:

> The United States is entirely a creature of the Constitution . . . [and] can only act in accordance with all the limitations imposed by the Constitution. When 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.

Rejecting a strict territorial approach, the Court demonstrated its willingness to extend rights and powers concurrently, while also casting doubt on the distinction between fundamental and nonfundamental rights.

Although *Reid* still applied a bright-line rule, substituting citizenship for territory as the guidepost for limiting constitutional rights, the opinion suggested that governmental powers and the Bill of Rights shield should generally extend concurrently, without regard for nationality. This view reemerged in Justice Brennan’s dissent in the landmark extraterritoriality case *United States v. Verdugo-Urquidez.*

B. *Verdugo-Urquidez*

In *Verdugo-Urquidez*, the Court held that the Fourth Amendment (and by implication, other substantive constitutional rights) applied to “the people,” or

Commentators offer various terms for this territorially focused approach. Keitner refers to it as “country-based reasoning.” See Keitner, *supra* note 4, at 57. Falkoff and Knowles term it the “territorialist” strand of the “membership approach” to extraterritoriality. See Falkoff & Knowles, *supra* note 4, at 868. In both cases, it is a strict approach.

As Keitner argues:

> [A] strict country approach remains unsatisfying . . . [because] it ignores the reality that countries routinely regulate extraterritorial and transnational activity . . . . [H] it seems unduly susceptible to manipulation . . . . [Furthermore,] it is neither unreasonable nor imperialistic for [a country’s] own actions to be constrained by standards prescribed by their domestic political processes, in addition to standards prescribed by the local jurisdiction and applicable international standards.


*Balzac*, 258 U.S. at 312-13.

*Reid v. Covert*, 354 U.S. 1, 5-6 (1957) (plurality opinion) (footnote omitted).

Id. at 8-9.

*See id.* at 7 (“The language of Art. III, § 2 manifests that constitutional protections for the individual were designed to restrict the United States Government when it acts outside of this country, as well as here at home.”).

in other words “a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.” Chief Justice Rehnquist, writing for the majority, argued that constitutional protections apply only to the national community—citizens and noncitizens who have established voluntary minimum contacts with the nation—a group to which the defendant did not belong. In other words, extraterritoriality is governed by the citizenship of the individual. Where neither citizenship nor territory provides a basis for extension, the Constitution cannot go. Chief Justice Rehnquist argued that from a historical perspective, “the purpose of the Fourth Amendment was to protect the people of the United States against arbitrary action by their own Government; it was never suggested that the provision was intended to restrain the actions of the Federal Government against aliens outside of the United States territory.”

Justice Brennan’s dissent focused on a perspective earlier considered in Reid: that constitutional rights track the exercise of governmental power. Brennan argued that just as the Constitution provided the government with the power to act beyond U.S. territory, it also prescribed limits to restrain the exercise of that power. Extending constitutional powers without extending the corresponding constitutional protections extraterritorially creates an impermissible “antilogy.” The troubling potential for governmental abuse is self-
evident when U.S. agents can search and seize aliens’ property abroad without complying with the Fourth Amendment, or arrest and detain noncitizens without abiding by the Fifth Amendment’s due process requirements.

Justice Kennedy’s concurrence provided an alternative view. Although he implicitly rejected Justice Brennan’s position, noting “that the Constitution does not create . . . any jurisdictional relation between our country and some undefined, limitless class of noncitizens who are beyond our territory,” he also rejected Chief Justice Rehnquist’s idea that the Constitution’s protections are limited to a national community. Justice Kennedy instead argued that there can be “no rigid and abstract rule” that the government must exercise its legitimate power overseas “subject to all the guarantees of the Constitution, no matter what the conditions and considerations are that would make adherence to a specific guarantee altogether impracticable and anomalous.” Rather, he reasoned that “[t]he restrictions that the United States must observe with reference to aliens beyond its territory or jurisdiction depend . . . on general principles of interpretation.” Applying this approach, Justice Kennedy concluded that “[t]he conditions and considerations of this case would make adherence to the Fourth Amendment’s warrant requirement impracticable and anomalous,” concurring in the majority’s ruling. However, he maintained that this did not “imply . . . that persons in the position of the respondent have no constitutional protection.”

Justice Kennedy’s analysis is not a Hegelian synthesis of the Rehnquist and Brennan positions. It is instead a third way that rejects the wholesale extension or denial of constitutional protections to noncitizens outside U.S. territory.
The “Kennedy doctrine” focuses on the context-specific defensibility of the government’s action, posing the key question of “what process is ‘due’ a defendant in the particular circumstances of a particular case” (an idea borrowed from Justice Harlan’s concurrence in Reid). Although it did not prevail in Verdugo-Urquidez, this practicality-grounded doctrine obviously guided the Supreme Court in Boumediene, a decision Justice Kennedy authored.

C. Substantive Rights After Verdugo-Urquidez

Verdugo-Urquidez became the Supreme Court’s guiding word on the extraterritorial application of substantive rights. The D.C. Circuit employed Verdugo-Urquidez’s hard-line approach even when U.S. agents engaged in particularly atrocious acts toward noncitizens outside U.S. territory. Such disappointing applications of the Verdugo-Urquidez rule emphasized the need for a more reasonable approach.

Although the functional approach to extraterritoriality prevailed in Boumediene, the D.C. Circuit cabined Boumediene on the grounds that the Supreme Court “explicitly confined its constitutional holding ‘only’ to the extraterritorial reach of the Suspension Clause. . . . Boumediene disclaimed any intention to disturb existing law governing the extraterritorial reach of any constitutional provisions, other than the Suspension Clause.” Citing Eisentrager and Verdugo-Urquidez, the D.C. Circuit has refused to budge; even the detainees at Guantanamo—now unequivocally permitted to petition for habeas relief—cannot invoke the substantive protection of the Due Process Clause. By

117. Verdugo-Urquidez, 494 U.S. at 278 (Kennedy, J., concurring) (quoting Reid v. Covert, 354 U.S. 1, 75 (1957) (Harlan, J., concurring in the result)).

118. In a particularly disconcerting case, the D.C. Circuit held that the Constitution does not prevent the torture of foreigners abroad. See Harbury v. Deutch, 233 F.3d 596, 603-04 (D.C. Cir. 2000), rev’d on other grounds sub nom. Christopher v. Harbury, 536 U.S. 403 (2002). Worse still, the D.C. Circuit badly applied the already unforgiving Verdugo-Urquidez rule: “the victim in [Harbury] was married to a U.S. citizen, but even that connection [to the U.S. national community] did not give him due process rights in the court’s view.” Neuman, supra note 4, at 272 n.78.

119. Rasul v. Myers, 563 F.3d 527, 529 (D.C. Cir. 2009). The Myers court cited Eisentrager for the proposition that nonresident aliens beyond U.S. territory have “no due process rights” and Verdugo-Urquidez for the proposition that they have no Fourth Amendment rights. Id.

120. See Myers, 563 F.3d at 529 (indicating that the lower federal courts are bound to obey Supreme Court precedent—here, Verdugo-Urquidez and Eisentrager—and the law of their circuit unless that law conflicts with a decision of the Supreme Court); Kiyemba v. Ob-
reading *Boumediene* too narrowly, the D.C. Circuit has failed to recognize the Supreme Court’s momentous shift away from a formalist approach to extraterritoriality. As the last Supreme Court decision addressing extraterritoriality prior to 9/11, *Verdugo-Urquidez* led to the widespread belief that the membership approach shaped the doctrine, obscuring the surprisingly dominant strain of globalist, limited government thinking that runs through the full range of these extraterritoriality cases and that animates even the “global due process” approach advocated by Justice Kennedy.

Falkoff & Knowles, supra note 4, at 878-79. This might explain the D.C. Circuit’s continued reliance on *Verdugo-Urquidez* and its unwillingness to acknowledge and follow the Supreme Court’s general move toward globalist thought in *Boumediene*. Although *Boumediene* addressed a different type of constitutional right, it significantly undermined the *Verdugo-Urquidez* rationale, the membership theory of extraterritoriality. *Boumediene* would have reached a different outcome had the membership theory governed the Court’s analysis, because the detainees at Guantanamo were not voluntarily connected to the U.S. national community. See Falkoff & Knowles, supra note 4, at 881.
light of the Supreme Court’s functional test for habeas, it is entirely plausible that the Court would set a similar standard for substantive rights. Mimicking Boumediene, the Court should adopt a multifactor test that evaluates whether the “conditions and considerations” of the petitioner’s detainment would make the extension of substantive rights “altogether impracticable and anomalous.” 123 Because the factors in such a test would involve the same pragmatic sentiments of the Boumediene habeas test, the likely result would be that procedural (habeas) and substantive rights would extend (or not extend) concurrently. This would give the detainees at facilities like Bagram a habeas challenge with some teeth.

Doctrinally, this would bring some consistency to the Court’s extraterritorial application of the Due Process and Suspension Clauses. Eliminating the incongruity of its current approach, the Supreme Court would finally have a clear and comprehensive statement of its extraterritoriality jurisprudence—one that would not deny judicial review based on arbitrary factors like where the detainee is being held or whether the detainee is a citizen. 124 This would allow the federal courts to exercise a firm discretionary check on the actions of the political branches overseas.

The key advantage of a functional approach is that “the Court can prevent particularly egregious injustices that result from adhering slavishly to a particular paradigm.” 125 As some critics have noted, however, part of the inherent risk is the potential for “arrogating judicial power.” 126 While the risk of judicial overreach is not insignificant, the risks attending a predictable bright-line rule (namely, deliberate executive evasion of that rule to escape legal review) are graver still—something the Boumediene Court understood. 127

Neuman applauds the Supreme Court’s “long overdue repudiation of Rehnquist’s opinion in Verdugo-Urquidez.” Neuman, supra note 4, at 272.

123. Verdugo-Urquidez, 494 U.S. at 277-78 (Kennedy, J., concurring) (quoting Reid v. Covert, 354 U.S. 1, 74 (1957) (Harlan, J., concurring in the result)).

124. “The most obvious normative difficulty with a compact approach based on citizenship is the arbitrariness of differentiating among individuals based solely on their citizenship (which is often determined by their place of birth or the place of their parents’ birth).” Keiter, supra note 4, at 64.

125. Falkoff & Knowles, supra note 4, at 882. Conversely, this type of flexible test also “conserves judicial resources by adopting a functional approach because it avoids interfering with the political branches’ activities unless it is truly necessary to preserve constitutional values.” Id. at 882-83.

126. Falkoff & Knowles, supra note 4, at 883; see also Boumediene v. Bush, 553 U.S. 723, 843 (2008) (Scalia, J., dissenting) (“[T]he functional test that does not (and never will) provide clear guidance for the future . . . is so inherently subjective that it clears a wide path for the Court to traverse in the years to come.”).

127. As the Court wrote:

To hold the political branches have the power to switch the Constitution on or off at will . . . would permit a striking anomaly in our tripartite system of government . . . . [T]he writ of habeas corpus is itself an indispensable mechanism for monitoring the separation of
Functional approaches also tend to generate uncertainty, making it difficult for actors to plan future action based on past precedent. While critics cite this unpredictability as a major deficiency of the *Boumediene* test,\(^\text{128}\) it is in reality a fundamental strength, which minimizes the potential for executive manipulation.\(^\text{129}\) When the President can safely conclude that a tract of land somewhere in the world lies beyond the reach of the Constitution,\(^\text{130}\) he is incentivized to detain people there. Although this does not mean the President necessarily will abuse his power, the potential to do so is enough to establish a separation of powers concern. If his goal is to avoid review, the President will be incentivized to move detainees to a Constitution-free zone instead of holding detainees in areas where the Constitution clearly extends (such as Guantanamo after *Boumediene*, or any facility on U.S. soil). The surest way to prevent such erosion of the rule of law is to deny the political branches clarity about where constitutional limitations cannot restrain them.

B. *The Changed International System*

Beyond a basic need for fairness and consistency, the Supreme Court should articulate a functional test for extraterritoriality because the changed international system requires it. The world has radically changed in the six decades since *Eisentrager* was decided, and it has even changed in many important ways since 1990 (the year *Verdugo-Urquidez* was decided). Commentators note that non-state actors occupy an increasingly significant position in international affairs today.\(^\text{131}\) Technological development and globalization have allowed these entities, which are often unaffiliated with any particular state, to exercise tremendous power and influence. The al Qaeda terrorist network provides the most visible example of a non-state group that operates fluidly across state boundaries without hesitation. Its operatives hail from nations around the

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\(^{128}\) See id. at 842 (Scalia, J., dissenting) (“[T]he Court’s ‘functional’ test that does not (and never will) provide clear guidance for the future.”). Chief Justice Roberts goes further and suggests that the Court’s functional test employs a “constitutional bait and switch” by inviting Congress to legislate regarding the detainees and then rejecting that legislative action (stripping habeas jurisdiction). Id. at 811 (Roberts, C.J., dissenting).


\(^{130}\) A true universalist, who believes the Constitution’s rights track the exercise of governmental power (for example, Justice Brennan in *Verdugo-Urquidez*), would not concede that such a place even exists.

\(^{131}\) See Rosa Brooks, *Protecting Rights in the Age of Terrorism: Challenges and Opportunities*, 36 Geo. J. Int’l L. 669, 671 (2005) (“Today, non-state actors from NGOs to corporations to terrorist groups can have an impact on international affairs in a way that would have seemed unimaginable fifty years ago.”).
world, and its operations target countries from the United Kingdom to Indonesia. In short, non-state actors like al Qaeda transcend both territorial borders and nationality. An al Qaeda terrorist can be defined only by his allegiance and conduct, not as a citizen of any particular nationality or as an agent operating within the borders of any particular state.

In response, governments have recognized the increased need to disregard once-clear boundaries, like territorial borders and nationality, to deal with the new security challenges presented by non-state actors. After the 9/11 terrorist attacks, the United States commenced both a traditional international armed conflict within Afghanistan and a broader military effort (a “transnational” conflict) to counter terrorism globally. U.S. forces today are engaged in a concerted effort to apprehend terrorist operatives of any nationality, wherever they might be; as part of that effort, U.S. forces could detain anyone, anywhere, whom they believe is engaging in or supporting acts of terrorism.

Just as the United States has recognized the need to extend its power overseas to combat the danger of terrorism, it must similarly recognize the imperative of extending substantive and procedural rights to limit the danger of unlawfully detaining innocents. In a world where non-state actors transcend both territoriality and nationality, and where government operations have responded by becoming equally global in scope, territorial sovereignty and nationality/citizenship have become outmoded principles by which to define the outer limits of extraterritoriality jurisprudence.

For example, a French national could be captured in Australia, taken to Bagram, classified as an enemy combatant by a UECRB and detained without access to meaningful judicial review. Neither his citizenship nor his physical location precipitated this series of events. But his ability to meaningfully

132. See Brooks, supra note 91, at 677 (“Shifts in the nature of security threats have broken down once clear distinctions . . . between states and nonstate actors; between combatants and noncombatants; between spatial zones in which conflict is occurring and zones in which conflict is not occurring . . . .”); id. at 684 (“In the long run, the old categories and rules need to be replaced by a radically different system that better reflects the changed nature of twenty-first century conflict and threat.”).

133. This term more aptly describes the GWOT than either “international” armed conflict or “noninternational” armed conflict, the two options offered under international humanitarian law (colloquially referred to as the “law of war”). See David Glazier, Playing by the Rules: Combating Al Qaeda Within the Law of War, 51 WM. & MARY L. REV. 957, 980, 994 (2009).

134. In this regard, the small sample offered in Al Maqaleh is telling: among four petitioners, two were Yemeni, one was Afghan, and one was Tunisian. The four were captured in locations as varied and distant as Dubai, Thailand, and Pakistan. See Al Maqaleh v. Gates, 604 F. Supp. 2d 205, 209 (D.D.C. 2009).

135. The pattern of this hypothetical situation tracks Al Maqaleh, at least for three of the petitioners: a citizen of country A is captured in country B and taken to be detained in country C (which is an active theater of combat).

136. Theoretically, in the GWOT a person is detained neither because of his nationality nor his geographic location (though these factors might raise the suspicions of U.S. agents),
challenge his classification and detention would be entirely circumscribed by his citizenship and the location of his capture and detention. Moreover, the fact that he is being detained in an active conflict zone—a matter entirely out of his hands and within the executive branch’s control—would be the decisive factor in denying him access to habeas review. Since the President knows that habeas would apply if the Frenchman caught in Australia is detained at Guantanamo and would not apply if he is detained at Bagram, the detainee’s ability to obtain habeas review would be entirely at the President’s whim under the D.C. Circuit’s interpretation in Al Maqaleh. And even if the detainee could seek habeas relief, he would be unable to claim the basic due process rights necessary to do so successfully.\footnote{Under Chief Justice Rehnquist’s approach in \textit{Verdugo-Urquidez}, the hypothetical detainee would undoubtedly be excluded from the “national community” of the governed eligible for extraterritorial due process rights. See United States v. Verdugo-Urquidez, 494 U.S. 259, 265 (1990); Rasul v. Myers, 563 F.3d 527, 529 (D.C. Cir. 2009) (limiting Boumediene’s holding solely to the Suspension Clause and denying any intent to change the extraterritorial reach of other constitutional provisions).}

By contrasting this detainee’s experience with a hypothetical U.S. citizen’s experience under similar circumstances, the inequity becomes apparent. An American accused of being an al Qaeda member and detained at Bagram would be permitted to challenge his detention and claim the substantive protections of the Due Process Clause, even if all the other circumstances of his capture and detention were the same as in the above example. Even a noncitizen residing in the United States would most likely be able to seek habeas review and challenge his detention.\footnote{See Al-Marri v. Pucciarelli, 534 F.3d 213, 216 (4th Cir. 2008) (en banc) (per curiam) (holding that petitioner, a resident alien arrested and held in the United States, had been denied his right “to challenge his designation as an enemy combatant”).}

These examples strongly suggest that attaching great importance to territorial sovereignty and nationality leads to arbitrary outcomes for noncitizens subjected to U.S. action abroad. In combating non-state organizations like al Qaeda, U.S. agents must cast their net widely and will inevitably capture and detain individuals entirely innocent of wrongdoing. All such detained persons should be given an opportunity to have their status and continued detention reviewed before a neutral arbiter. A bright-line rule that denies noncitizens outside the United States the ability to meaningfully challenge their detention, while allowing citizens or those held on U.S. territory to do so, erodes the legitimacy of the system.

A changing international order requires a new approach to extraterritoriality, one that extends substantive and procedural protections to those who need them most: foreigners who are detained and branded as enemy combatants but because of his suspicious or incriminating \textit{conduct}. Contrast this with more traditional interstate conflicts like World War II, where “the enemy” could be defined by nationality (e.g. German, Japanese, or Italian) as well as by location (well-defined combat zones of territorial occupation, such as Poland, occupied France, North Africa, etc.).
without proper judicial process, in places where the United States exercises exclusive and plenary control. In the case of the procedural right, the Supreme Court has articulated an appropriate test in Boumediene; that test has simply been applied badly by the D.C. Circuit. With regard to substantive rights, the Supreme Court should articulate another functional, pragmatic test to ensure that even noncitizen detainees held abroad can claim constitutional protection.

C. Where Is the Limit?

Some might view the ideas in this Comment as an overzealous expansion of the Constitution beyond U.S. borders. I have attempted to explain why this expansion is not unwarranted. Just as crucially, the expansion would also not be unlimited; this Comment does not advocate the “universal” application of the Constitution.139 The Boumediene test wisely imposed limits by requiring lower courts to consider the “practical obstacles” inherent in resolving a petitioner’s claim to the writ: the limiting principle arises from judicial discretion in evaluating each detainee’s claim. For example, where the United States lacks exclusive and plenary control over a detention center, or where adequate process has already been provided, lower courts would be able to cite the lack of objective control, or the adequacy of the process already provided, as a valid basis for denying habeas review.

The “practical obstacles” category provides room for judicial deference to the executive branch and Congress when such deference is necessary and appropriate (which will generally be the case). Boumediene only required that it be possible to extend the writ farther afield. The decision also suggested that the factors in its test comprise a nonexhaustive list; additional factors could possibly be added to better guide the exercise of judicial discretion.140 Undoubtedly, the proper exercise of judicial discretion is essential to the sound operation of any functional test, but this is equally true in many areas of the law. Judges must be willing to defer in situations where the exercise of executive power is restrained by the provision of sufficient legal process or where military exigency truly demands it.

Where detainees have already been provided with adequate judicial process, the necessity for habeas review is diminished and the case for denying

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139. Commentators discount the possibility that Boumediene contemplates a truly “universalist” approach to extraterritoriality, particularly given Justice Kennedy’s more moderate stance in Verdugo-Urquidez. See Falkoff & Knowles, supra note 4, at 882 n.161 (citing Neuman, supra note 4, at 271-72). A truly universal approach would imply not just that the Constitution applies everywhere, but that it applies everywhere in its entirety. Keitner argues: “Given the practical limits to the extraterritorial application of constitutional guarantees, a conscience approach does not necessarily require universal entitlement to the full panoply of domestic rights.” Keitner, supra note 4, at 67.

140. The Court held that “at least three factors are relevant in determining the reach of the Suspension Clause.” Boumediene v. Bush, 553 U.S. 723, 766 (2008) (emphasis added).
the writ becomes stronger. The executive branch could avoid habeas proceedings by simply providing detainees a genuine adversarial mechanism to challenge their detention before a neutral arbiter, allowing the federal judiciary to avoid interfering with executive actions.  

Finally, even the district court in *Al Maqaleh* recognized the need to avoid extending the writ to “battlefield detainees” captured in the active theater of combat itself. Judge Bates’s decision did not threaten to “open the floodgates,” because the petitioners before him were unusual in one important respect: unlike almost all of the eight hundred detainees at Bagram, they were *not* captured on the battlefields of Afghanistan, but were brought there from half a world away. The extension of habeas to Bagram would not have applied to the hundreds of Bagram detainees captured in Afghanistan.

CONCLUSION

The ultimate fate of the *Al Maqaleh* detainees remains unclear, but their prospects appear bleak. The D.C. Circuit panel that ruled on *Al Maqaleh* was composed of judges that “spanned the ideological spectrum.” After losing in the D.C. Circuit, the petitioners sought leave for rehearing, which was denied. Nevertheless, they moved to amend their habeas petitions based on new evidence, a motion that the district court granted—albeit with strong skepticism—on February 15, 2011. As this Comment goes to print, the case remains alive, but just barely.

Future petitioners might fare better. The Supreme Court proved willing to extend the writ to Guantanamo in light of the separation of powers concerns that non-extension would have entailed; as long as those concerns remain salient, the Court might be willing to extend the writ farther afield. Furthermore, personnel changes since *Boumediene*—Justice Stevens’s retirement and Justice Kagan’s appointment—have probably not changed the Court’s ideological balance; in a future case that comes before it, the new lineup on the Supreme Court might support further extension of the writ. Finally, given the opportunity, the Court can and should conform its substantive rights doctrine to its habeas doctrine. This would guarantee future detainees the necessary procedural and substantive grounds on which to challenge both their classification as enemy aliens and their indefinite detention. Just as importantly, the United States would strongly reaffirm the rule of law by refusing to establish, even in the midst of war, Constitution-free zones ruled by unchecked executive power.

141. For example, trial before a military commission, as provided in *Eisentrager*.
142. See Savage, supra note 92.
143. *Id.*
145. *Id.* at *7.