FUNCTIONALISM'S MILITARY NECESSITY PROBLEM: EXTRATERRITORIAL HABEAS CORPUS, JUSTICE KENNEDY, *BOUMEDIENE V. BUSH*, AND *AL MAQALEH V. GATES*

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The U.S. Supreme Court has struggled over the last 150 years to definitively answer the question of whether the U.S. Constitution applies beyond the borders of the territorial United States. Because the Constitution is silent on the issue, the burden has fallen on the judiciary to establish the contours of the doctrine. At times, the Court has espoused formulistic theories limiting constitutional application to territorial sovereignty, while at others it has looked to more objective, practical solutions that reach beyond the borders.

In 2008, the Supreme Court held in Boumediene v. Bush *that the application of the Suspension Clause of the Constitution to habeas petitions by detainees at Guantanamo Bay Naval Base in Cuba would turn on "functionalist" factors. Justice Kennedy, writing for the majority, ultimately concluded that the lack of adequate process, the site of detention, and the lack of practical obstacles weighed in favor of applying the Suspension Clause to the detainees' habeas petitions. Two years later, in* Al Maqaleh v. Gates*, a panel of the D.C. Circuit employed the* Boumediene *factors but held that they weighed against applying the Suspension Clause to the habeas petitions of similar detainees imprisoned at Bagram Air Force Base in Afghanistan.*

This Note argues that Justice Kennedy's functionalist test sits at the intersection of two constitutional theories: extraterritoriality and military necessity. Utilizing Justice Kennedy's highly subjective balancing test, the D.C. Circuit was able invoke the power of military necessity by focusing on the fact that Bagram was located in an "active theater of war." This allowed the D.C. Circuit to sidestep the obvious similarities between the Guantanamo and Bagram detainees and to clash with and undermine Boumediene. *Ultimately, this Note concludes that for Justice Kennedy's*

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functionalism to remain viable it must purge the influence of military necessity and reformulate or strike the "active theater of war" language from its balancing test.

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INTRODUCTION

In October 2001, Lakhdar Boumediene was captured in Bosnia and Herzegovina by Bosnian authorities for his alleged involvement in a plot to bomb the U.S. Embassy in Sarajevo.[1] Boumediene, a native Algerian, was legally residing in Bosnia and Herzegovina at the time of his capture and was held in a Bosnian prison during the investigation.[2] On January 17, 2002, Boumediene was released from Bosnian prison but was immediately detained by U.S. authorities and transferred to Guantanamo Bay Naval Base in Cuba.[3] Boumediene began his detention at Guantanamo on January 20, 2002.[4] The challenges to his detention at Guantanamo ultimately led to the Supreme Court decision *Boumediene v. Bush*[5] in 2008. The Supreme Court found that U.S. courts had jurisdiction over Boumediene's habeas corpus petition and remanded.[6] In light of the Supreme Court's holding, the district court reconsidered Boumediene's habeas petition and ordered his release from Guantanamo, six years after his capture by the United States.[7]

In 2003, Fadi Al Maqaleh, a Yemeni citizen, was taken into custody by U.S. forces in Zabul, Afghanistan.[8] He was detained by the United States at the Bagram Theater Internment Facility at Bagram Airfield in Afghanistan and filed a habeas corpus petition relying on the Court's decision in *Boumediene*.[9] The resolution of that habeas petition led to the D.C.

1. *See* Boumediene v. Bush, 579 F. Supp. 2d 191, 193 (D.D.C. 2008), *rev'd in part sub nom.* Bensayah v. Obama, 610 F.3d 718 (D.C. Cir. 2010) (holding that the government had failed to prove that Bensayah, one of the six *Boumediene* defendants, supported Al Qaeda). The U.S. Government later conceded that this alleged plot was no longer a legitimate reason for detention. *Id.*
2. *See id.*
3. *See id.* at 194.
4. *See id.*
5. 553 U.S. 723 (2008).
6. *Id.* at 798.
7. *See Boumediene*, 579 F. Supp. 2d at 198–99.
8. *See* Al Maqaleh v. Gates, 604 F. Supp. 2d 205, 209 (D.D.C. 2009), *rev'd*, 605 F.3d 84 (D.C. Cir. 2010). This was disputed by Al Maqaleh, whose petition asserted "on information and belief" that he was captured beyond Afghan borders; but a sworn declaration from Colonel James W. Gray, Commander of Detention Operations, states that Al Maqaleh was captured in Afghanistan. *See* Al Maqaleh v. Gates, 605 F.3d 84, 87 (D.C. Cir. 2010).
9. *See Al Maqaleh*, 604 F. Supp. 2d at 207–08.

Circuit's 2010 decision in *Al Maqaleh v. Gates*.[10] The D.C. Circuit distinguished *Boumediene* and denied Al Maqaleh's petition for lack of jurisdiction.[11] Al Maqaleh remains in U.S. custody and continues to petition federal courts for release.[12]

The outcomes for the two detainees could not have been more different. Boumediene, in custody at Guantanamo, could access the U.S. courts and seek his release, while Al Maqaleh, imprisoned at Bagram, was stuck in a legal black hole.[13] Al Maqaleh and the other detainees whose habeas petitions were joined in *Al Maqaleh* had filed a new habeas petition,[14] which demonstrated a potentially more significant concern than Al Maqaleh's individual plight: the government could, and may have already, exploited this legal conflict to delay justice for other detainees.[15] After the opportunity to advance this argument, however, the district court recently dismissed this petition for failing to provide sufficient evidence.[16]

Given that *Boumediene* and *Al Maqaleh* were decided only two years apart, under the same legal standard created by the Supreme Court and with similar factual postures, it is surprising and perhaps alarming that the cases had such different outcomes. Yet, things become clearer when one delves into the standard under which these cases were decided. This standard originated in Justice Kennedy's majority opinion in *Boumediene*, where he

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10. 605 F.3d 84 (D.C. Cir. 2010).

11. *See id.* at 99.

12. *See* Al Maqaleh v. Gates, Nos. 06-1669, 08-1307, 08-2143, 2011 WL 666883, at *2 (D.D.C. Feb. 15, 2011) (granting leave for the petitions to amend their habeas petitions); Larkin Reynolds, *Hearing Today in* Al Maqaleh v. Rumsfeld, LAWFARE (July 16, 2012, 9:10 AM), http://www.lawfareblog.com/2012/07/hearing-today-in-al-maqaleh-v-rumsfeld/; Wells Bennett, *Supplementary Declarations and Exhibits Filed in* Al Maqaleh, LAWFARE (Sept. 25, 2012, 12:43 PM), http://www.lawfareblog.com/2012/09/supplementary-declarations-and-exhibits-filed-in-al-maqaleh/.

13. Other articles have referred to Guantanamo Bay as a legal black hole. *See, e.g.*, Ernesto Hernández-López, *Guantánamo As a "Legal Black Hole": A Base for Expanding Space, Markets, and Culture*, 45 U.S.F. L. REV. 141, 141 (2012); Johan Steyn, *Guantanamo Bay: A Legal Black Hole*, 53 INT'L & COMP. L.Q. 1, 2 (2004).

14. *See* Joint Motion to Amend Petitions for Writ of Habeas Corpus at 1, 9, Al-Maqaleh v. Gates, Civil Action No. 06-1669 (JBD) (D.D.C. Sept. 1, 2010).

15. *See* Matt Apuzzo & Adam Goldman, *CIA Flight Carried Secret from Gitmo*, ASSOCIATED PRESS, *available at* http://www.apnewsarchive.com/2010/AP-Exclusive-CIA-flight-carried-secret-from-Gitmo/id-c65fc861ba0f45d39cece91f1d140d19?SearchText=CIA%20Flight%20Carried%20Secret%20from%20Gitmo;Display_ (detailing the transfer of detainees from Guantanamo before they could receive habeas corpus rights); Tim Golden, *Foiling U.S. Plan, Prison Expands in Afghanistan*, N.Y. TIMES, Jan. 7, 2008, at A1 (noting that the Bagram population was about 100 detainees in early 2004, but increased to more than 500 by 2007); Tim Golden & Eric Schmitt, *A Growing Afghan Prison Rivals Bleak Guantanamo*, N.Y. TIMES, Feb. 26, 2006, at A1 (attributing the shift of detainees to "a Bush administration decision to shut off the flow of detainees into Guantanamo," moving prisoners to other detention sites specifically to avoid habeas jurisdiction); *see also* Margaret L. Satterthwaite & Angelina Fisher, *Tortured Logic: Renditions to Justice, Extraordinary Rendition, and Human Rights Law*, 6 LONG TERM VIEW 52, 52 (2006) ("[T]he Bush Administration continues to employ strategies that appear to be aimed at keeping 'War on Terror' detainees outside the ambit of the U.S. legal system . . . .").

16. *See* Al Maqaleh v. Gates, Nos. 06-1669, 08-1307, 08-2143, 2012 WL 5077483, at *9–12 (D.D.C. Oct. 19, 2012).

espoused a functionalist test for the extraterritorial application of the Constitution.[17] Unlike some other theories for the extraterritorial application of the Constitution, which rely on more bright-line legal rules,[18] functionalism calls for case-by-case determinations of extraterritoriality.[19] Functionalism empowers judges to balance objective and practical factors to determine whether or not the Constitution applies outside of the United States.[20]

The problem with such a test, however, is evident in the seemingly conflicting results of the *Boumediene* and *Al Maqaleh* litigations, where there were two different outcomes for what appeared to be similar habeas petitions. The prisoners were both foreign citizens, were both captured outside of the United States, and were both detained outside of the United States by the U.S. military.[21] Yet, as Justice Kennedy has argued, the Supreme Court has a long history of wrestling with the application of the Constitution in cases that have originated outside the territorial United States. These cases have been decided using a "common thread" of functionalist theory.[22]

Whether a functionalist extraterritorial application of the Constitution is the "right" test is beyond the scope of this Note. As evidenced by the heated five-to-four split in *Boumediene*, the greatest legal minds in the country could not agree on the "right" test.[23] This Note is instead concerned with Justice Kennedy's three-factor test itself, because for now, it is the controlling Supreme Court precedent.[24] One factor is particularly important for the future of functionalism, because it has the potential to overshadow and overpower the other two. This is the third prong of Justice Kennedy's test, which calls on the court to balance "practical factors."[25]

"Practical factors" sounds benign, but this factor can free a court to employ another controversial and thorny issue to help decide the case—military necessity. Cases that turn on military necessity, like *Ex Parte Milligan*,[26] *Korematsu v. United States*,[27] and *Youngstown Sheet & Tube*

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17. *See* Gerald L. Neuman, *The Extraterritorial Constitution After* Boumediene v. Bush, 82 S. CAL. L. REV. 259 (2009); *see also infra* notes 87–91 and accompanying text.

18. One such bright-line rule is that the Constitution is limited by territorial sovereignty—the Constitution stops at the border. *See infra* notes 80–83 and accompanying text.

19. *See infra* notes 87–91 and accompanying text.

20. *See infra* notes 87–91 and accompanying text.

21. *See supra* notes 1–9 and accompanying text.

22. Boumediene v. Bush, 553 U.S. 723, 764 (2008) ("A constricted reading of *Eisentrager* overlooks what we see as a common thread uniting the *Insular Cases*, *Eisentrager*, and *Reid*: the idea that questions of extraterritoriality turn on objective factors and practical concerns, not formalism."); *see* Neuman, *supra* note 17, at 263–64.

23. *See Boumediene*, 553 U.S. at 730.

24. *See* Neuman, *supra* note 17, at 261–62.

25. *See infra* notes 314–20 and accompanying text.

26. 71 U.S. (4 Wall.) 2, 4 (1866) (holding that military necessity did not warrant the suspension of habeas corpus for a civilian in Indiana during the American Civil War).

27. 323 U.S. 214, 214–15 (1944) (holding that military necessity was a justification for the internment of Japanese Americans during World War II).

Co. v. Sawyer,[28] are unpredictable and have wrought unstable jurisprudence. Further, the failure to adopt cohesive bright-line rules in these heavily split and hotly contested military necessity cases suggests a Court struggling to find a practical, perhaps functionalist, solution to the scope of individual liberties and security concerns in times of emergency.

Ultimately, Justice Kennedy chose to side-step the military necessity arguments that would have supported the Government in his *Boumediene* opinion,[29] but strong arguments by Justice Scalia in dissent[30] and the D.C. Circuit in *Al Maqaleh*[31] show that the threat of mutating the three-factor functionalist test into one dominated by military necessity is real. For the functionalist test envisioned by Justice Kennedy to survive, it must change to avoid being twisted into something else entirely.

This Note is organized in four parts. Part I serves as a primer on the historical and technical aspects of the writ of habeas corpus. It also provides the theoretical foundations that inform the current debate over extraterritoriality and military necessity. To further solidify this framework, Part II provides a historical narrative of the Supreme Court's extraterritoriality and military necessity jurisprudence. Part III summarizes the postures of the *Boumediene* and *Al Maqaleh* litigations, and briefly explains the route that these two litigations took through the federal courts. The bulk of Part III analyzes the reasoning used by the judges and Justices—controlling as well as concurring and dissenting opinions—who have weighed in on the *Boumediene* and *Al Maqaleh* decisions. Part IV argues that, by overemphasizing military necessity for habeas corpus availability in *Al Maqaleh*, the D.C. Circuit undermined *Boumediene* and characterizes the decision as a symptom of *Boumediene*'s easily manipulated three-factor balancing test. Thus, this Note recommends a new test that moves the focus away from the current formulation of "practical concerns" and advocates for a new factor: the abuse or avoidance of process.

I. HABEAS CORPUS, EXTRATERRITORIALITY, AND MILITARY NECESSITY: A PREFACE TO FUNCTIONALISM

Part I describes the procedural nature of the writ of habeas corpus and provides a brief explanation of its origins in the United States. It details the modern history of habeas corpus jurisdiction pertaining to "enemy combatant" detainees, particularly the effect of the Military Commission

28. 343 U.S. 579, 579–80 (1952) (holding that military necessity was not a justification for the seizure of U.S. steel mills by the Secretary of Commerce during the Korean War).

29. *See* Boumediene v. Bush, 553 U.S. 723, 769 (2008) ("The Government presents no credible arguments that the military mission at Guantanamo would be compromised if habeas corpus courts had jurisdiction to hear the detainees' claims.").

30. *See id.* at 827–28 (Scalia, J., dissenting) ("The game of bait-and-switch that today's opinion plays upon the Nation's Commander in Chief will make the war harder on us.").

31. *See* 605 F.3d 84, 97 (D.C. Cir 2010).

Act of 2006[32] (MCA) and Detainee Treatment Act of 2005[33] (DTA) on 28 U.S.C. § 2241. Lastly, it addresses the two primary legal theories that intersect in Justice Kennedy's functionalism: extraterritoriality and military necessity. These two legal theories are recurring themes in the jurisprudence that comprises Parts II and III.

A. The Writ of Habeas Corpus

A writ is a written court order that requires an authority to carry out or refrain from committing some act.[34] The most literal meaning of habeas corpus comes from its Latin translation, which is "that you have the body."[35] Thus, at its most basic, the writ of habeas corpus is a court order related to some act having to do with the physical custody of the body of a person. This simple definition is not far off from the more sophisticated legal meaning of "[a] writ employed to bring a person before a court, most frequently to ensure that the person's imprisonment or detention is not illegal."[36]

While this definition seems sufficiently straightforward, there are some important underlying procedural points. First, the writ of habeas corpus is a collateral challenge to a person's imprisonment and only seeks to achieve a judicial hearing on the legality of the imprisoner's actions.[37] Thus, when a judge considers a petitioner's writ, he or she does not make a determination of the merits of the prisoner's crimes (i.e., the prisoner's guilt or innocence).[38] Second, if the court finds that there was no legal basis for the petitioner's imprisonment, the writ will issue and the remedy is release.[39]

The true power of the writ of habeas corpus becomes clearer when one considers what it seeks to prevent. Alexander Hamilton wrote that "the practice of arbitrary imprisonments, have been, in all ages, the favorite and most formidable instruments of tyranny."[40] Thus, it should come as no surprise that many of the great political and legal minds of both the

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32. Pub. L. No. 109-366, 120 Stat. 2600 (2006) (codified in scattered sections of 10, 18, 28, and 42 U.S.C.).

33. Pub. L. No. 109-148, 119 Stat. 2739 (2005) (amending 28 U.S.C. § 2241).

34. BLACK'S LAW DICTIONARY 1747 (9th ed. 2009).

35. *Id.* at 778.

36. *Id.*

37. *See* Boumediene v. Bush, 553 U.S. 723, 745 (2008) (noting that habeas corpus "protects the rights of the detained by affirming the duty and authority of the Judiciary to call the jailer to account"); Braden v. 30th Judicial Circuit Court of Ky., 410 U.S. 484, 494–95 (1973) ("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." (citing Wales v. Whitney, 114 U.S. 564, 574 (1885))).

38. *See In re* Yamashita, 327 U.S. 1, 8 (1946).

39. *See Wales*, 114 U.S. at 571 ("[The] purpose [of the writ] is to enable the court to inquire, first, if the petitioner is restrained of his liberty. If he is not, the court can do nothing but discharge the writ. If there is such restraint, the court can then inquire into the cause of it, and if the alleged cause be unlawful it must then discharge the prisoner.").

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

English[41] and American[42] tradition have written about the writ's essential place as a protection of individual rights.

The framers' exaltation of the writ of habeas corpus was more than just empty praise. First, a prohibition against the suspension of the writ of habeas corpus was immortalized in the Constitution.[43] Second, the first Congress enacted the Judiciary Act of 1789, which granted the federal courts the power to grant writs of habeas corpus.[44] This early commitment to the writ, both constitutionally and statutorily, helped create a tradition of viewing the right as more than just a procedural tool and reflected a new nation's commitment to the protection of individual rights.[45]

This tradition has been carried through to today, with the successor to the Judiciary Act of 1789 residing in 28 U.S.C. § 2241.[46] This section holds that federal courts may issue writs of habeas corpus but only "within their respective jurisdictions."[47] The meaning of "jurisdiction" has been interpreted to mean that the court issuing the writ must be able to serve process on the custodian—it is not tied to the location of the prisoner.[48] Thus, a prisoner can be confined outside the court's territorial jurisdiction, and the court will still be able to issue a writ of habeas corpus regarding the imprisonment, as long as the custodian can be reached.[49] The statute does limit the type of prisoner who can seek the writ, requiring an adequate

41. For an extensive history of the development of the English common law writ of habeas corpus, see R.J. SHARPE, THE LAW OF HABEAS CORPUS 1–18 (2d ed. 1989) and Paul D. Halliday & G. Edward White, *The Suspension Clause: English Text, Imperial Contexts, and American Implications*, 94 VA. L. REV. 575 (2008).

42. *See* Thomas Jefferson, First Inaugural Address (Mar. 4, 1801), *in* 8 THE WRITING OF THOMAS JEFFERSON 1, 4–5 (Paul Leicester Ford ed., 1897) (noting that the protection of habeas corpus was an essential principle of government); *see also* THE FEDERALIST NO. 83, *supra* note 40, at 468 (Alexander Hamilton) (recognizing that habeas corpus is a "bulwark" against arbitrary government (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *131, *available at* http://avalon.law.yale.edu/18th_century/blackstone_bk1ch1.asp)).

43. This clause is known as the "Suspension Clause." 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."). *See generally* Amanda Tyler, *The Forgotten Core Meaning of the Suspension Clause*, 125 HARV. L. REV. 901, 1000–01 (2012) (arguing that the founding generation's understanding of the Suspension Clause is likely at odds with many of the modern day habeas corpus decisions).

44. Judiciary Act of 1789, ch. 20, 1 Stat. 73 (codified as amended at 28 U.S.C. § 2241 (2006)); *see also* INS v. St. Cyr, 533 U.S. 289, 305 (2001) ("Federal courts have been authorized to issue writs of habeas corpus since the enactment of the Judiciary Act of 1789 . . . .").

45. *See* Fay v. Noia, 372 U.S. 391, 401–02 (1963) ("Although in form the Great Writ is simply a mode of procedure, its history is inextricably intertwined with the growth of fundamental rights of personal liberty.").

46. *See* 28 U.S.C. § 2241 (2006).

47. *Id.* § 2241(a).

48. *See* Braden v. 30th Judicial Circuit Court of Ky., 410 U.S. 484, 495 (1973). It is worth noting that Congress maintains the power to govern the federal judiciary's ability to hear habeas corpus petitions so long as it does not violate the Constitution. *See* Lonchar v. Thomas, 517 U.S. 314, 323 (1996) (noting that the scope of habeas corpus statute is for Congress to make).

49. *Braden*, 410 U.S. at 495.

connection between the prisoner, the custodian, and the United States.[50] This idea of an adequate connection was put to the test with the wave of cases that resulted from the War on Terror, during which the American military captured suspected terrorists and held them abroad.

B. Modern Habeas Corpus and the War on Terror: Rasul v. Bush, *the DTA and the MCA*

The unprecedented terrorist attack on September 11, 2001, led to an immediate legal response by the U.S. government. Just a few days after September 11, on September 18, Congress passed the Authorization for Use of Military Force (AUMF).[51] The AUMF empowers 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."[52] Since September 11, the United States has engaged in conflicts in Afghanistan and Iraq, while maintaining military operations across the globe in order to fight the Global War on Terror. Beyond serving as the authorization for combat in Afghanistan, the AUMF also served as justification for the Bush Administration's,[53] and later the Obama Administration's, policy of indefinite detention.[54]

The Supreme Court has responded to these extraordinary times with several opinions weighing in on the legality, nature, and policy of indefinite detention. In two cases decided on June 28, 2004, the Supreme Court evaluated the scope of the AUMF and the indefinite detention policies adopted by the Bush Administration, which had claimed that the practice was "necessary and appropriate force" used in the War on Terror.[55] In *Hamdi v. Rumsfeld*,[56] the Court held that indefinite detentions were authorized under the AUMF.[57] In *Rasul v. Bush*,[58] the Court granted the

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50. *See* 28 U.S.C. § 2241(c).

51. Pub. L. No. 107-40, 115 Stat. 224 (codified at 50 U.S.C. § 1541 note (2006)).

52. Rasul v. Bush, 542 U.S. 466, 470 (2004) (alteration in original) (quoting §§ 1–2, 115 Stat. at 224).

53. *Id.* at 471–74; *see* FREDERICK A.O. SCHWARZ JR. & AZIZ Z. HUQ, UNCHECKED AND UNBALANCED: PRESIDENTIAL POWER IN A TIME OF TERROR 142 (2007); Alan W. Clarke, *Decloaking Torture:* Boumediene *and the Military Commissions Act*, 11 SAN DIEGO INT'L L.J. 59, 78–88 (2009); Marc. D. Falkoff, *Back to Basics: Habeas Corpus Procedures and Long-Term Executive Detention*, 86 DENV. U. L. REV. 961, 993–95 (2009).

54. *See* Al Maqaleh v. Gates, 605 F.3d 84 (D.C. Cir. 2010); *see also* Robert M. Chesney, *Who May Be Held? Military Detention Through the Habeas Lens*, 52 B.C. L. REV. 769, 789 (2011); Judith Resnik, *Detention, the War on Terror, and the Federal Courts*, 110 COLUM. L. REV. 579, 623–629 & 624 n.172 (2010).

55. *See Rasul*, 542 U.S. at 470; *see also* Hamdi v. Rumsfeld, 542 U.S. 507, 518–19 (2004).

56. 542 U.S. 507 (2004).

57. Petitioner Hamdi's argument was that his indefinite detention violated 18 U.S.C § 4001(a) (2006). *See Hamdi*, 542 U.S. at 517–18, 520. Section 4001(a) provides that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." The Court held that the AUMF was sufficient to satisfy the statutory requirement of an "Act of Congress" and that, as long as hostilities were ongoing, the

request for habeas corpus challenges by detainees being held at Guantanamo Bay.[59]

In response to *Rasul*, Congress passed the DTA in 2005.[60] The Act covers many matters relating to the treatment of detainees in U.S. custody, including the introduction of a new process to review the status of detainees called a Combatant Status Review Tribunal (CRST).[61] The statute also attempted to amend § 2241[62] by stripping Article III courts of jurisdiction to hear habeas corpus petitions from detainees at Guantanamo Bay.[63] The DTA prevented any "court, justice or judge" from having jurisdiction over an application for a writ of habeas corpus filed on behalf of Guantanamo detainees.[64] The DTA also carved out a role for the D.C. Circuit to review the determinations of the CRST, but only to determine if the military followed the DTA in determining the status of the detainee.[65] Whether this collateral review was constitutionally sufficient compared to a more searching, habeas corpus review was a contested debate among the Justices and was a major element of the Supreme Court's *Boumediene* decision.[66]

In *Hamdan v. Rumsfeld*,[67] the Court held that while the DTA may have stripped the Court of the ability to review habeas petitions filed after the passage of the DTA, it still retained jurisdiction over ones that were pending at the time of the DTA's enactment.[68] Just as in *Rasul*, Congress responded quickly and four months later passed the MCA.[69] In addition to enacting a complex system of military tribunals for War on Terror detainees, the MCA explicitly forbade Article III courts from hearing the habeas petitions of detainees who had been deemed enemy combatants after

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government was empowered to hold Hamdi as long as necessary. *See Hamdi*, 542 U.S. at 518. The Court offered an important caveat, however, noting that the military necessity that served as the rationale for the detentions could "unravel" as the nature of the conflict changed. *Id.* at 521.

58. 542 U.S. 466 (2004).

59. *Id.* at 485.

60. Pub. L. No. 109-148, 119 Stat. 2739 (2005) (amending 28 U.S.C. § 2241).

61. *Id.* § 1005(a), 119 Stat. at 2741–42. For a thorough review of how and why the CRST was developed, see JOSEPH MARGULIES, GUANTANAMO AND THE ABUSE OF PRESIDENTIAL POWER 159–70 (2006).

62. *See supra* notes 46–50 and accompanying text.

63. § 1005(e), 119 Stat. at 2741–42; *see* Janet Cooper Alexander, *Jurisdiction-Stripping in a Time of Terror*, 95. CALIF. L. REV. 1193, 1194 (2007).

64. § 1005(e), 119 Stat. at 2741–42.

65. *Id.*

66. *Compare* Boumediene v. Bush, 553 U.S. 723, 771 (2008), *with id.* at 808 (Roberts, C.J., dissenting). Some scholars have been critical of the DTA and MCA. *See, e.g.*, Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 HARV. L. REV. 2029, 2063 (2007) ("Whatever the contemporary reach of the Suspension Clause as construed in *St. Cyr*, we believe that the total preclusion of review in the DTA and MCA is unconstitutional . . . .").

67. 548 U.S. 557 (2006).

68. *Id.* at 584–85.

69. Pub. L. No. 109-366, 120 Stat. 2600 (2006) (codified in scattered sections of 10, 18, 28 and 42 U.S.C.).

September 11, 2001.[70] Thus, the MCA removed all ambiguity about Congress's intent to deny enemy combatants habeas corpus rights via the statute, and the only recourse would be a constitutional challenge to the MCA and DTA.

This conflict between the Supreme Court and the political branches serves as a backdrop to, and ultimately spawned, the *Boumediene* and the subsequent *Al Maqaleh* litigation. An analysis of these two cases is conducted in Part III of this Note. Before getting there, however, the following section analyzes the legal theories that formed the foundation of the extraterritorial habeas corpus debate.

C. Two Legal Theories That Intersect in Justice Kennedy's Functionalism

The functionalist holding of *Boumediene*, which allows a court to balance the "practical factors" that may inhibit the government from reasonably hearing habeas petitions, sits at a theoretical crossroads between extraterritoriality and military necessity. At first glance, these two theories treat different problems. Extraterritoriality theory grapples with the application of constitutional rights outside the United States, and military necessity theory deals with the scope of the government's power to limit individual liberties in times of emergency.[71] Yet, the two theories do share important similarities. First, both theories try to solve important legal questions about which the Constitution is largely silent.[72] This constitutional silence has left the shaping of the debate to scholars and judges.[73] Second, while these theories can be often characterized by the polarized views of the debate, discussion has moved toward a murkier, but more operational, middle view.[74] While the concept of functionalism has been predominantly associated with extraterritoriality, the development of the military necessity law also suggests a move toward functional, practical theory.[75] Those similarities aside, the third factor in Justice Kennedy's *Boumediene* opinion provides a more formalized relationship for the two theories, and that relationship is the most important one addressed in Part II and Part III of this Note.

1. The Theory of Extraterritoriality

At its simplest, the theory of extraterritoriality considers whether the Constitution has force beyond the territorial limits of the United States.[76] The Constitution itself offers little guidance on this question.[77] Thus, it is

70. *See* Alexander, *supra* note 63, at 1197, 1201–11.
71. *See infra* notes 76, 92 and accompanying text.
72. *See infra* notes 76, 77, 92–98 and accompanying text.
73. *See generally infra* note 102 and accompanying text.
74. *See generally infra* Part I.C.1–2.
75. *See* discussion *infra* Part II.B.3.
76. *See* José A. Cabranes, *Our Imperial Criminal Procedure: Problems in the Extraterritorial Application of U.S. Constitutional Law*, 118 YALE L.J. 1660, 1664 (2009).
77. *Id.* at 1662.

no surprise that there is a lack of consensus among scholars and the courts on "[w]hether constitutional provisions have force beyond the borders of the United States—that is, whether they have 'extraterritorial' application."[78] While much has been written about extraterritoriality,[79] this scholarship is mostly beyond the scope of this Note. This section merely aims to clarify the basic theories which serve as a foundation for the later jurisprudence that comprises the extraterritorial habeas debate.

The most basic and traditional theory of extraterritoriality is that the Constitution does not travel beyond the borders of the United States.[80] The rationales for this view vary among scholars, ranging from interpretations of the Constitution's text and original intent[81] to more theoretical arguments about the exclusive relationship between the government and the governed.[82] Regardless of the reasoning, the effect is largely the same—the U.S. Constitution applies only within the borders of the fifty states and to U.S. citizens.[83]

A more recent theory takes the contrary view and argues that rights-granting constitutional provisions have no express limitations as to where or to whom they apply.[84] This theory views the Constitution as the ultimate source of the government's power and, regardless of the person on the other end of the government's action, it is nonetheless constrained by the document that empowers it.[85] The effect here is murkier than in the

78. *See id.* at 1664.

79. *See, e.g.*, Christina Duffy Burnett, *A Convenient Constitution? Extraterritoriality After* Boumediene, 109 COLUM. L. REV. 973, 1042–43 (2009) (arguing for a more consequentialist approach to extraterritoriality that looks to the Fourteenth Amendment incorporation doctrine as a model); Cabranes, *supra* note 76, at 1664 (arguing for a more functionalist application of a global Constitution focusing on a case by case application of specific provisions of the Constitution to extraterritorial cases); Sarah H. Cleveland, *Embedded International Law and the Constitution Abroad*, 110 COLUM. L. REV. 225, 286–87 (2010) (arguing that modern extraterritoriality doctrines intersects with international law); J. Andrew Kent, *A Textual and Historical Case Against a Global Constitution*, 95 GEO. L.J. 463, 467–72 (2007) (noting the debate around extraterritoriality and siding against application outside the territorial United States based on textual and originalist arguments); Jules Lobel, *Fundamental Norms, International Law, and the Extraterritorial Constitution*, 36 YALE J. INT'L L. 307, 359 (2011) (arguing that extraterritoriality should be shaped by an international law fundamental norms approach); Gerald L. Neuman, *Whose Constitution?*, 100 YALE L.J. 909 (1991) (noting the debate and arguing against a "global constitution" in favor of a more limited "municipal rights" model of constitutional application).

80. *See* Kent, *supra* note 79, at 538.

81. *See id.*

82. *See* Cabranes, *supra* note 76, at 1665–67 (calling this the "compact" theory of the Constitution); Neuman, *supra* note 79, at 917–19 (distinguishing between a "membership" model, which would have the Constitution apply to citizens, and a "municipal law" model, which would have the Constitution track to the jurisdiction of the nation).

83. *See* Cabranes, *supra* note 76, at 1667 ("Under the compact theory, the procedural safeguards set forth in the Constitution . . . have no force abroad."); Neuman, *supra* note 79, at 918 ("If the Constitution is viewed as itself a 'law' or legal norm, then the territorialist would conclude that the Constitution has power to bind only within the nation's borders.").

84. *See* Cabranes, *supra* note 76, at 1667; Neuman, *supra* note 79, at 916.

85. *See* Cabranes, *supra* note 76, at 1667; Neuman, *supra* note 79, at 916. An eloquent expression of this theory was expressed by Justice Black: "The United States is entirely a

territorial limitation argument because there are some aspects of constitutional law that cannot be lifted out of their domestic contexts and be applied elsewhere—say, in active military combat.[86] This problem leads to a third, hybrid approach to the application of extraterritorial constitutional rights.

This third way to solve the extraterritoriality problem is a more functional approach, which tries to allow judges to balance competing factors for and against application of the Constitution in the specific cases that come before them.[87] It is this form of extraterritorial application of constitutional rights that took root in *Boumediene*.[88] This view seeks to weigh the nature of the constitutional power to be applied, the relationship between the United States and the person seeking protection, the risk of injustice, and the practical limitations.[89] Yet, this balancing is not without flaw because the judge doing the balancing can impose his or her own predilections and understanding of the judiciary's role to shape the holding as he or she sees fit.[90] Thus, a judge can be as narrow, intrusive, or deferential as he or she desires.[91] It also serves as the bridge to the theory of military necessity, which follows in the next section.

2. Military Necessity Theory

The scope of the government's power, particularly the President's, to bypass constitutional provisions in emergencies and military conflicts is ambiguous.[92] The Constitution mostly focuses on the role of Congress and

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creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution." Reid v. Covert, 354 U.S. 1, 5–6 (1957) (citations omitted).

86. *See* Cabranes, *supra* note 76, at 1670–71 (explaining that a *Miranda* regime could not apply on the battlefield in the midst of house to house combat).

87. *Id.* at 1698; Neuman, *supra* note 79, at 919.

88. *See* Neuman, *supra* note 17, at 261 ("The Court rejects formalistic reliance on single factors, such as nationality or location, as a basis for wholesale denial of rights, and essentially maintains that functionalism has long been its standard methodology for deciding such questions."); *see also supra* Part III.A.1 (describing Justice Kennedy's functionalist test in *Boumediene*).

89. *See* Cabranes, *supra* note 76, at 1698.

90. *See* Neuman, *supra* note 79, at 919–20.

91. *See id.*

92. *See, e.g.*, William G. Howell, *Wartime Judgments of Presidential Power: Striking Down but Not Back*, 93 MINN. L. REV. 1778, 1786 (2009) ("The Constitution, after all, says precious little about what presidents can do when the life of the nation is imperiled."); Gary Lawson, *Ordinary Powers in Extraordinary Times: Common Sense in Times of Crisis*, 87 B.U. L. REV. 289, 291 (2007) ("The Constitution deals with extraordinary times primarily through ordinary powers."). There is even a debate about how to name this legal phenomenon. *See* EDWARD S. CORWIN, TOTAL WAR AND THE CONSTITUTION 76 (1947) (calling this the "constitutional law of war"); Lee Epstein et al., *The Supreme Court During Crisis: How War Affects Only Non-war Cases*, 80 N.Y.U. L. REV. 1, 1 (2005) (calling this "crisis jurisprudence"); Joel R. Paul, *The Geopolitical Constitution: Executive Expediency and Executive Agreements*, 86 CALIF. L. REV. 671, 673–74 (1998) (calling this the "discourse of executive expediency"); Eric A. Posner & Adrian Vermeule, *Originalism and*

positively enumerates several powers, including the right to declare war,[93] to raise and support armies[94] and navies,[95] and to make rules and regulations for the government of land and naval forces.[96] Yet, the document makes precious few references to the procedure and function of the government when the ordinary functioning of government is threatened.[97] The only reference to the possible removal of constitutional protections during extraordinary times when "the public Safety may require it" is in the Suspension Clause.[98] One limited reference buried in the enumerated powers of Congress, however, does not afford much guidance to a President or Congress when in need of quick decisions in extraordinary times of great pressure.

Just because the text of the Constitution remains mostly silent on the issue does not mean that the Framers did not anticipate the legal problems posed by emergency situations. Alexander Hamilton wrote in *The Federalist No. 8* that "[i]t is the nature of war to increase the Executive, at the expense of the Legislative authority."[99] Madison further argued in *Helvidius No. 4* that "[w]ar is in fact the true nurse of executive aggrandizement."[100] Hamilton, a Federalist who believed in a strong president and federal government, and Madison, a Democratic-Republican who believed in states' rights and a weakened executive, obviously disagreed on whether this increase of presidential authority was politically desirable; but as to its potential existence, they agreed.[101]

Given the dearth of legal guideposts in the Constitution and considered by the Framers, much of the debate around military necessity in constitutional adjudication is necessarily grounded in theoretical and

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Emergencies: A Reply to Lawson, 87 B.U. L. REV. 313, 313 (2007) (calling this the "judicial deference thesis").

93. U.S. CONST. art. I, § 8, cl. 11.

94. *Id.* art. I, § 8, cl. 12.

95. *Id.* art. I, § 8, cl. 13.

96. *Id.* art. I, § 8, cl. 14.

97. *See* Howell, *supra* note 92, at 1787; Lawson, *supra* note 92, at 291.

98. U.S. CONST. art. I, § 9, cl. 2. It is also worth noting that "[t]his provision, though, is found in Article I, not Article II—and hence grants wartime power to Congress rather than the President." Howell, *supra* note 92, at 1787. Howell finds three possible constitutional rationales for Presidents exercising expansive powers during war: (1) the designation of commander in chief, (2) the executive power via the Vesting Clause, and (3) the Take-Care Clause. *Id.* at 1787–88; *see also* U.S. CONST. art. II, § 1, cl. 1 (Vesting Clause); *id.* art. II, § 2, cl. 1 (Commander-in-Chief Clause); art. II, § 2, *id.* § 3 (Take-Care Clause). Howell argues that the Take-Care clause is the best rationale for executive power beyond what is found in the Constitution, noting that while laws passed by Congress must distinguish war and peace, "the clause . . . bestows upon presidents unique opportunities to exercise power during periods of war." Howell, *supra* note 92, at 1789; *see also* Amanda Tyler, *Suspension As an Emergency Power*, 118 YALE L.J. 600, 606–07 (2009) (arguing that while the suspension power is "a truly stupendous emergency power," separation of powers principles dictate that the power is truly "a last resort measure").

99. THE FEDERALIST NO. 8, *supra* note 40, at 45 (Alexander Hamilton).

100. JAMES MADISON, HELVIDIUS NUMBER IV (1793), *available at* http://press-pubs.uchicago.edu/founders/documents/a2_2_2-3s15.html.

101. *See* Howell, *supra* note 92, at 1783.

philosophical arguments in academic work and case law. These works generally center on answering two distinct questions. First, what is the scope of the executive and legislative branches' power in military emergencies or crises?[102] Second, what is the Supreme Court's role in upholding individual rights in these emergencies or, conversely, what level of deference is due to the political branches in adjudicating the rights of those affected by emergency policies?[103] The answer to the second question will depend on the answer to the first. When answering the first question, legal scholars and jurists generally fall between two types of theoretical categories: executive unilateralists or civil libertarians.[104]

An executive unilateralist takes an expansive view of the authority granted to the President in times when the public safety is threatened.[105] The rationale goes that the executive branch is the more efficient and effective branch in dealing with national security issues, and thus "unilateral executive discretion, not subject to oversight from other institutions, is required" for successful administration of the laws in times

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102. *See* Samuel Issacharoff & Richard H. Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime*, 5 THEORETICAL INQUIRIES L. 1, 5–6 (2004). This question has been the subject of great scholarly debate by some of the preeminent legal minds of the twentieth century. *See* David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689, 699–700 & 699 n.20 (2008) (noting "the ultimate question of law on this subject: Whom does the Constitution authorize to commit United States troops to military hostilities?" (quoting Peter M. Shane, *Learning McNarama's Lessons: How War Powers Resolution Advances the Rule of Law*, 47 CASE W. RES. L. REV. 1281, 1281 (1997))). *See generally* EDWARD S. CORWIN, THE PRESIDENT: OFFICE AND POWERS, 1787–1984, at 262–97 (5th ed. 1984); JOHN HART ELY, WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH 1–10, 47–67 (1993); HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR 67–100 (1990); CLINTON ROSSITER, THE AMERICAN PRESIDENCY 1–59 (1956); ARTHUR M. SCHLESINGER, JR., THE IMPERIAL PRESIDENCY 1–67 (1st ed. 1973). This question assumes the answer to another—what is an emergency? While the answer to that question can be just as complex as the one posed after it, the simplest answer would be a war or, to be more general, a crisis that threatens heightened risk to the physical safety of citizens. *See* Issacharoff & Pildes, *supra*, at 4. For scholarship on the complexity of defining "war," see generally Laurie R. Blank, *A Square Peg in a Round Hole: Stretching Law of War Detention Too Far*, 63 RUTGERS L. REV. 1169 (2011) (analyzing "war" detention); Colonel Fred K. Ford, *Keeping* Boumediene *off the Battlefield: Examining Potential Implications of the* Boumediene v. Bush *Decision to the Conduct of United States Military Operations*, 30 PACE L. REV. 396, 403–04 (arguing that the Court's War on Terror jurisprudence blurs the line between the traditional military and "a *de facto* law enforcement organization").

103. *See* Howell, *supra* note 92, at 1779–81. *See generally* David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—A Constitutional History*, 121 HARV. L. REV. 941 (2008) (providing a thorough history of many of the conflicts between the Supreme Court and the President regarding executive war powers).

104. *See* Issacharoff & Pildes, *supra* note 102, at 4.

105. *See, e.g.*, RICHARD A. POSNER, NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY 70, 158 (2006) (arguing that "law of necessity" trumps the law of the Constitution). This expansive view is also one advanced by presidential administrations; Franklin D. Roosevelt's Attorney General observed during World War II that "the Constitution has never greatly bothered any wartime President." FRANCIS BIDDLE, IN BRIEF AUTHORITY 219 (1962).

of crisis.[106] Obviously, given that executive unilateralists believe that the President is beyond judicial scrutiny, or at least should be afforded the broadest discretion in times of crisis, this group believes that the Court's role is strictly limited in times of military necessity and crisis.[107] This view of a severely constrained Court is not limited to academia and has also been espoused by former Chief Justice William Rehnquist.[108]

Conversely, civil libertarians take a more rights-based approach, termed the "Business as Usual" model.[109] Ideally, this view would hold that, "a state of emergency does not justify a deviation from the 'normal' legal system,"[110] and that "[t]he ordinary legal system already provides the necessary answers to any crisis without the legislative or executive assertion of new or additional governmental powers."[111] This view necessarily acknowledges that "shifts in the institutional frameworks and substantive rules of liberty/security tradeoffs do, indeed, regularly take place during times of serious security threats."[112] This view sees the courts as a bulwark against the encroachment of the political branches on the individual liberties of Americans and would have the judiciary resist the temptation to defer to its companion branches.[113]

Given that the positions of the executive unilateralists and the civil libertarians are polar opposites, it would be hard to place the reasoning used in any Court decision firmly in either group. Yet, these two views mark the outer bounds of the military necessity doctrine. A third view concludes that the Court "has been, on the whole, more complex" and focused on a "process-based, institutionally-oriented (as opposed to rights-oriented) framework for examining the legality of governmental action in extreme security contexts."[114] This approach sees a balance between judicial intervention and deference to the political branches, where the Court tries to

106. *See* Issacharoff & Pildes, *supra* note 102, at 4.

107. *See id.* at 7.

108. *See* WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME 205 (2000) ("Judicial inquiry, with its restrictive rules of evidence, orientation towards resolution of factual disputes in individual cases, and long delays, is ill-suited to determine an issue such as 'military necessity.'"); *see also* Korematsu v. United States, 323 U.S. 214, 245 (1944) (Jackson, J., dissenting) (cautioning that military judgment is not "susceptible of intelligent judicial appraisal").

109. Issacharoff & Pildes, *supra* note 102, at 4; *see also, e.g.*, Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 YALE L.J. 1011, 1043 (2003).

110. Gross, *supra* note 109, at 1043.

111. *Id.*

112. Issacharoff & Pildes, *supra* note 102, at 4.

113. *See id.* at 4–6.

114. *Id.* at 5; *see, e.g.*, Dawinder S. Sidhu, *Shadowing the Flag: Extending the Habeas Writ Beyond Guantánamo*, 20 WM. & MARY BILL RTS. J. 39, 79 (2011) ("The law adjusts in times of war—it may speak with a 'different voice,' but it is not silent." (quoting REHNQUIST, *supra* note 108, at 225)).

assure that the political branches are acting in unison rather than explicitly walking the fine line between security and private rights.[115]

II. THE FOUNDATIONS OF FUNCTIONALISM IN THE SUPREME COURT'S EXTRATERRITORIALITY AND MILITARY NECESSITY JURISPRUDENCE

Part I introduced the historical, statutory, and theoretical underpinnings of functionalism and the current extraterritorial habeas corpus debate, but it did not give the complete picture. While functionalism is a fairly new concept, its roots reach back through a series of Supreme Court cases decided over the last century.[116] Part II contains a historical progression of both the Court's extraterritoriality and military necessity jurisprudence leading up to *Boumediene* and *Al Maqaleh*.

A. The Extraterritoriality Cases

In developing his functionalist jurisprudence,[117] Justice Kennedy has looked back to opinions in the *Insular Cases*,[118] *Johnson v. Eisentrager*,[119] *Reid v. Covert*,[120] and his concurrences in *United States v. Verdugo-Urquidez*[121] and *Rasul*. These cases presented new legal issues that were hotly contested at the time they were decided and are comprised of several concurring and dissenting opinions. Yet, as mentioned in Part I.C, no clear extraterritoriality doctrine has developed.[122]

1. The *Insular Cases*

The earliest roots of functionalism arose around the turn of the twentieth century, when the Supreme Court decided a group of cases that has been

115. *See* Epstein, *supra* note 92, at 9 ("[A]t the theoretical level, we posit that the Supreme Court decides cases most related to war from an institutional-process perspective rather than from a first-order balancing of security and liberty rights."); Richard H. Fallon, Jr., *The Supreme Court, Habeas Corpus, and the War on Terror: An Essay on Law and Political Science*, 110 COLUM. L. REV. 352, 396 (2010) (arguing that the process oriented approach is consistent with political science principles); Issacharoff & Pildes, *supra* note 102, at 5 ("Through this process-based approach, American courts have sought to the shift responsibility of these difficult decisions away from themselves and toward the joint action of the most democratic branches of government."); Joseph Landau, *Muscular Procedure: Conditional Deference in the Executive Detention Cases*, 84 WASH. L. REV. 661, 666, 698–704 (2009) (arguing that courts operate through a process-oriented approach when they insist on procedural regularity in national security cases). *But see* Howell, *supra* note 92, at 1792 ("Crisis jurisprudence thereby puts Justices into the business of assessing the size and imminence of foreign threats, and of gauging the extent to which presidential polices effectively address them."); Tom S. Clark, *Judicial Decision Making During Wartime*, 3 J. EMPIRICAL LEGAL STUD. 397, 415 (2006) (arguing that there is no evidence of heightened judicial deference during war time).

116. *See* Neuman, *supra* note 17, at 264.

117. *See id.* at 263–64.

118. *See infra* Part II.A.1.

119. 339 U.S. 763 (1950).

120. 354 U.S. 1 (1957).

121. 494 U.S. 259 (1990).

122. *See supra* notes 78–79 and accompanying text.

subsequently dubbed the *Insular Cases* by legal scholars.[123] These cases were a result of the Spanish-American War and the colonial possessions the United States acquired—namely Puerto Rico, the Philippines, and Guam.[124] While these cases were not the Supreme Court's first attempt at solidifying extraterritorial theory,[125] these represent the Court's early development of a forward-looking legal doctrine for extraterritorial jurisprudence.[126]

Downes v. Bidwell,[127] one of the earlier *Insular Cases*, is probably the most important case in the series[128] because the divided Court set out the legal positions that would compete throughout the evolution of the doctrine.[129] Justice Brown, writing for the majority, held that the provision of the Constitution that establishes "all Duties, Imposts and Excises shall be uniform throughout the United States"[130] does not apply to Puerto Rico.[131] The majority concluded that while Puerto Rico was a U.S. territory and entitled to what the Court fashioned as "natural rights,"[132] it was still foreign enough to be excluded from the "artificial or remedial rights, which are 'peculiar'" to the U.S. system of jurisprudence.[133]

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123. *See* Juan Torruella, *The* Insular Cases*: The Establishment of a Regime of Political Apartheid*, 77 U.P.R. L. REV. 1, 2–3 (2008).

124. *See* Christina Duffy Burnett, *"They Say I Am Not an American . . .": The Noncitizen National and the Law of American Empire*, 48 VA. J. INT'L L. 659, 663 (2008); Cabranes, *supra* note 76, at 1685; Torruella, *supra* note 123, at 2. There are approximately twenty-five decisions issued by the Supreme Court between 1901 and 1922 that have been classified as the *Insular Cases* or direct descendants of those cases, but only a handful reached constitutional issues. *See, e.g.*, Balzac v. Porto Rico, 258 U.S. 298 (1922) (holding that the right for trial by jury did not extend to citizens living in Puerto Rico); Rassmussen v. United States, 197 U.S. 516 (1905) (holding that the right for trial by jury did extend to citizens living in Alaska); Dorr v. United States, 195 U.S. 138 (1904) (holding that the right for trial by jury did not extend to citizen living in the Philippines); Hawaii v. Mankichi, 190 U.S. 197 (1903) (holding that the right for trial by jury did not apply to Hawaii); Dooley v. United States, 183 U.S. 151 (1901) (holding that trade with Puerto Rico fell under the Export Clause of the Constitution rather than trade within the United States); Downes v. Bidwell, 182 U.S. 244 (1901) (holding that trade with Puerto Rico did not fall under the Uniformity Clause for the regulation of imports).

125. *See In re* Ross, 140 U.S. 453 (1891) (holding that a sailor who was convicted by an American consular tribunal in Japan for a murder committed while docked there was not entitled to constitutional procedural protections because the Constitution only applied within the United States); Am. Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511 (1828) (holding that judicial power could be vested in non-Article III courts sitting in Florida while it was still a territory because Congress was empowered by the Constitution to govern territories).

126. *See* Cabranes, *supra* note 76, at 1685–87.

127. 182 U.S. 244 (1901).

128. *See* Cabranes, *supra* note 76, at 1685.

129. *See id.* at 1685–87.

130. U.S. CONST. art. I, § 8.

131. *Bidwell*, 182 U.S. at 287.

132. *Id.* at 282 (explaining that rights like freedom of speech, freedom of religion, and due process of law extend to the territories).

133. *Id.* at 282–83 (explaining that rights like citizenship, suffrage, and particular procedural mechanisms are unique to the Anglo-Saxon method of jurisprudence and are "unnecessary" for the protection of individuals).

Justice White's concurring opinion, which would have significance in later *Insular Cases*,[134] was similar to the one espoused by the majority. But instead of focusing on "natural" and "artificial" rights, Justice White sought to create one threshold question to determine whether constitutional rights should apply abroad—was the territory "incorporated" into the United States?[135] This question of "incorporation" turned on the "situation of the territory and its relations to the United States."[136] Justice White concluded that in this case, for the sake of the uniformity of imports provision, Puerto Rico was not incorporated.[137] In dissent, Justice Fuller rebuked the majority's holding and argued that it would create territories that existed in a gray area of constitutional law.[138]

The doctrinal battle that began in *Bidwell* settled and reached its "maturity" twenty years later in *Balzac v. Porto Rico*.[139] Chief Justice Taft, writing for a unanimous court, adopted Justice White's "context-driven" doctrine of determining territorial incorporation.[140] The Court's two-prong approach first held—as did Justice Brown in *Bidwell*—that certain procedural provisions of the Constitution, like the right to trial by jury at issue in *Balzac*, should not be extended to unincorporated territories.[141]

The second prong of the Court's holding addressed the next logical question—was Puerto Rico incorporated?[142] The Court concluded that for a territory to be incorporated "Congress [must] with a clear declaration of purpose, and not [with] mere inference or construction" affirm its intention to incorporate the territory.[143] The Court concluded that Congress had not done so with respect to Puerto Rico; and coupled with the nonfundamental right at issue, the Court held the constitutional right to trial by jury did not extend to the island territory.[144] Thus, while *Bidwell* gave a glimpse of competing theories of extraterritoriality, *Balzac*, for the time at least, shifted the Court in the direction of a Constitution that does not "follow[] the flag."[145]

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134. *See, e.g.*, Balzac v. Porto Rico, 258 U.S. 298, 305 (1922).

135. *Bidwell*, 182 U.S. at 341–42 (White, J., concurring).

136. *Id.* at 293.

137. *Id.* at 341–42.

138. *Id.* at 372 (Fuller, C.J., dissenting) (calling territories in this gray area "disembodied shade[s]").

139. 258 U.S. 298 (1922); *see* Cabranes, *supra* note 76, at 1688.

140. Cabranes, *supra* note 76, at 1688.

141. *Balzac*, 258 U.S. at 304–05. The theory was that these rights were inappropriate for the "history and condition" of the new territories. *See* Hawaii v. Mankichi, 190 U.S. 197, 211 (1903).

142. *See Balzac*, 258 U.S. at 311–12.

143. *Id.* at 311.

144. *Id.* at 312–14.

145. *See* STUART CREIGHTON MILLER, BENEVOLENT ASSIMILATION: THE AMERICAN CONQUEST OF THE PHILIPPINES, 1899–1903, at 157 (1982) (quoting then-Secretary of War Elihu Root: "[A]s near as I can make out the Constitution follows the flag—but doesn't quite catch up with it"); Cabranes, *supra* note 76, at 1687; *see also* Andrew Kent, Boumediene, Munaf, *and the Supreme Court's Misreading of the* Insular Cases, 97 IOWA L.

2. *Johnson v. Eisentrager*

The trend of declining to extend constitutional rights beyond the sovereign borders of the United States continued through the Second World War. In *Eisentrager*, the Court's evaluation centered on the petition for writs of habeas corpus by twenty-one German nationals who were captured in the service of the German armed forces working in China at the close of the war.[146] The petitioners had been tried by military commissions in Germany and were being held in Landsberg Prison, a prison operated in Allied Forces territory but commanded by a U.S. military officer under the authority of the Commanding General, European Command.[147]

Justice Jackson, writing for a six-Justice majority, cleaved to the territorialist tradition of the Court.[148] Justice Jackson opined that a noncitizen may acquire rights under the Constitution as the relationship between that noncitizen and the United States grows, but that the threshold for the development of these rights has always been presence in U.S. territory.[149] In addition, Justice Jackson held that a "nonresident enemy alien" does not have "qualified access" to U.S. courts because such access poses significant problems for the military.[150] Beyond potentially aiding the enemy by distracting the military with interruptions by the federal courts,[151] Justice Jackson argued that such conflict would be "highly comforting to enemies of the United States."[152] The majority ultimately upheld the jurisdiction of military commissions to try the petitioners and denied their applications for the writ of habeas corpus.[153]

Justice Black, joined by Justice Douglas and Justice Burton, dissented from the majority's holding and its conclusion that the Court could not pass

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REV. 101, 103 (2011) (arguing that recent Supreme Court jurisprudence misconstrues the *Insular Cases* and that they do not support global constitutionalism).

146. *See* Johnson v. Eisentrager, 339 U.S. 763, 765 (1950).

147. *See id.* at 765–66.

148. *See id.* at 768. Justice Jackson added that "[n]othing in the text of the Constitution extends [the writ of habeas corpus], nor does anything in our statutes." *Id.*

149. *See id.* at 770–72 (arguing that the application of the Fourteenth Amendment was tied to territorial jurisdiction (citing Yick Wo v. Hopkins, 118 U.S. 356 (1886))).

150. *Id.* at 776.

151. *Id.* at 779 ("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.").

152. *Id.*

153. *Id.* at 790–91. Justice Jackson also relied on *In re Yamashita* and *Ex Parte Quirin* as examples where even enemy combatants captured on U.S. soil were tried by military commissions. *See In re* Yamashita, 327 U.S. 1 (1946) (holding that General Yamashita of the Japanese military command could be tried for war crimes in the Philippines by a hastily convened military commission that had sentenced him to death); *Ex parte* Quirin, 317 U.S. 1 (1942) (holding that German saboteurs captured off the coast of Long Island, New York, could be tried by a secret military commission that had sentenced the saboteurs to death). *But see infra* note 157 and accompanying text (discussing Justice Black's alternative view of these cases).

on the petitioner's habeas corpus claims.[154] Justice Black harkened to the Court's decisions in the *Insular Cases*, noting that those cases did not turn on pure territorial constitutionality, but on incorporation.[155] Thus, the Court's choice to find the Constitution "wholly inapplicable"[156] abroad created "a broad and dangerous principle."[157] Justice Black concluded, "Our constitutional principles are such that their mandate of equal justice under law should be applied as well when we occupy lands across the sea as when our flag flew only over thirteen colonies."[158]

3. *Reid v. Covert*

Justice Black was able to convince a plurality of the Court to adopt some aspects of his position supporting an extraterritorial constitution seven years later in *Reid*. The Court held that military tribunals of civilians attached to military bases abroad who committed nonmilitary crimes needed to comply with the Fifth and Sixth Amendments.[159] To justify this departure from previous case law,[160] Justice Black distinguished the *Insular Cases* as a solution to a different problem—a way around applying incompatible American traditions to new territories acquired from government action.[161] Here, however, Justice Black argued that this was a case of the American government trying an American citizen who happened to be abroad, and as such, the protections of the Constitution should not be stripped away because of that coincidence.[162]

Justice Harlan filed a concurrence, declining to join the parts of Justice Black's opinion that tried to distinguish the *Insular Cases* as "historical anomalies."[163] In fact, Justice Harlan saw these cases as supporting the proposition that there is "no rigid and abstract rule" when applying the

154. *See Eisentrager*, 339 U.S. at 797 (Black, J., dissenting) (conceding that the Court's ability to review writs of habeas corpus in military tribunal cases is narrow, but that the Court's authority should be extended in this case).

155. *See id.* at 796–97 (citing Downes v. Bidwell, 182 U.S. 244 (1901)).

156. *Id.* at 797.

157. *Id.* at 795. Justice Black drew a different conclusion from *Ex Parte Quirin* and *In re Yamashita*, and argued that these cases "emphatically rejected" the contention that enemy aliens have no standing for habeas proceedings. *Id.* at 794. Justice Black argued that only after upholding the Court's jurisdiction to hear the petitions did the Court deem the military tribunals, by which the petitioners were tried, to have competent jurisdiction. *Id.*; *see Yamashita*, 327 U.S. at 9; *Quirin*, 317 U.S. at 25.

158. *Eisentrager*, 339 U.S. at 798 (Black, J., dissenting) ("I would hold that our courts can exercise [habeas corpus] whenever any United States official illegally imprisons any person in any land we govern.").

159. Reid v. Covert, 354 U.S. 1, 40–41 (1957).

160. *See supra* Part II.A.1–2 (discussing the *Insular Cases* and *Eisentrager*).

161. *See Reid*, 354 U.S. at 14 (noting that the *Insular Cases* "involved the power of Congress to provide rules and regulations to govern temporarily territories with wholly dissimilar traditions and institutions").

162. *See id.* at 5–6 ("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 happen[ed] to be in another land." (citations omitted)).

163. *Id.* at 67 (Harlan, J., concurring).

Constitution abroad,[164] and viewed those cases as supporting a more functional test that required the Court to determine which parts of the Constitution applied where.[165] In making this determination, the Court would weigh the context, the practical necessities, and the possible alternatives Congress had in place for applying constitutional provisions.[166] Due to its emphasis on practicality and its refusal to find a bright-line rule, this opinion in particular has been pointed to as one of the early forerunners to Justice Kennedy's functionalism.[167]

4. *United States v. Verdugo-Urquidez*

The Court more recently tackled the extraterritoriality question in 1990, when it held that the Fourth Amendment's exclusionary rule did not apply to the fruits of a warrantless search conducted by U.S. authorities in Mexico after an arrest by Mexican authorities.[168] Chief Justice Rehnquist, writing for the majority, rejected the "global view" of the Constitution[169] and relied on *Eisentrager* to hold that constitutional rights only develop for noncitizens as their relationship and contacts with the United States increases.[170] Thus, because the defendant in this case had no prior connection to the United States, the Fourth Amendment did not apply to his search.[171] To bolster this holding, Chief Justice Rehnquist also pointed to the practical difficulties of an extraterritorial Constitution, particularly for American foreign policy, and argued that such exportation of the Constitution should be left to the political branches.[172]

Justice Kennedy, who joined Justice Rehnquist in the majority, wrote a concurring opinion that looked back to Justice Harlan's concurring opinion in *Reid*.[173] Justice Kennedy espoused a more functional test, whereby the Court would determine if extraterritorial application was "impracticable and anomalous."[174] Like Justice Harlan, he argued that the Court's precedent suggested that it must balance the constitutional right at issue with the power of the United States to "assert its legitimate power and authority abroad."[175] In this case, however, where there were no magistrates to issue warrants, a potentially different expectation of privacy, and a strong interest

164. *Id.* at 74.
165. *See* Neuman, *supra* note 17, at 265. *See generally supra* notes 88–89 and accompanying text.
166. *Reid*, 354 U.S. at 75 (noting that the question for the Court in these cases was "one of judgment, not of compulsion").
167. *See* Neuman, *supra* note 17, at 265.
168. United States v. Verdugo-Urquidez, 494 U.S. 259, 261–62 (1990).
169. *See* Cabranes, *supra* note 76, at 1692.
170. *Verdugo-Urquidez*, 494 U.S. at 269, 271.
171. *Id.* at 271.
172. *Id.* at 275.
173. *Id.* at 278 (Kennedy, J., concurring) (citing Reid v. Covert, 354 U.S. 1, 74 (1957) (Harlan, J., concurring)).
174. *Id.* (quoting *Reid*, 354 U.S. at 74 (Harlan, J., concurring)).
175. *Id.* at 277; *Reid*, 354 U.S. at 74 (Harlan, J., concurring).

in cooperating with the Mexican government, the Fourth Amendment did not apply.[176]

Justice Brennan, joined by Justice Marshall,[177] pointed to Justice Black's plurality opinion in *Reid*,[178] and argued that extraterritorial prosecutions must be subject to application of constitutional protections.[179] Whether citizen or noncitizen, whether domestic or abroad, Justice Brennan argued that the U.S. government is bound to follow the limitations of the Constitution, just as the Constitution empowers the government to bind those whom it seeks to prosecute.[180] In his conclusion, Justice Brennan found no difference in the warrant process at home or abroad and concluded its purpose to be the same.[181]

5. *Rasul v. Bush*

Justice Stevens's majority opinion in *Rasul* is different from the previously discussed cases,[182] because it was not a constitutional holding, but a statutory one.[183] This distinction is important because it shaped the nature of Justice Stevens's analysis. By focusing on the statutory availability of the writ of habeas corpus,[184] Justice Stevens was able to skirt the precedent of *Eisentrager*[185] without overruling it.[186] First, Justice Stevens argued that there are two types of habeas corpus at issue—statutory and constitutional—and that since *Eisentrager* ruled on the latter, it did not explicitly rule on the former.[187] This led to the second part of Justice Stevens's argument, which was that statutory habeas corpus had changed since the time of *Eisentrager*,[188] and that *Eisentrager* did not control because *Braden v. 30th Judicial Circuit Court of Kentucky* had extinguished

176. *Verdugo-Urquidez*, 494 U.S. at 278.

177. Justice Stevens filed a concurring opinion and Justice Blackmun a dissenting opinion, both expressing doubt as to government's power to issue warrants in another country. *See id.* at 279 (Stevens, J., concurring); *id.* at 297 (Blackmun, J., dissenting).

178. *See supra* Part II.A.3.

179. *Verdugo-Urquidez*, 494 U.S. at 281 (Brennan, J., dissenting) ("The Constitution is the source of Congress' authority to criminalize conduct, whether here or abroad, and of the Executive's authority to investigate and prosecute such conduct. But the same Constitution also prescribes limits on our Government's authority to investigate, prosecute, and punish criminal conduct, whether foreign or domestic.").

180. *Id.* at 284–85.

181. *Id.* at 296.

182. *See supra* Part II.A.1–4.

183. *See* Rasul v. Bush, 542 U.S. 466, 484 (2004).

184. *See supra* notes 46–50 and accompanying text.

185. *See* Johnson v. Eisentrager, 339 U.S. 763, 768 (1950); *supra* Part II.A.2.

186. *See Rasul*, 542 U.S. at 478–79.

187. *See id.*

188. Justice Stevens argued that *Ahrens v. Clark* controlled at the time of *Eisentrager*. *See* Ahrens v. Clark, 335 U.S. 188 (1948) (holding that the D.C. Circuit lacked statutory jurisdiction to hear habeas claims of German military personnel being held at Ellis Island). Yet, he argued that *Ahrens* was later overruled by *Braden v. 30th Judicial Circuit Court of Kentucky*, 410 U.S. 484 (1973) (holding that the prisoner's presence in the territorial jurisdiction of the court was not necessary for availability of the writ of habeas corpus).

Eisentrager's "statutory predicate."[189] Thus, Justice Stevens framed the legal issue as "whether the habeas statute confers a right to judicial review of the legality of executive detention of aliens in a territory over which the United States exercises plenary and exclusive jurisdiction, but not 'ultimate sovereignty.'"[190] Based on this narrower legal question, Justice Stevens's majority opinion held that Guantanamo Bay detainees were afforded habeas corpus rights[191] because the United States has "complete jurisdiction and control"[192] over the base, and that this was sufficient jurisdiction under the statutory language of § 2241.[193]

Justice Kennedy's concurrence,[194] which continued his adherence to the functional application of an extraterritorial constitution,[195] contended that Justice Stevens's avoidance of *Eisentrager* was a weakness and that *Eisentrager* controlled.[196] Yet, Justice Kennedy was able to distinguish the facts of *Eisentrager*, pointing to the government's jurisdictional control, the prison's location far from any battlefield, and the detainee's lack of process, as major differences between the Guantanamo detainees and the soldiers tried by military commissions in post-war Germany.[197]

Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, dissented from the majority's opinion. Justice Scalia argued that the majority overruled *Eisentrager*,[198] regardless of its contention that it did not, and that by doing so "the Court boldly extend[ed] the scope of the habeas statute to the four corners of the earth."[199] He also attacked the Court's argument that Guantanamo is subject to domestic law without sovereignty because of the level of control exerted there, noting that if that were true, *Eisentrager* would have come out the same way.[200] Justice Scalia concluded by cautioning that the Court's decision will have "a potentially harmful effect upon the Nation's conduct of a war" and that the majority's decision "is judicial adventurism of the worst sort."[201]

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189. *Rasul*, 542 U.S. at 479.
190. *Id.* at 475.
191. *Id.* at 483–84.
192. *Id.* at 480 (citing 1903 Lease Agreement art. III).
193. *Id.* at 483–84.
194. *Id.* at 485 (Kennedy, J., concurring). This concurrence serves as an important forerunner to Justice Kennedy's majority opinion in *Boumediene*. *See* Neuman, *supra* note 17, at 264.
195. *See* Neuman, *supra* note 17, at 264. *See generally supra* notes 88–89 and accompanying text.
196. *Rasul*, 542 U.S. at 485–87 (arguing that *Eisentrager* called for a balancing of the strength of the prisoner's claim to the writ against the government's interest in denying it).
197. *Id.* at 487–88.
198. *Id.* at 496–97 (Scalia, J., dissenting) (arguing that the majority's analysis of *Braden* overruling *Aherns* ignored the fact that the decision only dealt with American citizens in the United States, not noncitizens held abroad, and also that *Braden* failed to mention *Eisentrager* at all). *But see supra* notes 188–89 and accompanying text (distinguishing *Eisentrager* from *Braden*).
199. *Rasul*, 542 U.S. at 498.
200. *Id.* at 501.
201. *Id.* at 506.

B. The Military Necessity Cases

Concurrent to the development of the extraterritoriality jurisprudence, many of the Court's key military necessity cases were also decided. While not purely functionalist cases, *Milligan*, *Korematsu*, and *Youngstown* do exhibit some functionalist tendencies. Opinions in these cases also espouse the range of military necessity theory: executive unilateralist, civil libertarian, and institutional process.[202] The last of these three, while certainly different, resembles Justice Kennedy's functionalist theory, particularly in Justice Jackson's *Youngstown* concurrence.[203] Further, given the intersection of extraterritoriality and military necessity in Justice Kennedy's *Boumediene* holding, these cases also provide important context about the difficulty the Court has had in adjudicating military necessity cases. These cases are characterized by having several concurrences, vigorous dissents, and companion cases that either complicate or limit the majority holdings from the main cases.[204] Yet, like the extraterritoriality cases, the Court's military necessity jurisprudence leaves murky precedent about the Court's role in evaluating the government's ability to balance individual rights and government expediency.

1. *Ex Parte Milligan*

The actual result of *Milligan* was a rather uncontroversial nine-to-zero opinion holding that the President had acted unconstitutionally by allowing a citizen to be tried by a military commission in Indiana during the American Civil War.[205] Yet, the reasoning and conclusions used by the majority and the four-member concurrence were particularly divisive and subjected to significant scrutiny in the media and the court of public opinion.[206] This division was again revealed in *Ex parte McCardle*,[207] where the votes on the Court changed, and the reasoning used by the concurrence in *Milligan* prevailed.[208] Thus, *Milligan* presents a somewhat elusive target for clarifying the military necessity doctrine and the Court's annunciation of it. Yet, the majority and concurrence in *Milligan*, taken together with the Court's opinion in *McCardle*, show remnants of the

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202. *See supra* Part I.C.2.

203. *See Youngstown*, 343 U.S. at 634 (Jackson, J., concurring); *see infra* notes 268–74 and accompanying text.

204. *See infra* notes 205–08, 229–53, 263–74 and accompanying text.

205. *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 131 (1866); Issacharoff & Pildes, *supra* note 102, at 9–10. In the midst of the American Civil War, Congress authorized President Lincoln to suspend the writ of habeas corpus throughout the United States. *See* An Act Relating to Habeas Corpus, and Regulating Judicial Proceedings in Certain Cases, ch. 81, 12 Stat. 755 (1863).

206. *See* Howell, *supra* note 92, at 1797 (noting several articles found in national newspapers including the *New York Herald*, *Chicago Tribune*, and *The New York Times*, criticizing the majority opinion).

207. 74 U.S. (7 Wall.) 506 (1868).

208. *See* Issacharoff & Pildes, *supra* note 102, at 16–17.

Court's division on the scope of the government's wartime power.[209] It also demonstrates the Court's uncertainty in adjudicating military necessity cases.

The unanimous Court agreed that the President and the military had acted improperly in trying Milligan by a military commission. Milligan was a U.S. citizen in Indiana, which was not, and never was, part of the rebellion.[210] The Court's reasoning on the issue was divided, however. Justice Davis's majority opinion was heavily grounded in rights-based language[211] that reflected the "Business as Usual" view of the Constitution[212] championed by civil libertarians.[213] These passages have been pointed to as "the palladium of the rights of the individual" and "one of the bulwarks of American liberty."[214] Justice Davis's view, while elegant, was also couched in some deference to the necessity of the Civil War.[215] While this language certainly detracts from the pure civil libertarianism of Justice Davis's passage above, it was Chief Justice Chase's concurrence that undercut Justice Davis's opinion the most.[216]

Chief Justice Chase and three concurring Justices viewed the problem in *Milligan* as one that centered on the relationship between Congress and the President.[217] The Chief Justice wrote that it is "for Congress to determine the question of expediency," and "[t]hat body did not see fit to authorize trials by military commission in Indiana, but by the strongest implication prohibited [it]."[218] Chief Justice Chase's opinion rested on the view that the President had acted without Congress's authorization, which made Milligan's treatment unconstitutional.[219] Thus, Chief Justice Chase and the other concurring Justices viewed the majority's opinion as "an absolutist, non-pragmatic vision of constitutional law that ought to be strenuously

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209. *See id.* at 17.

210. *See Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 131 (1866).

211. *Id.* at 120–21 ("The 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.").

212. *See* Gross, *supra* note 109, at 1043.

213. *See* Issacharoff & Pildes, *supra* note 102, at 10–11. *See generally supra* notes 109–13 and accompanying text.

214. Isacharoff & Pildes, *supra* note 102, at 10 (quoting 3 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 149, 154 (1923)).

215. *Milligan*, 71 U.S. at 109 ("During the late wicked Rebellion, the temper of the times did not allow that calmness in deliberation and discussion so necessary to a correct conclusion of a purely judicial question."); *id.* (admitting that only after the war could the Court review the case without, "the admixture of any element not required to form a legal judgment"); *see also* Howell, *supra* note 92, at 1801.

216. *See* Issacharoff & Pildes, *supra* note 102, at 12–13; Howell, *supra* note 92, at 1803; *see also* Andrew Kent, *The Constitution and the Laws of War During the Civil War*, 85 NOTRE DAME L. REV. 1839, 1845–46 (2010) (arguing that the legal and political material from the Civil War era shows that the *Milligan* majority was an outlier, and that the Court's true view recognized the government's extensive power in times of war).

217. *See* Issacharoff & Pildes, *supra* note 102, at 11.

218. *Milligan*, 71 U.S. at 141 (Chase, C.J., concurring).

219. *See id.*; *see also* Howell, *supra* note 92, at 1803; Issacharoff & Pildes, *supra* note 102, at 12.

resisted."[220] Two years later in *McCardle*, Chief Justice Chase's more limited and institution-based reasoning won out over the highly criticized *Milligan* decision.[221] The Chief Justice recognized Congress's power to remove the Court's jurisdiction in military commission cases, noting that the Constitution grants to the Court jurisdiction "under such regulations as Congress shall make."[222]

Thus, it becomes clear that any doctrinal points culled from *Milligan*'s majority opinion are limited by the Chief Justice's concurring opinions in that case, and his majority opinion two years later in *McCardle*.[223] Ultimately, a case that contains some of the most rights-protecting language in constitutional law is undercut by more moderate institutional process reasoning.[224] *Milligan* and *McCardle* demonstrate the Court's earliest attempts to curb the scope of the government's emergency power.[225] Yet, they are limited by an equally compelling need to show deference to properly exercised actions of military necessity by the unified political branches.[226]

2. *Korematsu v. United States*

While *Milligan* represented the Court's attempt to corral the doctrine during the Civil War, *Korematsu* was one of the Court's more infamous attempts to do the same during the Second World War.[227] This hotly contested five-to-four decision centered on military imposed curfews and exclusion from military zones targeted at Japanese Americans, out of a fear of sabotage on American bases.[228] Justice Black's majority opinion[229]

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220. Issacharoff & Pildes, *supra* note 102, at 12.

221. *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1868) (holding that the jurisdiction stripping statute passed after *Milligan* was constitutional); *see* Howell, *supra* note 92, at 1797 (highlighting *Milligan* criticism); Issacharoff & Pildes, *supra* note 102, at 12 (describing Chase's view).

222. *McCardle*, 74 U.S. at 513; *see also* U.S. CONST. art. III, § 2.

223. *See* Issacharoff & Pildes, *supra* note 102, at 12–16.

224. *See* Howell, *supra* note 92, at 1803–04; Issacharoff & Pildes, *supra* note 102, at 12–13.

225. *See supra* notes 212–15 and accompanying text.

226. *See* Howell, *supra* note 92, at 1803; Issacharoff & Pildes, *supra* note 102, at 12–13.

227. *See* Issacharoff & Pildes, *supra* note 102, at 20 ("*Korematsu* is excoriated as one of the two or three worst moments in American constitutional history."). For a sweeping account of the Court's struggles with *Korematsu*, see PETER IRONS, JUSTICE AT WAR 309–46 (1983).

228. Korematsu v. United States, 323 U.S. 214, 216 (1944). As a response to the Japanese attack on Pearl Harbor in December of 1941, President Roosevelt issued Executive Order No. 9066 in February of 1942, which later authorized the exclusion of people of Japanese descent from military zones. *See* Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 19, 1942) ("[T]he successful prosecution of the war requires every possible protection against espionage and against sabotage to national-defense material, national-defense premises, and national-defense utilities."). Congress ratified this order one month later. *See* Act of Congress of March 21, 1942, 56 Stat. 173 (1942).

229. Justice Frankfurter added a concurring opinion that agreed with the majority and took it a step further. *Korematsu*, 323 U.S. at 225 (Frankfurter, J., concurring) ("To find that the Constitution does not forbid the military measures now complained of does not carry

upheld both the curfew order, "as an exercise of the power of the government to take steps necessary to prevent espionage and sabotage in an area threatened by Japanese attack,"[230] and the exclusion of Japanese Americans from military areas, as necessary because it was impossible to ascertain the "disloyal from the loyal."[231] While Justice Black was sympathetic to the hardship visited upon those affected by the military's actions,[232] and while he characterized those actions as "inconsistent with our basic governmental institutions," he nonetheless concluded that when "our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger."[233]

This case also contained compelling dissents from Justices Roberts, Murphy, and Jackson, running the gamut from championing individual rights to recognizing the Court's hazy role in addressing military necessity.[234] Justice Roberts squarely claimed that the military had acted purely on the basis of race.[235] Justice Roberts viewed the government's actions as a "clear violation of Constitutional rights,"[236] denying the defendant due process of law,[237] and forcing him to choose between an unconstitutional imprisonment and illegally remaining in his home.[238]

Justice Murphy's dissent, like Justice Roberts's, did not lack for strong language, arguing that the exclusion in this case "goes over 'the very brink of constitutional power' and falls into the ugly abyss of racism."[239] Justice Murphy contended that the only time military necessity can validly deprive an individual of constitutional rights is when the deprivation is reasonably related to the public danger.[240] Yet in this case, the government's evidence proving public danger from sabotage by Japanese Americans was limited to "a few intimations that certain individuals actively aided the enemy."[241]

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with it approval of that which Congress and the Executive did. That is their business, not ours."); *see* Stephen Breyer, *Making Our Democracy Work: The Yale Lectures*, 120 YALE L.J. 1999, 2021 (2011) ("They might have thought that either President Roosevelt must run the war or we must run it. And we know that we cannot run it. The result: judicial abnegation.").

230. *Korematsu*, 323 U.S. at 217.

231. *Id.* at 219.

232. *Id.* ("[W]e are not unmindful of the hardships imposed by [the order] upon a large group of American citizens.").

233. *Id.* at 220.

234. *See id.* at 225 (Roberts, J., dissenting); *id.* at 240 (Murphy, J., dissenting); *id.* at 245 (Jackson, J., dissenting).

235. *See id.* at 226 (Roberts, J., dissenting) ("[This] is the case of convicting a citizen as a punishment for not submitting to imprisonment in a concentration camp, based on his ancestry . . . without evidence or inquiry concerning his loyalty . . . .").

236. *Id.* at 225.

237. *Id.* at 232.

238. *Id.* at 233.

239. *Id.* (Murphy, J., dissenting).

240. *Id.* at 234 (noting that the danger must be so "immediate, imminent, and impending" as not to admit of delay and not to permit the intervention of ordinary constitutional processes to alleviate the danger (citing United States v. Russell, 80 U.S. (13 Wall.) 623, 627–28 (1871))).

241. *Id.* at 240.

Justice Jackson provided a more temperate dissent, balancing the majority's acknowledgement of military necessity[242] with a condemnation of the sanction of the orders as bad constitutional law.[243] Justice Jackson adopted the position that just as a general may not be subject to the Constitution in times of public danger, so too may the Court not be bound to approve that expediency as constitutional.[244] A military judgment, cautioned Justice Jackson, is not "susceptible of intelligent judicial appraisal," and as such, he would have had the Court avoid passing judgment on the reasonableness of military commands and instead abide by the Constitution as it was written.[245]

Beyond these forceful dissents, the companion case to *Korematsu*, *Ex parte Endo*,[246] further complicated *Koremastu*'s jurisprudence.[247] In contrast to *Korematsu*, the Court was unanimous in ending the continued detention of Japanese Americans.[248] *Endo* operated under similar facts as *Korematsu*, dealing with the internment of Japanese Americans during World War Two.[249] Yet, Justice Douglas, who was also in the majority in *Korematsu*,[250] concluded that the defendant was entitled to release from government-operated internment camps.[251] Justice Douglas argued that the statute at issue in both cases supported curfew and exclusion, but did not support detention.[252] Thus, when the military engaged in long-term detention, they lost the authorization of Congress and violated the statute.[253]

The contrast between Justice Black's majority opinion in *Korematsu*[254] and Justice Douglas's majority opinion in *Endo* are hard to rationalize given the similarity of the two cases.[255] Further, given the starkly conflicting

242. *Id.* at 244 (Jackson, J., dissenting) ("It would be impracticable and dangerous idealism to expect or insist that each specific military command in an area of probable operations will conform to conventional tests of constitutionality.").

243. *Id.* ("[Military orders] may have a certain authority as military commands, although they may be very bad as constitutional law."); *see also* Issacharoff & Pildes, *supra* note 102, at 23 (noting that Jackson's argument is that "it is unrealistic to expect courts to do anything other than rubberstamp military decisions during times of war").

244. *See Korematsu*, 323 U.S. at 246 (Jackson, J., dissenting) ("A military commander may overstep the bounds of constitutionality, and it is an incident. But if we review and approve, that passing incident becomes the doctrine of the Constitution.").

245. *See id.* at 245.

246. 323 U.S. 283 (1944).

247. *See* Patrick O. Gudridge, *Remember* Endo*?*, 116 HARV. L. REV. 1933, 1934 (2003) (noting that *Endo*, not *Korematsu*, should have been the better remembered case, because that case actually closed the Japanese American internment camps); Issacharoff & Pildes, *supra* note 102, at 21.

248. *See* Gudridge, *supra* note 247, at 1947; Issacharoff & Pildes, *supra* note 102, at 21.

249. *See Endo*, 323 U.S. at 284–94.

250. *See Korematsu*, 323 U.S. at 215.

251. *See Endo*, 323 U.S. at 303.

252. *See id.* at 300–02.

253. *See id.*; *see also* Issacharoff & Pildes, *supra* note 102, at 22–23 (arguing that Justice Douglas relied on an institutional-process based argument).

254. *See Korematsu*, 323 U.S. at 222.

255. *See* Gudridge, *supra* note 247, at 1967–68. *But see* Issacharoff & Pildes, *supra* note 102, at 22–23 (arguing that the differences between the two cases turned on institutional-process focused jurisprudence in *Endo*).

opinions within *Korematsu*, the tenuous balance reached in *Korematsu* and *Endo* demonstrates the Court's struggles with adopting cohesive military necessity jurisprudence. Unlike *Milligan*, which took some steps to protect individual rights in times of war, *Korematsu* was a step back toward a more unfettered executive.[256]

3. *Youngstown Sheet & Tube Co. v Sawyer*

The next major military necessity case, *Youngstown*, was decided by the Supreme Court seven years after *Korematsu* and was the result of a potential steel workers strike during the Korean War.[257] President Truman, fearing an interruption in the steel market, issued Executive Order No. 10,340[258] and ordered the Secretary of Commerce to seize the steel mills in order to keep them open and running.[259] After initially complying with the executive order, the mill owners brought a claim in federal court, challenging the constitutionality of the President's actions.[260] Just one month after the President had issued the executive order, the Supreme Court heard arguments on the case.[261] In a six-to-three ruling, the Court ultimately found in favor of the mill owners.[262]

Similar to *Milligan* and *Korematsu*, *Youngstown* presented a complicated case with no clear rationale for the holding. Each of the Justices in the majority wrote their own concurrence, suggesting that each was driven by a different set of considerations.[263] In most of these concurrences, one fact proved dispositive, namely that Congress had previously denied the President the very power he sought to employ.[264] Congress had explicitly chosen to deny the executive the power to seize property to settle labor disputes during times of emergency.[265] Yet, the concurring Justices employed differing rationales to get to that point, and there was a definite spectrum of opinion regarding the amount of power the President had in the absence of Congressional action.[266] In contrast, the dissenters, all joining

256. *See* Issacharoff & Pildes, *supra* note 102, at 20 (noting that the context of *Korematsu* is a "powerful counterexample to any view that executive and legislative checks and balances, even in a system of separated and divided powers, are adequate to protect against excessive security measures.").

257. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 583 (1952).

258. Exec. Order No. 10,340, 17 Fed. Reg. 3139 (Apr. 10, 1952).

259. *Youngstown*, 343 U.S. at 583.

260. *Id.*

261. *See* Howell, *supra* note 92, at 1804. President Truman entered his order on April 9, 1952. *See Youngstown*, 343 U.S. at 583. The Court heard arguments on the case starting May 12, 1952. *Id.* at 584.

262. *See id.* at 589; Howell, *supra* note 92, at 1805 (describing articles in *The New York Times* and *Los Angeles Times* that called the decision a "stunning rebuke" of the President).

263. Howell, *supra* note 92, at 1805.

264. *Id.*

265. *See Youngstown*, 343 U.S. at 586; *see also* 93 CONG. REC. 3637–45 (1947) (documenting the Congressional debate that chose not to amend the Taft-Hartley Act to allow governmental seizures in times of emergency).

266. Justice Black filed a more formalistic opinion. *See Youngstown*, 343 U.S. at 582–89 (holding that Congress alone has the power to legislate and, by seizing the steel mills, the

an opinion by Justice Vinson, would have recognized much greater power for the President in times of emergency.[267]

The most doctrinally important of the concurrences was Justice Jackson's.[268] Justice Jackson espoused an analytical framework that explained how the "the Constitution's cryptic and deeply ambiguous division of authority between Congress and the President in wartime" should be understood in actual practice.[269] Justice Jackson accomplished this by setting up a "three-tiered continuum of presidential power."[270] First, when the President is acting with the authorization of Congress, executive power is "at its maximum."[271] Second, where Congress has been silent, the President may act in a "zone of twilight" where the executive and Congress have concurrent authority.[272] Lastly, when the President acts against the will of Congress "his power is at its lowest ebb."[273] The critical lesson of this opinion is twofold: (1) the Constitution gave the Congress, not the executive, the authority to limit civil liberties during war time, and (2) the courts must "rigorously scrutinize congressional meaning before finding such authorization."[274]

Ultimately, Justice Jackson's test was one based on an institutional process view of military necessity jurisprudence,[275] but it represented a

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President had infringed on Congress's power). Justices Burton, Clark, and Frankfurter saw more authority for the President in the absence of congressional action, but here, they all agreed that Congress had spoken. *See id.* at 659–60 (Burton, J., concurring) (arguing that the Court was not facing the issue of the President acting to respond to emergency but facing the issue of a President who had infringed on Congress's power); *id.* at 662 (Clark, J., concurring) (arguing that the President is bound to follow the procedures of Congress when they exist but, in their absence, the President's power is limited by the gravity of the situation); *id.* at 609 (Frankfurter, J., concurring) ("It is quite impossible, however, when Congress did specifically address itself to a problem, as Congress did to that of the seizure, to find secreted in the interstices of legislation the very grant of power which Congress consciously withheld."). Justice Douglas worried about an unfettered executive. *Id.* at 633 (Douglas, J., concurring) ("We pay a price for our system of checks and balances, for the distribution of power among the three branches of government.").

267. *Id.* at 680 (Vinson, C.J., dissenting) ("Accordingly, if the President has any power under the Constitution to meet a critical situation in the absence of express statutory authorization, there is no basis whatever for criticizing the exercise of such power in this case.").

268. *See* Sarah H. Cleveland, Hamdi *Meets* Youngstown*: Justice Jackson's Wartime Security Jurisprudence and the Detention of "Enemy Combatants,"* 68 ALB. L. REV. 1127, 1128 (2005); Sanford Levinson, *Why the Canon Should be Expanded To Include the* Insular Cases *and the Saga of American Expansionism*, 17 CONST. COMMENT. 241, 242 n.2 (2000).

269. Cleveland, *supra* note 268, at 1128–29.

270. *Id.* at 1129; *see also Youngstown*, 343 U.S. at 635–39 (Jackson, J., concurring).

271. *Youngstown*, 343 U.S. at 635.

272. *Id.* at 637.

273. *Id.*

274. *See* Cleveland, *supra* note 268, at 1131; *see also* Issacharoff & Pildes, *supra* note 102, at 28.

275. *See* Cleveland, *supra* note 268, at 1136; Issacharoff & Pildes, *supra* note 102, at 28; *see also* Joseph Landau, Chevron *Meets* Youngstown*: National Security and the Administrative State*, 92 B.U. L. REV. (forthcoming 2012) (arguing that *Youngstown*'s process-oriented approach has been carried through to the modern post-9/11 cases); *supra* notes 114–15 and accompanying text.

doctrine that preserved "flexibility"[276] while trying to protect liberty in times of national crisis.[277] *Youngstown* was a shift away from the heavily deferential holding in *Korematsu* and back toward the more balanced but conflicted doctrine of *Milligan*. Further, the emphasis on practicality and flexibility in Justice Jackson's opinion is an important bridge between functionalism and the military necessity case law. It is also an important consideration in Part III below.

III. *BOUMEDIENE V. BUSH* AND *AL MAQALEH V. GATES*: FUNCTIONALISM IN PRACTICE

Part III is divided into two sections, one focusing on *Boumediene* and the other focusing on *Al Maqaleh*. These two cases exemplify how extraterritoriality and military necessity have intersected and clashed in Justice Kennedy's functionalism. To help illustrate this point, these sections are further broken up into subsections, analyzing majority, concurring, and dissenting opinions, with a greater emphasis on the majority opinions. The analysis also uses Justice Kennedy's three *Boumediene* factors as a helpful tool in distinguishing these cases. Ultimately, *Boumediene* and *Al Maqaleh* demonstrate a stark contrast in reasoning between judges who wish to heavily defer to the military and those who seek a more stable balance between expediency and individual rights.

A. Boumediene v. Bush

In *Boumediene*, the Supreme Court held that the detainees imprisoned at Guantanamo Bay Naval Base were entitled to habeas corpus hearings because the DTA and MCA violated the Suspension Clause of the Constitution.[278] *Boumediene* was a five-to-four decision with a concurrence and two dissenting opinions.[279] Justice Kennedy's majority opinion was joined by Justices Breyer, Ginsburg, Stevens, and Souter.[280] Justice Souter filed a concurring opinion in which Justice Ginsburg and Justice Breyer joined.[281] Chief Justice Roberts filed a dissent joined by Justices Scalia, Thomas, and Alito.[282] Justice Scalia also filed a separate dissent that was joined by the other three dissenting Justices.[283] The substance of these opinions ranged from the concurrence's desire to take Justice Kennedy's majority opinion a bit further than he was willing to

276. *See* Cleveland, *supra* note 268, at 1137.
277. *Id.* at 1136.
278. Boumediene v. Bush, 553 U.S. 723, 798 (2008); *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.").
279. *Boumediene*, 553 U.S. at 730.
280. *Id.*
281. *Id.* at 799–800 (Souter, J., concurring).
282. *Id.* at 801 (Roberts, C.J., dissenting).
283. *Id.* at 826 (Scalia, J., dissenting).

go,[284] to the dissents' disagreement on both the test the majority proposed and the substantive conclusions it reached employing that test.[285] Thus, as was often the case with the extraterritoriality and military necessity cases analyzed in Part II,[286] the Supreme Court approached the *Boumediene* case in varied and often contradictory ways.

1. Justice Kennedy's Majority Opinion

Justice Kennedy's holding in *Boumediene* utilized the functionalist test he initially espoused in his concurrences in *Verdugo-Urquidez* and *Rasul*.[287] Before the holding, however, Justice Kennedy had to make some procedural clarification. First, he held that the MCA effectively stripped the federal courts of statutory habeas jurisdiction.[288] Thus, for the Court to obtain jurisdiction, it had to overrule the MCA as a violation of the Suspension Clause of the Constitution.[289] Then, Justice Kennedy began his constitutional analysis with an exhaustive survey of habeas corpus common law precedent, both in the United States and in England,[290] ultimately concluding that the historical record did not yield a definitive answer.[291] Justice Kennedy then drew on the precedent of the *Insular Cases*,[292] *Eisentrager*,[293] and *Reid*,[294] concluding that these cases did not espouse a purely territoriality driven application of constitutional rights, but also weighed context and practical considerations.[295] Thus, "[b]ased on th[e] language from *Eisentrager*, and the reasoning in our other extraterritoriality opinions,"[296] Justice Kennedy developed a test that listed three factors that would determine when the Suspension Clause would be applied: "(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."[297]

While the functionalist factors served as the framework for Justice Kennedy's analysis, he was also motivated by a keen awareness of separation of powers principles. These principles manifested themselves in several ways. Justice Kennedy opined that the writ of habeas corpus was

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284. *See infra* Part III.A.2.
285. *See infra* Part III.A.3.
286. *See* discussion *supra* Part II.
287. *See supra* notes 173–76, 194–97 and accompanying text.
288. *Boumediene*, 553 U.S. at 739.
289. *Id.*
290. *See id.* at 739–52.
291. *Id.* at 752.
292. *See supra* Part II.A.1.
293. *See supra* Part II.A.2.
294. *See supra* Part II.A.3.
295. *See Boumediene*, 553 U.S. at 758–64.
296. *Id.* at 766.
297. *Id.* at 766; *see also* Johnson v. Eisentrager, 339 U.S. 763, 778 (1950); *supra* Part II.A.2.

both vital to the protection of individual liberty[298] and to maintaining a limited government.[299] Further, Justice Kennedy held that the reach and purpose of the Suspension Clause was governed by separation of powers principles[300] and that these principles were not limited to American citizens.[301] Also, in rejecting the government's proposed sovereignty-based test, Justice Kennedy was wary of the dangers of a government that could intentionally surrender sovereignty, lease back the land it had surrendered, and then "govern without legal constraint."[302] Similarly, such a situation could lead to the government having the power to "switch the Constitution on or off at will."[303] Finally, Justice Kennedy cautioned that the scope of the Suspension Clause and the writ of habeas corpus "must not be subject to manipulation by those whose power it is designed to restrain."[304] Thus, the analysis of the three factors outlined above proved to be the decisive part of Justice Kennedy's functional, context-driven approach, but his conclusions were also informed by separation of powers concerns.

a. Adequacy of Process

Justice Kennedy looked to past precedent when deciding whether the process that the petitioner had received was sufficient to eliminate the need for habeas review.[305] Comparing the military commissions that were used in *Eisentrager*, Justice Kennedy held that the Combatant Status Review Tribunals[306] (CSRT) used by the government resulted in a situation where, "unlike in *Eisentrager* . . . there has been no trial by military commission for violations of the laws of war. . . . The difference is not trivial."[307] The Court concluded that the procedures and adversarial mechanisms that would

298. *Boumediene*, 553 U.S. at 743 (noting that the Framers considered the writ "a vital instrument for the protection of individual liberty").

299. *Id.* at 744 (referencing Alexander Hamilton's belief that the writ preserves limited government); *see* Marc D. Falkoff & Robert Knowles, *Bagram,* Boumediene*, and Limited Government*, 59 DEPAUL L. REV. 851, 897 (2010) (arguing that scholarship's focus on the practical aspects of *Boumediene* "obscured the importance of limited government in the extraterritoriality doctrine").

300. *Boumediene*, 553 U.S. at 746; *see* Gerald Neuman, *The Habeas Corpus Suspension Clause After* Boumediene v. Bush, 110 COLUM. L. REV. 537, 562 (2010) (noting that *Boumediene* emphasizes habeas corpus as a separation of powers mechanism).

301. *Boumediene*, 553 U.S. at 743 (arguing that the Constitution's separation of powers structure protects persons as well as citizens and that foreign nationals who have the privilege to litigate in American courts can enforce separation of powers principles); *see* Stephen I. Vladeck, Boumediene*'s Quiet Theory: Access to Courts and the Separation of Powers*, 84 NOTRE DAME L. REV. 2107, 2110 (2009) (arguing that Justice Kennedy's opinion construes habeas corpus as "a structural mechanism protecting individual liberty by preserving the ability of the courts to check the political branches").

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

303. *Id.*

304. *Id.* at 766.

305. *Id.* at 767.

306. This is a review by the military "to determine whether individuals detained at the U.S. Naval Station at Guantanamo Bay, Cuba, were 'enemy combatants.'" *Boumediene*, 553 U.S. at 733; *see also*, *supra* Part I.B.

307. *Boumediene*, 553 U.S. at 767.

eliminate the need for habeas corpus review had not been applied.[308] As such, this factor of Justice Kennedy's test weighed in favor of applying the Suspension Clause and granting habeas corpus review.

b. Nature and Location of the Detention Sites

Justice Kennedy at first compared the Guantanamo Bay site to Landsberg Prison, the military prison located in Germany at issue in *Eisentrager*, noting that both the detainees' apprehension and detention were technically outside the sovereign territory of the United States.[309] Justice Kennedy held that this would have weighed against the need for habeas corpus review.[310] He then distinguished the military prison in *Eisentrager* from Guantanamo Bay, enumerating several key facts. First, he pointed out that "the United States' control over the prison in Germany was neither absolute nor indefinite. Like all parts of occupied Germany, the prison was under the jurisdiction of the combined Allied Forces."[311] Conversely, Guantanamo Bay is not such a "transient possession," and "[i]n every practical sense Guantanamo is not abroad; it is within the constant jurisdiction of the United States."[312] For these reasons, Justice Kennedy concluded that this factor would weigh in favor of habeas corpus review.[313]

c. Practical Obstacles

As to the third factor, Justice Kennedy began by noting that "[h]abeas corpus proceedings may require expenditures of funds by the Government and may divert the attention of military personnel from other pressing tasks."[314] However, he contrasted the situation in *Eisentrager*[315] and argued that the security threats present after World War II in occupied Germany "are not apparent here; nor does the Government argue that they are."[316] The U.S. naval base at Guantanamo Bay consists of forty-five square miles of land and water, detains prisoners in a "secure prison facility

308. *Id.*
309. *See id.* at 768.
310. *See id.*
311. *Id.*
312. *Id.* at 768–69; *see also* Rasul v. Bush, 542 U.S 466, 487 (2004). The Court noted that the 1903 lease that the United States signed with Cuba, who retains "ultimate sovereignty," is "no ordinary lease," and that "[i]ts term is indefinite and at the discretion of the United States." *Boumediene*, 553 U.S. at 768–69. The Court ultimately believed that "[w]hat matters is the unchallenged and indefinite control that the United States has long exercised over Guantanamo Bay." *Id.*
313. *See Boumediene*, 553 U.S. at 768–69.
314. *Id.* at 769.
315. *Id.* The Court noted that the situation was far different in *Eisentrager*. *Id.* There, the United States military became responsible for "57,000 square miles with a population of 18 million people." *Id.* In addition, the United States, who was engaged in reconstruction efforts in the affected area, faced the security threats from a "defeated enemy" and "enemy elements, guerilla fighters, and 'werewolves.'" *Id.* at 769–70 (quoting Johnson v. Eisentrager, 339 U.S. 763, 784 (1950)).
316. *Id.* at 770.

located on an isolated and heavily fortified military base," and is operated by only American military personnel.[317]

However, Justice Kennedy admitted that were this not the case, or should the detention facility have been located in an "active theater of war," arguments against extending the writ would have more weight.[318] Finally, there was no jurisdictional friction with the host government, Cuba, because no Cuban court had jurisdiction over the American military personnel at Guantanamo or the detainees housed there.[319] Given that this third and final factor also weighed in favor of granting the writ of habeas corpus, Justice Kennedy admitted that he was taking a new leap in constitutional law but held that the Suspension Clause applied to the Guantanamo detainees' petitions.[320]

Before Justice Kennedy could hold that the MCA and DTA violated the Suspension Clause and that habeas corpus has full effect at Guantanamo Bay,[321] he had to consider whether the MCA and DTA provided procedural safeguards that were an adequate substitute for habeas corpus. Particularly, Justice Kennedy honed in on the MCA's provision for a review of a CSRT determination by the D.C. Circuit.[322] He concluded that because the statute does not allow the D.C. Circuit to consider newly discovered exculpatory evidence in its review of the legality of the CRST's findings, the MCA was "an insufficient replacement for the factual review these detainees are entitled to receive through habeas corpus."[323] An additional consideration that drove Justice Kennedy was that some detainees had been waiting for six years without judicial scrutiny, and requiring them to test Congress's new procedure would have only caused more delay.[324] Therefore, Justice Kennedy held that the Suspension Clause applied, and the detainees were granted the right to file habeas corpus petitions.[325]

2. Justice Souter's Concurrence

Justice Souter, joined by Justices Ginsburg and Breyer, offered a brief concurrence that made two succinct points. First, Justice Souter countered Justice Scalia's dissenting argument about the Court's "new" application of extraterritorial constitutional rights.[326] He argued that five members of the Court agreed in *Rasul* that while the outcome only required a decision pertaining to the reach of the habeas corpus statute, the historical reach of the writ, which is a factor in the constitutional analysis as well, went

317. *Id.*
318. *Id.*
319. *Id.* at 770.
320. *See id.* at 770–71.
321. *Id.*
322. *See supra* notes 65–66 and accompanying text.
323. *Boumediene*, 533 U.S. at 791.
324. *Id.* at 794.
325. *Id.* at 771.
326. *Id.* at 799 (Souter, J., concurring).

beyond territorial sovereignty.[327] Thus, despite Justice Scalia's arguments to the contrary, Justice Souter concluded that, "whether one agrees or disagrees with today's decision, it is no bolt out of the blue."[328]

Justice Souter's second point squarely addressed the detainee's six years in prison and argued that it was an important factor in the *Boumediene* analysis.[329] The dissenting opinions, particularly Justice Roberts's, argued that the majority's action would only further delay the detainees' imprisonment and the MCA process could be conducted in a reasonable amount of time.[330] Yet, after six years of little or no action by the military, Justice Souter believed that the dissent's arguments rang hollow.[331] Further, the courts and the writ of habeas corpus had always served, first in England and then in the United States, as a check on the power of the executive and as a tool for inquiry into the legality of detention.[332] Justice Souter concluded that *Boumediene*'s holding was "no judicial victory" but, "an act of perseverance in trying to make habeas review, and the obligation of the courts to provide it, mean something of value both to prisoners and to the Nation."[333]

3. Justice Roberts's and Justice Scalia's Dissents

Chief Justice Roberts's dissent, joined by Justices Scalia, Thomas, and Alito, began by leaving the difficult and knotty issue of habeas jurisdiction at Guantanamo Bay to Justice Scalia, while joining in that opinion.[334] Instead, he honed in on the question of whether the MCA was an adequate substitute for habeas corpus; if it were, the Court did not need to reach the availability of habeas corpus at all.[335] The Chief Justice concluded that the DTA was indeed an adequate substitute process[336] and presented two primary critiques of the majority's opinion.

First, the Chief Justice argued that the majority short-circuited the DTA process by failing to force the petitioners to exhaust the statutory remedy before passing judgment upon it.[337] This failure, coupled with the majority's express declination to decide if CSRT proceedings subject to Article III review could satisfy due process,[338] accorded little deference to

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327. *See id.*
328. *Id.*
329. *Id.* at 799–800.
330. *See infra* Part III.A.3.
331. *Boumediene*, 533 U.S. at 800.
332. *Id.*
333. *Id.* at 801.
334. *Id.* (Roberts, C.J., dissenting).
335. *Id.* at 802.
336. *Id.*
337. *Id.* at 803 (noting that given the posture of the petitioners cases, "the Court should have declined to intervene until the D.C. Circuit had assessed the nature and validity of the congressionally mandated proceedings in a given detainee's case").
338. *Id.* at 804. Chief Justice Roberts cited the plurality in *Hamdi* as outlining minimum due process requirements for a detainee, including the right to notice of the government's

Congress.[339] Further, the majority's decision to replace the system outlined in the MCA with a habeas remedy that needed to be crafted ad hoc by the district court on remand would likely proceed no faster than the process adopted by Congress, and likely "promise[d] to take longer."[340]

Second, the Chief Justice contended that the majority's objections to the DTA were weak compared to the aggressive action it took in striking down the statute.[341] Relying principally on *Hamdi*, the Chief Justice argued that the Government had met its burden of providing an adversarial proceeding with the right to provide evidence that the detainee had been unlawfully detained[342] as well as providing the possibility of collateral review by an Article III court.[343] Thus, the MCA offered adequate substitute process and "provide[d] the combatants held at Guantanamo greater procedural protections than have ever been afforded alleged enemy detainees—whether citizens or aliens—in our national history."[344]

Justice Scalia joined the Chief Justice's critique of the majority's procedural analysis, focusing on two themes in his own dissent. First, Justice Scalia clearly and unabashedly contended that the majority's decision ran counter to military necessity[345] and simultaneously lacked deference to processes established by the executive and the legislature.[346] Justice Scalia began his dissent by asserting that "America is at war with radical Islamists."[347] This statement—accompanied by a history of terror attacks against the United States,[348] examples of recidivist detainees,[349] and complex hurdles necessary for military compliance with the Court's purportedly new standard[350]—vividly articulated Justice Scalia's focus on

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classification proceeding and the right to rebut that classification before a neutral decision maker.

339. *Id.* at 805.

340. *Id.* at 806.

341. *Id.* at 808.

342. *Id.* at 816–18.

343. *Id.* at 812 (discussing also that while the MCA's collateral review may have been weaker than normal habeas corpus review, it did not need to meet the normal standards because of the nature of the ongoing military conflict (citing Hamdi v. Rumsfeld, 542 U.S. 507 (2004))).

344. *Id.* at 826.

345. *Id.* at 827–28 (Scalia, J., dissenting) ("The game of bait-and-switch that today's opinion plays upon the Nation's Commander in Chief will make the war harder on us. It will almost certainly cause more Americans to be killed.").

346. *Id.* at 831 ("What competence does the Court have to second-guess the judgment of Congress and the President on such a point?"). Justice Scalia's answer was "[n]one whatever." *Id.*

347. *Id.* at 827. It is worth noting that this statement evokes a mindset and atmosphere found in many of the executive unilateralist opinions in the military necessity cases mentioned in Part II.B of this Note, such as *Milligan*, *Korematsu*, and *Youngstown*.

348. *Id.* at 827–28.

349. *Id.* at 828–29 ("At least 30 of those prisoners hitherto released from Guantanamo Bay have returned to the battlefield."). Justice Scalia noted situations where former detainees kidnapped Chinese dam workers, died fighting Pakistani commandos, returned to battle as Taliban commanders, and murdered an Afghan judge. *Id.*

350. *Id.* at 829. As an example, Justice Scalia argued that a higher evidentiary standard would be burdensome because "even when the military has evidence that it can bring

military necessity. Further, Justice Scalia argued that the two branches best equipped to deal with this kind of military problem, the executive and the legislative, had been "elbow[ed] aside"[351] by the judiciary.[352] Justice Scalia concluded that answers to "how to handle enemy prisoners in this war will ultimately lie with the branch that knows least about national security concerns that the subject entails."[353]

Second, Justice Scalia argued that the majority's analysis of the extraterritorial application of habeas corpus was not supported by the Court's precedent[354] or common law.[355] He believed that the Court both misapplied the precedent of the *Insular Cases*,[356] *Eisentrager*[357], and *Reid*,[358] and misconstrued the history of the writ of habeas corpus.[359] As to common law, Justice Scalia cited precedent that would limit the reach and prohibitions of the Suspension Clause only to facets of the writ that existed at the time of the founding[360] and argued that the writ would not have been available.[361]

The weight of military necessity and the majority's mischaracterization of extraterritoriality precedent led Justice Scalia to conclude that the Court's action was driven by "an inflated notion of judicial supremacy."[362] Justice Scalia chastised the majority[363] and chided that, "the text and history of the Suspension Clause provide no basis for our jurisdiction."[364] He ominously concluded that "[t]he Nation will live to regret what the Court has done today."[365]

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forward, it is often foolhardy to release that evidence to the attorneys representing our enemies." *Id.*

351. *Id.* at 830.

352. *Id.* at 831 (arguing that the passage of the MCA "emphatically" reasserted the political branches intent to forbid detainees from filing habeas petitions).

353. *Id.*

354. *Id.* at 841–42.

355. *Id.* at 844–48.

356. *Id.* at 838–39 (arguing that the *Insular Cases* all turned on territorial sovereignty, which the United States had in the territories like Puerto Rico but not in Landsberg or Guantanamo Bay).

357. *Id.* at 834 (arguing that *Eisentrager* "conclusively establishes the opposite" of a functionalist approach to the extraterritoriality of habeas corpus).

358. *Id.* at 839 (arguing that the holding of *Reid* likewise offers little precedent for the majority's functionalist reading of *Eisentrager*, because the "practical considerations" relied on in that case applied to American citizens abroad).

359. *See id.* at 843–48.

360. *Id.* at 844 (citing McNally v. Hill, 293 U.S. 131, 135–36 (1934)).

361. *Id.* at 847 ("[T]he writ would not have been available at common law for aliens captured and held outside the sovereign territory of the Crown.").

362. *Id.* at 842.

363. *Id.* at 849–50 (arguing that the court had "warp[ed]" the Constitution, "blatantly misdescribe[d]" judicial precedent, broke "a chain of precedent as old as the common law," and "tragically" undermined the efficacy of the military).

364. *Id.* at 849.

365. *Id.* at 850.

B. Al Maqaleh v. Gates

Subsequent to the *Boumediene* decision, another detainee litigation made its way into federal court. In 2009, Judge Bates decided *Al Maqaleh* in the District Court for the District of Columbia.[366] Judge Bates, viewing *Boumediene* as precedential, employed the *Boumediene* factors to conclude that the petitioner detainees at Bagram Air Force Base in Afghanistan were entitled to habeas corpus review because the Suspension Clause applied to the DTA and MCA with respect to Bagram.[367] He concluded that all three factors in the *Boumediene* test weighed in favor of applying the Suspension Clause: the petitioners had been given inadequate process, the U.S. exercised sufficient control over Bagram to establish de facto jurisdiction, and the practical factors that could make extension of habeas too burdensome for the government were not substantial enough to require denying habeas corpus review.[368]

On appeal, the D.C. Circuit reversed the district court and held that the Suspension Clause did not extend to Bagram.[369] Applying the *Boumediene* factors, in a similar but more abbreviated manner, the court reached a factually different conclusion.[370] While the D.C. Circuit agreed with the district court that the detainees had been afforded insufficient process, as in *Boumediene*, the court argued that the location and practical concerns were decisive.[371] The court held that Afghanistan was an "active theater of war" and that this fact differentiated Bagram from Guantanamo Bay.[372] Thus, the detainees were not afforded habeas corpus rights.[373]

1. The District Court

Judge Bates of the District Court of the District of Columbia was one of the first to extend the three-factor *Boumediene* test and its application to a new set of detainees in a new detention facility outside of the United States.[374] When considering the foreign, "enemy combatant" detainees held in Bagram Air Force Base in Afghanistan, Judge Bates immediately saw a "close[] parallel"[375] to the facts and circumstances in *Boumediene* and went so far as to hold that "the Bagram detainees in these cases are virtually identical to the Guantanamo detainees in *Boumediene*, and the

366. Al Maqaleh v. Gates, 604 F. Supp. 2d 205 (D.D.C. 2009), *rev'd*, 605 F.3d 84 (D.C. Cir. 2010).

367. *Id.* at 232 ("Here, of course, there is a very close historical precedent—*Boumediene* itself, which compels this outcome.").

368. *Id.* at 231.

369. Al Maqaleh v. Gates, 605 F.3d 84, 99 (D.C. Cir. 2010).

370. *Id.*

371. *Id.* at 96–98.

372. *Id.*

373. *Id.*

374. *See* Al Maqaleh v. Gates, 604 F. Supp. 2d 205, 207–08 (D.D.C. 2009), *rev'd*, 605 F.3d 84 (D.C. Cir. 2010) (recognizing that this case called "for the first application of the multi-factor functional test crafted by the Supreme Court in *Boumediene*").

375. *Id.*

circumstances of their detention are quite similar as well."[376] Thus, the close historical precedent of *Boumediene* "compel[led]"[377] Judge Bates to hold that the Suspension Clause barred the MCA's jurisdiction stripping effects on the Bagram detainee's habeas corpus petitions.[378]

Judge Bates's application of the *Boumediene* factors is important for several reasons. First, the opinion's reasoning stands in stark contrast to that employed on appeal in the D.C. Circuit.[379] To begin, Judge Bates broke down the three *Boumediene* factors into a more specific grouping of six subfactors[380] that merely clarified the original *Boumediene* factors.[381] Judge Bates then concluded that three of the six factors, "citizenship, site of apprehension, and status," were "roughly the same as [they were] for the petitioners in *Boumediene*" and would weigh in favor of the detainees.[382] The adequacy of process factor weighed more heavily in favor of detainees at Bagram than at Guantanamo because the United States afforded less process in Afghanistan than it did in Cuba.[383] The remaining two factors, site of detention and practical obstacles, did pose some problems for the detainees. Yet, Judge Bates held that while Bagram was different in proximity to the United States,[384] there was still a high "objective degree of control."[385] Yet, Judge Bates also admitted that there was a lesser "objective degree of control" at Bagram than at Guantanamo.[386]

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376. *Id.* at 232.

377. *Id.*

378. *Id.* at 231.

379. The D.C Circuit's eventual reversal of Judge Bates's decision will be analyzed in the next section. *See infra* Part III.B.2.

380. The six factors are: "(1) the citizenship of the detainee; (2) the status of the detainee; (3) the adequacy of the process through which the status determination was made; (4) the nature of the site of apprehension; (5) the nature of the site of detention; and (6) the practical obstacles inherent in resolving the petitioner's entitlement to the writ." *Al Maqaleh*, 604 F. Supp. 2d at 215.

381. *See supra* notes 296–97 and accompanying text.

382. *Al Maqaleh*, 604 F. Supp. 2d at 231. The petitioners were not American citizens, they were deemed to be enemy combatants by the United States, and they were apprehended outside the sovereign territory of the United States. *Id.* at 208–09.

383. *Id.* The detainees were reviewed by an Unlawful Enemy Combatant Review Board and were unable to appeal their decision to a neutral decision-maker, making this process "less sophisticated and more error-prone" than the CRST process held unconstitutional in *Boumediene*. *Id.* at 227.

384. *Id.* at 231 ("[T]he Court does not conclude that Bagram, like Guantanamo, is 'not abroad.'").

385. *Id.* at 223. Judge Bates described the actual status of the United States presence at Bagram. The United States has both a lease and a "Status of Forces Agreement" (SOFA) with Afghanistan, which, when read together, appear to grant the United States "near-total operational control at Bagram." *Id.* at 222. The lease allows the United States exclusive use of Bagram while the SOFA allows U.S. personnel to enter and leave Afghanistan without a passport and exempts U.S. vehicles, imports, and exports from taxation and regulation. *Id.*

386. *Id.* at 223. Judge Bates recognized significant differences between Guantanmo and Bagram, and put Bagram between Guantanamo and Landsberg in *Eisentrager* on a spectrum of control. Unlike Guantanamo, Bagram was occupied by allied forces rather than just U.S. forces, making it more similar to Landsberg, while a SOFA acknowledges the sovereignty of the state on whose territory it applies—thus it recognizes actual de jure Afghani sovereignty at Bagram. *Id.* at 223 n.16. Also, the agreement at Guantanamo provides the United States

Ultimately, these differences were not enough to weigh against a finding of de facto sovereignty[387] at Bagram and did not "tip the balance" against the detainees.[388] Finally, the practical obstacles factor, while more of an issue at Bagram than at Guantanamo due to Bagram's location near an "active theater of war,"[389] distance from the United States, and potential friction with the host country, was not significant enough to counsel against the application of the Suspension Clause.[390]

While the only judge to pass on the issue at the time, in the brief interlude between the District Court decision and the D.C. Circuit's review, Judge Bates's analysis was supported by contemporaneous scholarship that saw the same parallels between Guantanamo and Bagram.[391] One scholar noted that when comparing seven similar factors between the leases at Guantanamo and Bagram,[392] it became apparent that the United States had "a similarly unconstrained, practical control over its operations in Bagram."[393] Further, the only real distinctions between Guantanamo and Bagram in the determination of the second factor lay in the fact that Guantanamo was "literally oceans away from any battlefield and, arguably, as insulated from military conflict as a naval base inside Florida."[394] Yet, such battlefield considerations seemed to be more at home in the third factor rather than the second.[395]

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with "'complete jurisdiction and control' over the military base," *id.* at 222, while the SOFA does not grant the U.S. criminal jurisdiction over Afghan workers or allied personnel, nor does it grant civil jurisdiction over claims brought by individuals. *Id.* at 223. Lastly, the United States has declared that it will remain at Bagram only as long as military operations last, and although this intent does not explicitly state a term to the lease, it is significantly different from the permanent installation at Guantanamo. *Id.* at 225.

387. *See id.* at 223 ("But the differences in control and jurisdiction set forth above do not significantly reduce the 'objective degree of control' the United States has at Bagram.").

388. *Id.* at 209.

389. *Id.* at 230. In *Boumediene*, Justice Kennedy noted that if a facility were located in an "active theater of war" the government would be accorded greater weight in the determination of the "practical" obstacles factor. Boumediene v. Bush, 553 U.S. 723, 770 (2008); *see also supra* note 318 and accompanying text. Judge Bates recognized that Bagram was in such an "active theater of war" but was not persuaded that this "dictum" from *Boumedieme* would lead to "dire" consequences. *Al Maqaleh*, 604 F. Supp. 2d at 230. The most compelling factor for Judge Bates, however, was that "[t]he only reason that these petitioners are in an active theater of war is because respondents brought them there." *Id.* at 230–31.

390. *Al Maqaleh*, 604 F. Supp. 2d at 231.

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

392. *Id.* These factors include: (1) ultimate ownership; (2) exclusive use rights; (3) right to perpetual possession, subject to U.S. termination; (4) consideration; (5) host country's lack of control over territory; (6) rights of United States to assign the agreement; and (7) the current duration of the lease. *Id.*

393. *Id.* at 493.

394. *Id.* at 494.

395. *Id.* ("Perhaps these considerations are relevant only to the third of the *Boumediene* factors: whether there are practical obstacles inherent in extending the writ.").

Lastly, Judge Bates recognized an additional factor that "tacitly informed"[396] *Boumediene*'s holding—the "length of a petitioner's detention without adequate review."[397] While unable to fully analyze this factor separately, like those explicitly recognized in *Boumediene*, Judge Bates was clear that this consideration could "shade" the determinations of other factors, such as "practical obstacles," and should be considered in the overall balancing.[398] This sentiment was reaffirmed in the decisive reasoning at the conclusion of the opinion, where Judge Bates held that the application of the Suspension Clause was even more warranted considering "that these petitioners were apprehended elsewhere more than six years ago and are only in the Afghan theater of war because the United States chose to send them there."[399]

2. The D.C. Circuit

The D.C. Circuit's opinion,[400] written by Chief Judge Sentelle, was markedly different in form and substance from Judge Bates's decision below. Rather than taking *Boumediene* as a starting point and applying the factors, the legal analysis went back to earlier precedent and gave a detailed historical recount of the lay of the land prior to *Boumediene*.[401] Recognizing that the context of the earlier cases provided much of the force of the *Boumediene* opinion, Chief Judge Sentelle concluded that the mandate from *Boumediene* was to apply the "common thread" of a functional theory of territoriality based on objective and practical concerns that ran through the *Insular Cases*, *Eisentrager*, and *Reid*.[402] Chief Judge Sentelle held that the three factors in *Boumediene* were relevant as a way to apply that "common thread,"[403] but that the context of the earlier cases also colored the application of those factors. Thus, when reviewing the District Court's decision de novo, the court reexamined Judge Bates's factual

396. Al Maqaleh v. Gates, 604 F. Supp. 2d 205, 216 (D.D.C. 2009); *see also* Boumediene v. Bush, 553 U.S. 723, 794 (2008) ("In some of these cases six years have elapsed without the judicial oversight that habeas corpus or an adequate substitute demands."); *id.* at 799–800 (Souter, J., concurring) ("A second fact insufficiently appreciated by the dissents is the length of the disputed imprisonments, some of the prisoners represented here today having been locked up for six years . . . .").

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

398. *Id.* at 216–17; *see also Boumediene*, 553 U.S. at 794–95 (majority opinion) ("While some delay in fashioning new procedures is unavoidable, the costs of delay can no longer be borne by those who are held in custody.").

399. *Al Maqaleh*, 604 F. Supp. 2d at 231.

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

401. *See id.* at 88–94; *see* Stephen Vladeck, *The D.C. Circuit After* Boumediene, 41 SETON HALL L. REV. 1451, 1454–56 (2011) (noting a debate among scholars about the D.C. Circuit's efforts in undermining the Supreme Court in many War on Terror cases, and arguing that while the D.C. Circuit has not blatantly undermined the Court, it has not necessarily been faithful in applying its precedent.).

402. *Al Maqaleh*, 605 F.3d at 93.

403. *Id.*

conclusions in each of the three *Boumediene* factors and ultimately reached a different result.[404]

a. Adequacy of Process

Chief Judge Sentelle's application of the *Boumediene* factors began with the first prong of the test, the adequacy of process. Like the District Court below, the D.C. Circuit held that this factor weighed in favor of the detainees.[405] Chief Judge Sentelle first recognized that as far as citizenship and status were concerned, the detainees at Guantanamo in *Boumediene* differed "in no material respect" from the detainees at Bagram, and as such, neither citizenship nor status would weigh against their claim to protection under the Suspension Clause.[406] Chief Judge Sentelle then held that the *Al Maqaleh* petitioners were not tried by either a military commission, as in *Eisentrager*, or by a CSRT, held to be insufficient in *Boumediene*, and agreed with Judge Bates's contention that the Unlawful Enemy Combatant Review Board afforded less protection than even a CRST.[407] Chief Judge Sentelle also agreed that "while the important adequacy of process factor strongly supported the extension of the Suspension Clause and habeas rights in *Boumediene*, it even more strongly favors petitioners here."[408]

b. Nature and Location of Detention Site

Chief Judge Sentelle moved onto the second factor and held that it weighed heavily in favor of the government.[409] Unlike Judge Bates, Chief Judge Sentelle did not find the high degree of objective control or the lease agreements dispositive and held that the "surrounding circumstances are hardly the same."[410] Chief Judge Sentelle identified a few key differences. First, the United States had not occupied Bagram as long or with the same intention of permanence as Guantanamo, which had been occupied for more than one hundred years in the face of a hostile government.[411] Bagram, conversely, had options in the lease that would have allowed the United States to remain for a longer duration, but Chief Judge Sentelle, as Judge Bates had acknowledged below,[412] found that the United States did not intend to remain at Bagram long term.[413] In addition, there was no "hostility" with the host country, unlike at Guantanamo where the U.S.-

404. *Id.* at 94.
405. *Id.* at 96 ("[T]he petitioners are in a stronger position for the availability of the writ than were either the *Eisentrager* or *Boumediene* petitioners.").
406. *Id.* at 95–96.
407. *Id.*; *see supra* note 383 and accompanying text.
408. *Id.* (quoting Al Maqaleh v. Gates, 604 F. Supp. 2d 205, 227 (D.D.C. 2009), *rev'd*, 605 F.3d 84 (D.C. Cir. 2010)).
409. *Id.* at 96–97.
410. *Id.* at 97.
411. *Id.*
412. *See supra* note 386 and accompanying text.
413. *Al Maqaleh*, 605 F.3d at 96–97.

Cuba relationship had been strained for decades.[414] Ultimately, Chief Judge Sentelle saw a closer parallel between Bagram and Landsberg prison in *Eisentrager* than with Guantanamo in *Boumediene*. Because he concluded that there was a much lesser degree of de facto sovereignty over Bagram, this factor favored the government.[415]

c. Practical Obstacles

Given that Chief Judge Sentelle had split the first two factors between the government and the petitioners, the third factor ended up being dispositive.[416] He held that not only was the government's argument for practical obstacles to adjudicating habeas petitions stronger in this case than in *Boumediene*, but that it was stronger even than that in *Eisentrager*.[417] To bolster this assertion, Chief Judge Sentelle plainly stated early in the practical obstacles analysis that "[i]t is undisputed that Bagram, indeed the entire nation of Afghanistan, remains a theater of war."[418]

By invoking the "theater of war" language, Chief Judge Sentelle was able to make several important points. First, it allowed the Chief Judge to distinguish *Boumediene*, where the Court held that "'if the detention facility were located in an *active theater of war*, arguments that issuing the writ would be impractical or anomalous would have more weight.'"[419] Further, the Court had held that threats posed by a "defeated enemy" at Landsberg, something the Court in *Eisentrager* had relied on, were not apparent at Guantanamo.[420] Considering that Afghanistan was an active theater of war, something that even Landsberg could not claim, Chief Judge Sentelle concluded that the threats at Bagram were even greater than those in either of the two previous cases.[421] Thus, Chief Judge Sentelle held that the petitioners could not credibly dispute that "all of the attributes of a facility exposed to vagaries of war are present in Bagram," and that the ability for detainees to have civil courts hear habeas petitions "would hamper the war effort and bring aid and comfort to the enemy."[422] As such, the only result consistent with *Eisentrager*, as clarified in *Boumediene*, would be to hold that the right to the writ of habeas corpus and the privilege of the Suspension Clause do not extend to Bagram.[423]

Chief Judge Sentelle did not end there but concluded with an important caveat to the holding with the potential to aid future petitioners. While holding that such consequences did not occur in this case, the Chief Judge

414. *Id.* at 97.
415. *Id.*
416. *See id.* at 97–99.
417. *Id.*
418. *Id.* at 97.
419. *Id.* at 98 (quoting Boumediene v. Bush, 553 U.S. 723, 770 (2008)) (internal quotation marks omitted).
420. *Id.* at 97 (quoting Johnson v. Eisentrager, 339 U.S. 763, 784 (1950)).
421. *Id.*
422. *Id.* at 97–98 (citing Johnson v. Eisentrager, 339 U.S. 763, 779 (1950)).
423. *Id.* at 98.

admitted that this holding created a risk of the evasion of judicial review by the military and the executive branch. This could be effected by transferring detainees into active conflict zones, "thereby granting the Executive the power to switch the Constitution on or off at will."[424] This concern would not fit neatly into either the second or third factor enumerated by the Court in *Boumediene*, but Chief Judge Sentelle noted that the Court's list in *Boumediene* was not exhaustive, and in a case where the claim was more reality than speculation, "such manipulation by the Executive might constitute an additional factor."[425] This additional factor could potentially weigh in favor of the detainees in a future claim.

IV. MOVING AWAY FROM PRACTICAL FACTORS IN JUSTICE KENNEDY'S FUNCTIONALIST TEST

The disparate outcomes of the *Boumediene* and *Al Maqaleh* litigations set out in Part III highlight several issues that hinder clear extraterritorial habeas corpus jurisprudence, both for detainees seeking habeas protection and for judges trying to adjudicate their claims. The D.C. Circuit's decision has created two classes of detainees. One class, that at Guantanamo Bay, has access to the federal courts to seek release, while the other remains in a legal black hole at Bagram.[426] While appellate review still remains a possibility, Judge Bates's recent decision to dismiss Al Maqaleh's amended habeas corpus petition only highlights the direness of his legal prospects.[427] Thus, the *Boumediene* and *Al Maqaleh* schism, and the current status of detainees outside of Guantanamo, place a renewed focus on functionalism and a need to reevaluate Justice Kennedy's expression of this doctrine. For functionalism to remain a vital part of constitutional adjudication, Justice Kennedy's test must change.

Part IV of this Note advocates for changes to Justice Kennedy's three-factor test to better serve his stated goals of protecting individual liberty and preserving the separation of powers.[428] Part IV.A revisits the D.C. Circuit's opinion in *Al Maqaleh* and analyzes how that court diverged from both the district court and the Supreme Court in *Boumediene*. Part IV.B proposes a new test that moves away from the "practical obstacle" factor and toward a new factor that was a recurrent theme in the *Boumediene* and *Al Maqaleh*

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424. *Id.* (internal quotation marks omitted); *see* Nelson Berardinelli, Boumediene v. Bush*: Does It Really Curtail Executive Manipulation?*, 37 OHIO N.U. L. REV. 169, 197 (2011) (seeking the adoption of executive manipulation as a *Boumediene* factor); Luke R. Nelson, Note, *Territorial Sovereignty and the Evolving* Boumediene *Factors:* Al Maqaleh v. Gates *and the Future of Detainee Habeas Corpus Rights*, 9 U.N.H. L. REV. 297, 319–20 (2011) (same).

425. *Al Maqaleh*, 605 F.3d at 98–99 (noting that the Court in *Boumediene* held that there were "at least three factors" (citing Boumediene v. Bush, 553 U.S. 723, 776 (2008))). The Chief Judge cabined this caveat, however, cautioning that in order to deliberately "turn off the Constitution" the executive would have had to have predicted the *Boumediene* result before it had been decided. *Id.* at 99.

426. *See supra* notes 1–12 and accompanying text.

427. *See supra* notes 14–16 and accompanying text.

428. *See supra* notes 298–304 and accompanying text.

litigations—the abuse or avoidance of process. This updated and reorganized set of factors allows for a more predictable brand of functionalism that both permits the government the flexibility to determine constitutionally sound procedural rights, as well as protect individuals from executive overreach.

A. The D.C. Circuit's Al Maqaleh v. Gates *Opinion Revisited*

There were factual differences between *Boumediene* and *Al Maqaleh*, but the juxtaposition of Judge Bates's decision below and the D.C. Circuit's reversal show that the D.C. Circuit more strongly emphasized inherent military necessity in the "practical obstacles" factor. Judge Bates observed that the situations of the detainees at Guantanamo and Bagram were "virtually identical" and he felt "compelled" to hold as *Boumediene* did, applying the Suspension Clause to the MCA's jurisdiction-stripping at Bagram.[429] Further, to get to that holding, Judge Bates's analysis of the factors was thorough, noting the similar standing of the detainees, carefully comparing the locations of Guantanamo and Bagram, and scrutinizing the government's "practical obstacles" argument.[430] This analysis was supported by scholarship that analyzed the two leases and found them to be almost identical.[431]

In contrast, the D.C. Circuit's review of the facts was less comprehensive. Chief Judge Sentelle agreed with the district court that the adequacy of process factor weighed in favor of the detainees, but as to the other two factors, there was little accord.[432] For the second factor, site of detention, Chief Judge Sentelle looked beyond the leases themselves, and found the circumstances at Bagram to be different than those at Guantanamo.[433] Chief Judge Sentelle focused on the lesser degree of permanence at Bagram, characterized by the intent to leave at some point in the future.[434] Yet, while these concerns were substantial enough to be addressed in *Boumediene*,[435] the scope of control analysis performed by Judge Bates's opinion found that the United States had near total operational control at Bagram.[436] Further, he held that this consideration outweighed concerns about permanence and jurisdiction and held that the disposition of this factor favored the detainees.[437] Thus, the D.C. Circuit did not give enough credence to the practical autonomy that the United States had at Bagram. The relative weakness of the D.C. Circuit's analysis of the second factor suggests that it bypassed the similarities of

429. *See supra* notes 375–78 and accompanying text.
430. *See* discussion *supra* Part III.B.1.
431. *See supra* notes 392–93 and accompanying text.
432. *Compare supra* notes 384–90, *with supra* notes 405–23 and accompanying text.
433. *See supra* note 409 and accompanying text.
434. *See supra* notes 411–15 and accompanying text.
435. *See supra* notes 310–13 and accompanying text.
436. *See supra* notes 384–85 and accompanying text.
437. *See supra* notes 385–86 and accompanying text.

Guantanamo and Bagram, and instead focused on the meat of its argument—military necessity in the "practical obstacles" factor.

The disposition of the third factor, "practical obstacles," was where the D.C. Circuit most significantly diverged from the district court and the holding of *Boumediene*. This factor turned on a small piece of Justice Kennedy's "practical obstacles" analysis, where he cautioned that the Government's case would have had more weight had the detention facility been located in an "active theater of war."[438] The district court's and D.C. Circuit's analyses of this element could not have been more different. Judge Bates acknowledged that Bagram was in an "active theater of war," but gave more weight to the fact that the United States had sufficient control over Bagram and had intentionally moved the detainees there.[439] Thus, Judge Bates held that this factor weighed in favor of the detainees.[440]

Chief Judge Sentelle, however, relied almost entirely on the "active theater of war" language and recalled the precedent of *Eisentrager* where the Court had denied habeas corpus review to detainees in post-war Europe.[441] Since Bagram was located in an "active theater of war," the government had a better case than in either *Eisentrager* or *Boumediene*.[442] Invoking language reminiscent of the military necessity cases,[443] Chief Judge Sentelle held that all the "vagaries of war" were present at Bagram, and granting the petitioners habeas corpus rights would "bring aid and comfort to the enemy."[444] Thus, this factor weighed in favor of the government and, combined with the second factor, counseled against the application of the Suspension Clause and habeas corpus review.[445] Having weighed the close determination of the second factor in favor of the government, Chief Judge Sentelle held that the Constitution and the Suspension Clause did not travel to Guantanamo.[446]

After comparing the D.C. Circuit's alternate determinations of the second and, particularly, the third factors to those of the district court, it becomes clear that the district court's holding undermines, if not clashes with, the spirit of Justice Kennedy's *Boumediene* decision. To be sure, as Justice Kennedy held in *Boumediene*, the location of a detention site in an "active theater of war" has bearing on the determination of that factor.[447] Yet, *Boumediene* did not hold that an "active theater of war" would be dispositive; rather, it would "carry more weight."[448]

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438. *See supra* text accompanying note 318.
439. *See supra* notes 386–89 and accompanying text.
440. *See supra* note 390 and accompanying text.
441. *See supra* text accompanying notes 419–21.
442. *See supra* text accompanying note 421.
443. *See* discussion *supra* Part II.B.1–3.
444. *See supra* text accompanying note 422.
445. *See supra* text accompanying note 423.
446. *See supra* text accompanying note 423.
447. *See supra* text accompanying note 318.
448. *See supra* text accompanying note 318.

Further, the spirit of Justice Kennedy's opinion was twofold. First, he espoused a flexible and context-driven test based on objective factors.[449] Second, Justice Kennedy paid special attention to the important protections that the writ of habeas corpus provided throughout American history and the separation of powers principles that informed the writ's purpose.[450] There were opportunities for the majority in *Boumediene* to defer to the executive and military,[451] but as Chief Justice Roberts and Justice Scalia protested in their dissents, the majority refused to defer to the political branches.[452] Thus, while the three-factor test was the relevant legal test for the *Al Maqaleh* decision, it was passed down with a spirit of judicial independence from the political branches and emphasis on the protection of individual rights.[453] It was this spirit that was missing from the D.C. Circuit's opinion, where it was instead replaced with an emphasis on military necessity and deference to the executive branch.

Even so, it would be hard to call the D.C. Circuit's decision an anomaly. Given the freedom to invoke military necessity through the "active theater of war" and "practical obstacles" language, the D.C Circuit had a powerful argument against extending the Suspension Clause to Bagram, just as Justice Scalia echoed in his *Boumediene* dissent with respect to Guantanamo.[454] Ultimately, the *Al Maqaleh* decision is as much a symptom of the easily manipulated functionalist test[455] set out by Justice Kennedy in *Boumediene* as it is as about the D.C. Circuit's choice to look past *Boumeidene*'s spirit and precedent.

B. A New Functional Test

This section proposes two changes to Justice Kennedy's three part functionalist test. The first looks to cabin the effect that military necessity has on the "practical obstacles" factor by either redefining or removing the "active theater of war" language from the functionalist analysis. The second advocates for the addition of another factor, abuse or avoidance of process, which places a renewed emphasis on Justice Kennedy's commitment to protection of the individual.

1. Moving Away from Military Necessity in the "Practical Obstacles" Factor

Given the unpredictable and highly contested nature of the Supreme Court's jurisprudence in the extraterritoriality and military necessity cases discussed in Parts II and III, the differences between *Boumediene* and *Al Maqaleh* should not come as a surprise. The Court's difficulties in

449. *See supra* notes 291–97 and accompanying text.
450. *See supra* notes 298–303 and accompanying text.
451. *See supra* notes 314–20 and accompanying text.
452. *See supra* notes 337–39, 352 and accompanying text.
453. *See supra* notes 302–04 and accompanying text.
454. *See supra* Part III.A.3.
455. *See supra* text accompanying note 91.

adjudicating military necessity and balancing expediency and individual rights have resulted in confusing and often highly criticized holdings.[456] *Milligan*, a stern rebuke of executive overreach, only stood for a few years before being effectively overruled by the more deferential *McCardle*.[457] *Korematsu* put the Supreme Court's stamp of approval on the military's internment of Japanese American citizens, while the companion case of *Endo*, which ended the internment, has been essentially forgotten.[458] The six-to-three *Youngstown* decision was a sharp deviation from *Korematsu*, but was justified via six competing concurrences, each with a different reason for why the President's actions were unconstitutional.[459]

Despite their differences, the underlying theme of all of these cases is the Court's struggle to determine its role in the adjudication of military necessity. As Justice Jackson argued in dissent in *Korematsu*, military judgments are not "susceptible of intelligent judicial appraisal" and the courts should avoid passing judgment on the reasonableness of military commands.[460] Further, once the Court reviews and approves that command, it becomes constitutional law, which other courts are bound to follow.[461] Judicial decisions predicated on review of military commands, as Justice Jackson cautioned, often create bad constitutional precedent.[462]

These warnings ring true when confronted with the highly subjective nature of Justice Kennedy's functionalist test and the D.C. Circuit's application of "active theater of war" rationale in the "practical obstacles" factor. The reliance on military necessity that drove the D.C. Circuit in *Al Maqaleh*,[463] similar to the majority's reliance on it in *Korematsu*,[464] may have appeared as expedient or deferential at the time of the decision. Yet, what is at one time military necessity may not appear to be so five, ten, or even fifty years later. As was the case with Japanese American internment during the Second World War, such decisions may be viewed in a completely different light when the threat has subsided.[465] This point is highlighted by Justice O'Connor in *Hamdi* where, on one hand, she authorized the indefinite detention of suspected terrorists under the AUMF but, on the other, she recognized that the case for this kind of military necessity has the tendency to "unravel" over time.[466] The question then becomes: Should the Constitution and its related jurisprudence rely on such shifting foundations? This Note argues that it should not.

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456. *See* discussion *supra* Part II.B.1–3.
457. *See* discussion *supra* Part II.B.1.
458. *See* discussion *supra* Part II.B.2.
459. *See supra* notes 263–66 and accompanying text.
460. *See supra* note 245 and accompanying text.
461. *See supra* note 244 and accompanying text.
462. *See supra* note 243 and accompanying text.
463. *See* discussion *supra* Part III.B.2.c.
464. *See* discussion *supra* Part II.B.2.
465. *See supra* note 227 and accompanying text.
466. *See supra* note 57 and accompanying text.

The goal for a sounder functionalist test should be to limit the effect that military necessity can have on the overall balancing of the functionalist factors. While there are several ways to do this, this Note advocates for one of two solutions. First, the "active theater of war" dictum[467] should be removed from the "practical obstacles" factor. This term is loaded with the same military necessity concerns mentioned above and, as was the case with the D.C. Circuit in *Al Maqaleh*, can swing a functionalist analysis.[468]

Alternatively, if the "active theater of war" language is to remain, it must be redefined, because it is unclear what Justice Kennedy meant by the term in the first place.[469] Yet, Judge Bates's emphasis on looking to the actual security and practical limitations at the detention facility itself, independent of the overall "active theater of war" in Afghanistan, was a step in the right direction. Simply put, the availability of valuable constitutional rights should not turn on oblique dictum[470] buried in a Supreme Court decision.

2. Moving Toward "Abuse or Avoidance of Process"

A recurring concern in many of the *Boumediene* and *Al Maqaleh* opinions was the difficult and thorny problem of the length of a detainee's detention—essentially, the abuse or avoidance of process by the executive. Justice Kennedy's majority opinion in *Boumediene* touched on such considerations. There, he recognized that the detainees had been held for six years without any kind of judicial scrutiny.[471] Justice Kennedy also voiced concerns about manipulation of constitutional rights by moving detainees away from where process could reach them.[472] And Justice Souter also raised this concern even more pointedly in his concurrence, going so far as to suggest that length of detention without process should be an additional factor in the functionalist analysis.[473] Judge Bates, picking up on both Justice Kennedy's and Souter's concerns, called the length of detention without adequate review an additional factor that could "shade" the determination of all the others.[474] Even in the D.C. Circuit's opinion in *Al Maqaleh*, which did not extend the Suspension Clause, Chief Judge Sentelle explicitly recognized the danger presented by an executive that could shield detainees from the federal courts by transferring them to active combat zones.[475] He went on to admit that such concerns could lead to an additional factor.[476]

In light of the D.C. Circuit's reasoning, the *Al Maqaleh* detainees made arguments in the district court, supported by reports from *The New York*

467. *See supra* note 389 and accompanying text.
468. *See* discussion *supra* Part III.B.2.
469. *See supra* notes 318, 389 and accompanying text.
470. *See supra* note 389 and accompanying text.
471. *See supra* note 324 and accompanying text.
472. *See supra* notes 302–04 and accompanying text.
473. *See* discussion *supra* Part III.A.2.
474. *See supra* notes 397–98 and accompanying text.
475. *See supra* notes 424–25 and accompanying text.
476. *See supra* note 425 and accompanying text.

Times and *Associated Press*, that the military has been shuffling detainees away from Guantanamo to Bagram.[477] Further, these stories are only part of a more general policy pursued by the executive branch to keep detainees away from the ambit of the federal courts.[478] Despite the fact that Al Maqaleh recently lost on this argument before Judge Bates for failure to present enough new evidence,[479] future cases may have enough evidence to advance this theory. Therefore, for a new functionalist test to be relevant in this climate of executive manipulation, the courts must be able to weigh in on and scrutinize the actions of the political branches. As Justice Kennedy cautioned in *Boumediene*, the separation of powers principles that inform the Suspension Clause and the writ of habeas corpus, "must not be subject to manipulation by those whose power it is designed to restrain."[480] Thus, a new factor, one that squarely addresses concerns of executive manipulation, must be explicitly added to the three-factor *Boumediene* test. This Note proposes a new fourth factor, entitled "abuse or avoidance of process."

Admittedly, these remedies to the functionalist three-factor test are not easy ones. Chief Justice Roberts's and Justice Scalia's dissents in *Boumediene*[481] and the D.C. Circuit's opinion in *Al Maqaleh*[482] provide powerful arguments that would caution against this change. The threat of global terrorism and the need for the political branches to have adequate freedom to respond to that threat are pressing. However, the need to protect individual rights is equally, if not more, pressing. The Framers saw the writ of habeas corpus as an essential part of the common law and protected it in the Constitution via the Suspension Clause.[483] The Framers also viewed the writ as one of the chief protections for individuals against the overreach of the government: a "bulwark against arbitrary punishment."[484] A rule that ensures that the government cannot too easily sidestep the consequences of its actions, even when those actions are abroad, was also a major goal of Justice Kennedy's *Boumediene* holding.[485] In the hope of better preserving that goal, this change to the "practical obstacles" factor and the addition of the "abuse or avoidance of process" factor will better ensure that the Court's functionalist jurisprudence does not warp into a test dominated by military necessity that can "switch the Constitution on or off at will."[486]

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477. *See supra* notes 14–15 and accompanying text.
478. *See supra* note 15 and accompanying text.
479. *See supra* note 16 and accompanying text.
480. Boumediene v. Bush, 553 U.S. 723, 766 (2008); *see supra* note 304 and accompanying text.
481. *See* discussion *supra* Part III.A.3.
482. *See* discussion *supra* Part III.B.2.
483. *See supra* note 43 and accompanying text.
484. *See supra* note 42 and accompanying text.
485. *See supra* notes 302–04 and accompanying text.
486. Boumediene v. Bush, 553 U.S. 723, 765 (2008); *see also supra* note 303 and accompanying text.

CONCLUSION

The D.C. Circuit's deference to the military in its *Al Maqaleh* decision departed from the spirit of the Supreme Court's holding in *Boumediene*. *Boumedieme* extended the Suspension Clause of the Constitution to detainees at Guantanamo Bay who were seeking to file habeas corpus petitions in U.S. courts.[487] Justice Kennedy's functionalist *Boumediene* test, while well-intentioned, was overly subjective and has unsurprisingly resulted in jurisprudential uncertainty. The consequent schism between *Boumediene* and *Al Maqaleh* has effectively created two classes of War on Terror detainees: detainees lucky enough to be held at Guantanamo Bay with access to the U.S. courts to seek release, and everyone else.[488] Further, the current formulation of the test, particularly the third factor, "practical obstacles," can easily be warped by the undue influence of military necessity. Drawing on the jurisprudence of cases like *Milligan*,[489] *Korematsu*,[490] and *Youngstown*,[491] this Note concludes that the Court's controversial history with military necessity makes the issue not "susceptible of intelligent judicial appraisal."[492] As such, for the functionalist test to remain faithful to Justice Kennedy's commitment to individual rights in *Boumediene*,[493] the "practical obstacles" factor must be purged of the influence of military necessity. Lastly, with growing concern about the executive's willingness to manipulate this inequity in availability of habeas corpus,[494] this Note recommends a new factor, "abuse or avoidance of process," to ensure that Justice Kennedy's commitment to separation of powers principles and individual rights, remains at the forefront of his functionalist test.

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487. *See supra* note 325 and accompanying text.
488. *See supra* notes 1–14 and accompanying text.
489. *See* discussion *supra* Part II.B.1.
490. *See* discussion *supra* Part II.B.2.
491. *See* discussion *supra* Part II.B.3.
492. Korematsu v. United States, 323 U.S. 214, 245 (1944) (Jackson, J., dissenting); *see supra* note 245 and accompanying text.
493. *See supra* notes 298–301 and accompanying text.
494. *See supra* notes 14–16 and accompanying text.