

PAINTING OURSELVES INTO A CORNER: THE FUNDAMENTAL PARADOXES OF MODERN WARFARE IN *AL MAQALEH V. GATES*

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*See how few of the cases of the suspension of the habeas corpus law, have been worthy of that suspension. They have been either real treason, wherein the parties might as well have been charged at once, or sham plots, where it was shameful they should ever have been suspected. Yet for the few cases wherein the suspension of the habeas corpus has done real good, that operation is now become habitual and the minds of the nation almost prepared to live under its constant suspension.*¹

INTRODUCTION

On a cold December morning in 2002, United States military personnel entered a small wire cell at Bagram Airfield, in the Parwan province of Afghanistan. There, they found Dilawar, a 20-year-old Afghan taxi driver, hanging naked and dead from the ceiling.² The air force medical examiner who performed Dilawar's autopsy reported his legs had been beaten so many times the tissue was "falling apart" and "had basically been pulpified."³ The medical examiner ruled his death a homicide, the result of an interrogation lasting four days as Dilawar stood naked, his arms shackled over his head while U.S. interrogators performed the "common peroneal strike," a debilitating blow to the side of the leg above the knee.⁴ The U.S. military detained Dilawar because he

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¹ Letter from Thomas Jefferson to James Madison (July 31, 1788), in THOMAS JEFFERSON: THOUGHTS ON WAR AND REVOLUTION, at 73 (Brett E. Woods ed., 2009).

² TAXI TO THE DARK SIDE (Jigsaw Productions, Inc. 2007).

³ LAUREL E. FLETCHER & ERIC STOVER, THE GUANTÁNAMO EFFECT: EXPOSING THE CONSEQUENCES OF U.S. DETENTION AND INTERROGATION PRACTICES 31 (2009) (internal quotation marks omitted).

⁴ *Id.* at 31–32. Private Willie Brand, one of the Bagram guards prosecuted for prisoner abuses, said in interviews that the knee strikes were taught at Bagram as a basic way to gain prisoner compliance, even though they were only supposed to be used for self-defense. Tim Golden, *Abuse Cases Open Command Issues at Army Prison*, N.Y. TIMES, Aug. 8, 2005, at 1, available at <http://www.nytimes.com/2005/08/08/national/nationalspecial3/08bagram.html?pagewanted=all>. Brand said, "So you just give them a common peroneal strike and yank [the hood] down and be on your merry way. . . . It just seemed like the way to control people." *Id.*

drove his taxi too close to a U.S. base at the wrong time, not because it found him setting up an improvised explosive device near a routine transport route, nor because he took up arms with the Taliban.⁵

Dilawar's horrific death was one of many prisoner abuses at Bagram Airfield since late 2001, thrusting the base into the national spotlight as the *New York Times* and other media outlets began to investigate the abuses at Bagram.⁶ In the wake of this increased international scrutiny and the United States Supreme Court's decision opening federal courts to detainee habeas challenges from Guantánamo Bay Naval Base in *Boumediene v. Bush*,⁷ detainees at Bagram filed habeas suits in federal court to seek release.⁸ The United States District Court for the District of Columbia ("District Court") consolidated these cases into a single action, *Al Maqaleh v. Gates*, and held in August 2009 that the Bagram detainees could indeed seek habeas relief in domestic courts.⁹ However, the United States Court of Appeals for the District of Columbia ("D.C. Circuit") reversed this decision in May 2010 because the detainees' location in an active "theater of war" precluded their access to federal courts under *Boumediene*.¹⁰

The D.C. Circuit's reversal revealed a fundamental paradox in the government's approach to the Afghan conflict and the "war on terror."¹¹ Presidents Obama and Bush have insisted the nation cannot be at "war" with al Qaeda and therefore the protections of the Geneva Conventions and other international law

⁵ TAXI TO THE DARK SIDE, *supra* note 2; see also Tim Golden, in *U.S. Report, Brutal Details of 2 Afghan Inmates' Deaths*, N.Y. TIMES, May 20, 2005, at 1, available at www.nytimes.com/2005/05/20/international/asia/20abuse.html. The *New York Times* reported Dilawar, the son of an Afghan farmer, went to the provincial capital to get gas money for his new taxi and picked up three men. *Id.* He headed back towards his village and passed Camp Salerno, an American base that had been attacked by rockets that morning. *Id.* Local militia stopped Dilawar at a checkpoint and turned him and his passengers over to American soldiers. *Id.* Dilawar's passengers were eventually detained at Guantánamo for more than a year before being sent home without a charge and said their treatment at Bagram was far worse than Guantánamo. *Id.*

⁶ See *Bagram News Archive*, INT'L JUST. NETWORK, www.ijnetwork.org/bagram-news-room-52/72-bagram-news-archive (last updated Jan. 16, 2008).

⁷ *Boumediene v. Bush*, 553 U.S. 723 (2008). The landmark *Boumediene* case held United States' "war on terror" detainees at Guantánamo Bay could not be denied access of the writ of habeas corpus simply because their site of detention was outside the territorial United States. For further discussion of the case, see *supra* Part II(C).

⁸ See *Al Maqalah v. Rumsfeld*, No. 1:06-CV-01669 (D.D.C. Sept. 28, 2006); *Wazir v. Rumsfeld*, No. 1:06-CV-01697 (D.D.C. Sept. 29, 2006); *Al-Bakri v. Bush*, No. 1:08-CV-01307 (D.D.C. July 28, 2008); *Al-Najar v. Gates*, No. 1:08-CV-02143 (D.D.C. Dec. 10, 2008).

⁹ *Al Maqaleh v. Gates*, 604 F. Supp. 2d 205, 232 (D.D.C. 2009), *rev'd* 605 F.3d 84, 98 (D.C. Cir. 2010).

¹⁰ *Al Maqaleh*, 605 F.3d at 98. Military theorist Carl von Clausewitz defined the theater of war as "a portion of the space over which war prevails . . . [consisting of] fortresses, or important natural obstacles presented by the country, or even in its being separated by a considerable distance from the rest of the space embraced in the war." CARL VON CLAUSEWITZ, *ON WAR: MILITARY FORCES* 256 (J.J. Graham trans., N. Trübner ed. 1873) (1832).

¹¹ See President George W. Bush, Declaration of War on Terrorism (Sept. 20, 2001) (transcript available at <http://www.britannica.com/bps/additionalcontent/8/398253/Document-George-W-Bush-Declaration-of-War-on-Terrorism>).

do not apply to nor protect captured persons.¹² When the Bagram detainees challenged the legality of their detentions, the D.C. Circuit deferred to the executive's judgment and denied habeas relief because Bagram was in an "active theater of war in a territory under neither the *de facto* nor the *de jure* sovereignty of the United States."¹³ This paradox puts Bagram detainees in a legal "black hole"¹⁴ where they cannot obtain relief through traditional military justice (like Geneva-governed military commissions) and domestic courts refuse to hear their habeas claims.

This Note argues the Bagram detainees are entitled to the same habeas access the Supreme Court granted the Guantánamo Bay detainees in *Boumediene*. The two groups are sufficiently similar both in the context of their captures and the degree of control the U.S. exercises over their sites of detention. Moreover, treating detainees like prisoners, rather than combatants, is a crucial step toward conducting the war on terror in a way consummate with international humanitarian values, including individual dignity, minimization of civilian harm, and discriminate use of force. Though this Note skirts the torture debate, the abuses at Bagram are actually symptomatic of larger accountability issues in American military policy that deserve deeper scrutiny. Although the D.C. Circuit's decision in *Al Maqaleh v. Gates* identified valid practical military concerns inherent in an "active theater of war," such as access to judicial functions and presentation of sensitive evidence, these concerns are not insurmountable. While courts should not discard claims of military necessity, the D.C. Circuit's reasoning in *Al Maqaleh* demonstrates applying anachronistic precedent to habeas cases involving the practical concerns of modern warfare leads to contradictory results. The nation is at war, but it refuses to treat the people it detains as prisoners of war.

This paradoxical outcome ultimately stems from legislative inaction and requires Congress to overhaul its approach to military actions in the Middle East. Part I of this Note presents the case law federal courts rely upon in determining habeas rights during military conflict. Part II analyzes the interaction between the Supreme Court's precedent and the detention developments at Guantánamo Bay. Part III reviews the conditions at Bagram Airfield and the District Court's reversal in *Al Maqaleh v. Gates*. Part IV analyzes the D.C. Circuit's opinion and its paradoxical use of the "active theater of war" concept,

¹² See Eric Schmitt, *Afghan Prison Poses Problem in Overhaul of Detainee Policy*, N.Y. TIMES, Jan. 26, 2009, http://www.nytimes.com/2009/01/27/washington/27bagram.html?page_wanted=all.

¹³ *Al Maqaleh v. Gates*, 605 F.3d 84, 98 (D.C. Cir. 2010) (emphasis omitted). De jure sovereignty refers to "formal" or "technical" sovereignty, like formal recognition of authority by the government vis-à-vis other governments, and is generally considered a political question. Anthony J. Colangelo, "De Facto Sovereignty": *Boumediene and Beyond*, 77 GEO. WASH. L. REV. 623, 626 (2009). De facto sovereignty, on the other hand, looks at practical control and jurisdiction over a territory, like the laws and legal system governing the territory. *Id.* De facto sovereignty is a type of political question as well, but the Court may look to determinations of the executive or legislature governing jurisdiction and control over the territory to determine if de facto sovereignty even exists. *Id.*

¹⁴ Geoffrey S. Corn, *What Law Applies to the War on Terror?*, in THE WAR ON TERROR AND THE LAWS OF WAR: A MILITARY PERSPECTIVE 1, 7 (Michael W. Lewis ed., 2009) [hereinafter Corn, *What Law Applies*]. Corn uses the term to describe the status of captured al Qaeda operatives, and it certainly applies to Afghan detainees as well.

which ultimately resulted in a misapplication of the *Boumediene* factor test. Part V considers the nature of the armed conflict in Afghanistan in light of military and legal definitions, given its context in the worldwide war on terror. Part VI offers solutions for resolving the detention status of Bagram detainees that require a revision of legislative and executive policy and a reconsideration of “just war” theory in order to bring the war on terror back in line with fundamental American and international values.

I. OUTDATED ANALOGIES: A BRIEF HISTORY OF MILITARY CONFLICT IN AMERICAN COURTS

The opinions in *Al Maqaleh* exemplify the typical line of cases federal courts cite when analyzing detainees’ habeas claims, stretching all the way back to the Civil War. These cases focus on one of the only legal vehicles foreign nationals held by the U.S. have to challenge their detentions: the Suspension Clause.¹⁵ It provides: “The Privilege of the Writ of Habeas Corpus shall not be suspended, unless in Cases of Rebellion or Invasion the public Safety may require it.”¹⁶ Therefore, while the Suspension Clause allows Congress to suspend the writ, it also implies that citizens will retain habeas rights in all instances that do not involve rebellion, invasion, or public safety.¹⁷ Noncitizen detainees have successfully used the Suspension Clause to challenge their detentions, arguing that they have a right to the writ by virtue of being held in U.S. custody.¹⁸ However, the D.C. Circuit’s struggle with applying a legal framework to a modern theater of war reveals federal precedent is ill-equipped to deal with the changing realities of warfare, as the analysis is highly contextual and development of military technology and tactics often outpaces the judiciary’s ability to distinguish between permissible and impermissible uses of executive power.

Suspension Clause cases generally outline the parameters of executive power during wartime, both domestically and internationally. A brief overview of the three main eras of Suspension Clause cases—the Civil War, World War II, and the Cold War—is necessary in order to understand the mindset of the modern federal judiciary when it attempts to analogize current problems to old solutions.

¹⁵ For comprehensive listing and discussion of cases, see Michael A. Rosenhouse, *Construction and Application of Suspension Clause of United States Constitution*, *U.S. Const. art. I, § 9, cl. 2*, 31 A.L.R.6th (2008).

¹⁶ U.S. CONST. art. I, § 9, cl. 2.

¹⁷ Amanda L. Tyler, *Is Suspension a Political Question?*, 59 *STAN. L. REV.* 333, 336 (2006); see also *Ex Parte Merryman*, 17 F. Cas. 144, 152 (C.C.D.Md. 1861).

¹⁸ The Clause protects the rights of the detained by affirming the duty and authority of the Judiciary to call the jailer to account. . . . ‘The important fact to be observed in regard to the mode of procedure upon this [habeas] writ is, that it is directed to, and served upon, not the person confined, but his jailer.’

Boumediene v. Bush, 553 U.S. 723, 745–67 (2008) (citations omitted).

A. *Limiting the Reach of Martial Law in Intrastate War: The Civil War Era*

Well before the Geneva Conventions of 1949, federal courts identified an enduring principle: humanitarian needs and military necessity are natural enemies of each other and extra scrutiny is necessary to ensure a harmonious balance between the two.¹⁹ This concept most powerfully arose out of two Civil War Suspension Clause cases: *Ex Parte Merryman*²⁰ and *Ex Parte Milligan*.²¹ After Chief Justice Taney issued a writ of habeas corpus in *Merryman* to secure the release of a Confederate sympathizer in Maryland, the army ignored his order.²² Taney's subsequent blistering opinion emphasized that only Congress has the power to suspend habeas corpus, not the president.²³ Furthermore, Taney insisted the U.S. government was "one of delegated and limited powers"²⁴ and the president cannot "by force of arms, thrust aside the judicial authorities and officers to whom the constitution has confided the power and duty of interpreting and administering the laws, and substitute[] a military government in its place."²⁵ Lincoln, of course, ignored Taney.²⁶

The Supreme Court issued a similar edict five years later in *Milligan*, but the decision came down too late to effectively influence Lincoln's prosecution of the war.²⁷ Justice David Davis recognized: "Martial law . . . destroys every guarantee of the Constitution . . . Civil liberty and this kind of martial law cannot endure together; the antagonism is irreconcilable; and, in the conflict, one or the other must perish."²⁸ Given the choice between military necessity and civil liberty, the Court favored civil liberty, finding a suspected Confederate's indefinite detention in Illinois, outside the area of active hostilities (or theater of war), in violation of the Suspension Clause.²⁹ Because the civilian courts in Illinois were open and operating, the president lacked the constitutional authority to suspend the writ of habeas corpus and establish a system of military justice in its place.³⁰

Merryman and *Milligan* hold intrastate war is not a blank check for the president to substitute military judgment for domestic law.³¹ *Merryman* high-

¹⁹ BRIAN R. DIRCK, *WAGING WAR ON TRIAL: A HANDBOOK WITH CASES, LAWS, AND DOCUMENTS* 35–36 (2003).

²⁰ *Merryman*, 17 F. Cas. at 144, 147. Taney, as Chief Justice, wrote the opinion sitting circuit for the United States Circuit Court for the District of Maryland. *Id.* at 147.

²¹ *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2 (1866).

²² DIRCK, *supra* note 19, at 88.

²³ *Merryman*, 17 F. Cas. at 148.

²⁴ *Id.* at 149.

²⁵ *Id.* at 152.

²⁶ DIRCK, *supra* note 19, at 88. A month later, in defense of his action, Lincoln famously noted before Congress that enforcement of Taney's decision would let "all the laws, but one, go unexecuted, and the government itself go to pieces, lest that one be violated." Stephen I. Vladeck, *The Detention Power*, 22 *YALE L. & POL'Y REV.* 153, 163 (2004). For more details on Lincoln's rebuke, see *id.* at 162–64.

²⁷ DIRCK, *supra* note 19, at 99–100.

²⁸ *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2, 124–25 (1866).

²⁹ *Id.* at 127.

³⁰ *Id.*

³¹ Justice Sandra Day O'Connor echoed this sentiment in her *Hamdi v. Rumsfeld* plurality opinion when she wrote, "[A] state of war is not a blank check for the President when it

lights the difficult position of courts during times of war; the judiciary's opinions are not self-enforcing and courts must walk a line between vindicating civil liberties and recognizing the need for military discretion in some cases.³² While *Milligan*'s protection of civil liberty is admirable, Lincoln chose not to ignore the decision because peace and a sense of security had been reestablished in the nation after General Lee surrendered.³³ *Merryman*'s language, on the other hand, more strongly rebuked the President's claims, but because of its wartime setting, it has joined *Worcester v. Georgia*³⁴ as an example of the executive's willingness to flaunt the court's opinions during times of crisis.³⁵

B. *Expanding Obligations in International War: The World War II Cases*

Nearly 75 years later, the Supreme Court revisited its stance on the habeas rights of prisoners to provide for more executive deference in *Ex Parte Quirin*³⁶ and *Johnson v. Eisentrager*,³⁷ this time during an interstate conflict. The two cases broadened the definition of "enemy combatant" to include enemy foreign nationals while insisting upon humane treatment for those captured by the United States during World War II.³⁸ *Quirin* involved eight German saboteurs, including one American citizen, captured on U.S. soil, clearly outside a theater of war.³⁹ Although the suspected spies claimed that under *Milligan* the president lacked the authority to try their cases in front of military tribunals because civilian courts were open and functioning,⁴⁰ the Supreme Court found Congress' Articles of War divested any civilian court the authority to hear the saboteurs' claims without violating the Suspension Clause.⁴¹ Five days after

comes to the rights of the Nation's citizens." *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004). For discussion on this, see *infra* Part II(A).

³² See Robert J. Pushaw, Jr., *Creating Legal Rights for Suspected Terrorists: Is the Court Being Courageous or Politically Pragmatic?*, 84 NOTRE DAME L. REV. 1975, 2051 (2009).

³³ DIRCK, *supra* note 19, at 99–100.

³⁴ *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832). The Supreme Court held President Andrew Jackson could not constitutionally remove the Cherokee tribe in Georgia, but Jackson proceeded with the infamous Trail of Tears anyway. Ethan Davis, *An Administrative Trail of Tears: Indian Removal*, 50 AM. J. LEGAL HIST. 49, 62–63 (2010).

³⁵ *Merryman* also retains little precedential value because it was an "in-chambers" opinion. Typically, Circuit Judges would either grant or deny a habeas petition and only occasionally would issue a short opinion with the decision. This opinion would not circulate among the rest of the court before the decision was released. Regardless, Taney personally forwarded the opinion to President Lincoln, determined to embarrass the administration to the greatest degree possible. See Frank J. Williams et al., *Still A Frightening Unknown: Achieving a Constitutional Balance Between Civil Liberties and National Security During the War on Terror*, 12 ROGER WILLIAMS U. L. REV. 675, 689 (2007).

³⁶ *Ex parte Quirin*, 317 U.S. 1 (1942).

³⁷ *Johnson v. Eisentrager*, 339 U.S. 763 (1950).

³⁸ Jonathan Hafetz, *Stretching Precedent Beyond Recognition: The Misplaced Reliance on World War II Cases in the "War on Terror"*, 28 REV. LITIG. 365, 369 (2008).

³⁹ *Quirin*, 317 U.S. at 7–8. One group of the saboteurs landed with four crates of explosives on Amagnessett Beach, Long Island, dressed in civilian clothing while the others came ashore at Ponte Vedra, Florida. David J. Danelski, *The Saboteurs' Case*, 1 J. SUP. CT. HIST. 61, 63–65 (1996).

⁴⁰ *Quirin*, 317 U.S. at 19.

⁴¹ *Id.* at 48.

President Roosevelt received the Supreme Court's opinion, the military electrocuted six of the eight prisoners.⁴²

Eisentrager presented the Court with a more complicated question because the enemy aliens in question were captured in the China theater and tried by a military commission convened by President Roosevelt and Congress, which found the Germans guilty of war crimes.⁴³ After the German surrender, the prisoners were moved to serve out their sentences at the Landsberg Prison in Allied-occupied Germany and they filed habeas claims in federal court seeking their release.⁴⁴ However, the Supreme Court dismissed their petitions because, as enemy aliens, they were held at an Allied-controlled base beyond the territorial reaches of the United States and its courts.⁴⁵ Justice Robert Jackson opined: "at no relevant time were [the prisoners] within any territory over which the United States is sovereign, and the scenes of their offense, their capture, their trial and their punishment were all beyond the territorial jurisdiction of . . . the United States."⁴⁶ Transporting the prisoners to the United States by sea would also have imposed a considerable burden on military authorities.⁴⁷

Therefore, by the end of World War II, it became clear that prisoners of war who were afforded due process rights (however limited they may be) in accordance with Geneva, and who were detained in U.S. control outside the territorial reach and de facto sovereignty of the United States, could not claim habeas rights in federal court. However, the *Eisentrager* and *Quirin* decisions were specific to the circumstances of World War II, a traditional armed conflict with an identifiable enemy, defined battlefields, and a clear ending point.⁴⁸ Even though the Supreme Court compared the Guantánamo Bay cases to these two World War II cases in *Boumediene*, the differences between 1940s battlefields and modern warfare led to incongruent analogies.⁴⁹

⁴² Danelski, *supra* note 39, at 72. Later, Justice Frankfurter called the case "not a happy precedent." Justice Black's law clerk described the case as an instance "of haste [where] the Court allowed itself to be stampeded." *Id.* at 80 (alteration in original).

⁴³ *Johnson v. Eisentrager*, 339 U.S. 763, 766.

⁴⁴ *Id.* at 766–67.

⁴⁵ *Id.* at 784–85.

⁴⁶ *Id.* at 778.

⁴⁷ *Id.* at 779.

To grant the writ to these prisoners might mean that our army must transport them across the sea for hearing. This would require allocation of shipping space, guarding personnel, billeting and rations. It might also require transportation for whatever witnesses the prisoners desired to call as well as transportation for those necessary to defend [the] legality of the sentence.

Id. at 778–79.

⁴⁸ Hafetz, *supra* note 38, at 377.

⁴⁹ *Id.* According to Hafetz, the Bush administration "has tried to defend its position against legal challenges by relying on precedents from World War II. But none of those decisions contemplate, let alone approve, the sweeping and unreviewable executive power asserted in their name." *Id.* Michael Ratner argues *Quirin* was inapplicable to the Guantánamo Bay detainees because it involved declared war between two nation-states and the prisoners were working directly for the German enemy. MICHAEL RATNER & ELLEN RAY, *GUANTÁNAMO: WHAT THE WORLD SHOULD KNOW* 21 (2004). Furthermore, the prisoners were provided with a trial, not simply detained indefinitely without a hearing. *Id.*

C. *Legal Land Mines: The Cold War Era*

Although international obligations grew and military tactics and strategy developed, the Supreme Court's approach to prisoners' habeas rights did not. The United States joined the United Nations in 1945, signed the Geneva Conventions in 1949, and obligated itself to dozens of different protocols since that time, many of which clearly operate when countries officially declare war against each other.⁵⁰ However, no declaration of war has supported the United States' participation in any armed conflict since World War II—President Truman fought the Korean War pursuant to a United Nations resolution, President Johnson relied on the Gulf of Tonkin Resolution to deploy troops in Vietnam, and President Bush received approval to use armed force against Iraq in the First Gulf War from both houses of Congress.⁵¹ While Congress appropriated funds for the military effort, it did so without an official declaration, which would have clearly invoked international humanitarian obligations.⁵²

However, even without an official declaration of war, U.S. foreign policy operated under the assumption that "U.S. forces would comply with the principles of the law of war during any military operation no matter how that operation was legally characterized."⁵³ As a result, detainees were treated "as if" they were prisoners of war, and the laws of war were applied to a variety of difficult combat situations, including operational decision-making for detention in Kosovo, medical treatment obligations in Haiti, the use of military power in Bosnia, and detainee interrogations in Somalia.⁵⁴

Despite the many conflicts the United States involved itself in during this time, no American court ever needed to review the president's procedures for captures and interning battlefield prisoners,⁵⁵ as the Department of Defense abided by the customs of war by treating captured enemies as if they were prisoners of war. However, this stasis eventually resulted in a fifty-year gap in the Supreme Court's Suspension Clause case law. Although the American military faced a changing style of combat and new enemies during that time, *Eisen-trager* was the last time the Supreme Court dealt with the Suspension Clause head-on before the war on terror. As the Supreme Court soon learned, the world had changed dramatically since 1950 and its precedent failed to recog-

⁵⁰ See Derek Jinks & David Sloss, *Is the President Bound by the Geneva Conventions?*, 90 CORNELL L. REV. 97, 108 (2004).

⁵¹ WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME* 218 (1998).

⁵² *Id.*; see also Corn, *What Law Applies*, *supra* note 14, at 15.

⁵³ Corn, *Introduction*, in *THE WAR ON TERROR AND THE LAWS OF WAR*, *supra* note 14, at xiii-xiv [hereinafter Corn, *Introduction*].

⁵⁴ *Id.* at xiv. *But see* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214. Passed after the 1995 Oklahoma City bombing, the Act authorizes the Attorney General to initiate special "Alien Terrorist Removal Procedures" against non-citizens terrorist suspects and detain them until they are deported; in the event no country will accept the suspect, he or she will be held indefinitely. 8 U.S.C. § 1537(2)(B)-(C) (2006). Though the Act applies to terror suspects on American soil, its approach foreshadows the Bush Administration's ultimate choice to extend indefinite detention to terror suspects captured on foreign soil as well.

⁵⁵ Ruth Wedgwood, *The Supreme Court and the Guantánamo Controversy*, in *TERRORISM, THE LAWS OF WAR, AND THE CONSTITUTION: DEBATING THE ENEMY COMBATANT CASES* 159, 159-61 (Peter Berkowitz ed., 2005).

nize the new realities of battle, where the enemy was not as clear as it once was.

II. CRITICAL MASS: ENEMY COMBATANTS AND GUANTÁNAMO BAY

A. *Changing Policy, Changing Warfare*

In the wake of 9/11, the operational assumption that detainees would be treated “as if” they were prisoners of war under Article 3 of the Geneva Conventions⁵⁶ was quickly overridden by senior executive branch policymakers who imposed a new category of detention: the unlawful enemy combatant.⁵⁷ The designation stemmed from Geneva and Hague distinctions between lawful and unlawful combatants: lawful combatants have a fixed distinctive emblem recognizable at a distance, carry arms openly, and conduct operations in accordance with the laws and customs of war,⁵⁸ while unlawful combatants do not fulfill all of the conditions of regular forces (for example, they might not wear a uniform), but are nonetheless engaged in the hostilities.⁵⁹ International humanitarian law values this distinction because it encourages a clear line between civilians and soldiers, which promotes civilian safety because the enemy is readily identifiable.⁶⁰

To discourage soldiers from disguising themselves as civilians, the drafters of the Geneva and Hague Conventions agreed that soldiers who engage in warfare as irregular or unlawful combatants would lose their “prisoner of war” status if captured.⁶¹ The United States has balked at applying the “prisoner of war” label to persons captured in the Afghan conflict because “[e]quating terrorists with soldiers . . . lends credence to their contention that they are engaged in an armed struggle with the United States, a fight between opposing forces, each claiming legitimacy,” when they are no more than bandits and outlaws.⁶²

⁵⁶ Common Article 3 provides a minimum humanitarian standard for treatment of detainees in both international and non-international armed conflicts, prohibiting torture as well as cruel and degrading treatment. Geneva Convention Relative to the Treatment of Prisoners of War, art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135. Article 4 governs the classification and treatment of prisoners of war and civilians. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 4, Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365.

⁵⁷ Corn, *Introduction*, *supra* note 53, at xv.

⁵⁸ Hague Convention Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land, art. 1, Oct. 18, 1907, 3 NRG, 3 série 464; *see also* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 13, Aug. 12, 1949, 6 U.S.T. 3217; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, art. 13, Aug. 12, 1949; Geneva Convention Relative to the Treatment of Prisoners of War, art. 4, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 4, 13, 27–34, Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365.

⁵⁹ INGRID DETTER, *THE LAW OF WAR* 136–37 (2d ed. 2000).

⁶⁰ MICHAEL BYERS, *WAR LAW: INTERNATIONAL LAW AND ARMED CONFLICT* 118 (2005).

⁶¹ *Id.* Byers notes that U.S. Special Forces took to wearing civilian clothing for a while in Afghanistan, but the practice was eventually halted when the administration realized the risks in doing so. *Id.*

⁶² JOHNATHAN HAFETZ, *HABEAS CORPUS AFTER 9/11: CONFRONTING AMERICA’S NEW GLOBAL DETENTION SYSTEM* 210 (2010).

However, the incentives to receive prisoner of war status and avoid maltreatment are not always effective, especially for irregular forces like guerilla or resistance fighters in poorer countries.⁶³ For example, the armed forces of the Taliban government, apart from the turbans, wore nothing suggesting a uniform during the 2001 U.S.-Afghanistan war.⁶⁴ Even though Taliban forces were clearly in the chain of command, carried arms openly, and for the most part abided by international humanitarian law, they were technically unlawful combatants.⁶⁵ The situation in Afghanistan suggests the old distinction between combatants and noncombatants might be ill-adapted for the changing nature of modern warfare, especially considering unique challenges like kinship networks harboring terrorists, child soldiers, the rise of private security firms, and economic and technological warfare.⁶⁶

While the Geneva Conventions specify humane treatment for prisoners of war, it is silent as to the treatment of unlawful combatants.⁶⁷ The question of unlawful combatants did not present itself in the pre-9/11 era due to the Department of Defense's choice to treat all detainees as if they were prisoners of war.⁶⁸ However, the capture of the so-called "Twentieth Hijacker," Mohammed al-Qahtani, forced policymakers to confront this issue head-on as they sought to "use every tool and weapon—including the advantages presented by the laws of war—to win the war."⁶⁹

B. *Down a Dark Path: The Road to Bagram*

Congress passed the Authorization for Use of Military Force ("AUMF") on September 18, 2001, authorizing the president to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001."⁷⁰ Presented with the question of where to detain suspected terrorists, an inter-agency task force composed of lawyers from the White House and the Departments of Defense, State, and Justice decided, "any detention facility should be located outside the United States."⁷¹ The military

⁶³ BYERS, *supra* note 60, at 128.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ ERIC PATTERSON, JUST WAR THINKING: MORALITY AND PRAGMATISM IN THE STRUGGLE AGAINST CONTEMPORARY THREATS 69 (2009).

⁶⁷ Persons who are not found to be prisoners of war may be released if innocent, may be held in a secure situation if they are engaged in hostile activities that threaten the security of the state, or interrogated or tried for war crimes if appropriate. RATNER & RAY, *supra* note 49, at 16; *see also* Geneva Convention Relative to the Treatment of Prisoners of War, art. 102, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

⁶⁸ Corn, *Introduction*, *supra* note 53, at xiv-xv.

⁶⁹ Alberto R. Gonzales, Counsel to the President, Remarks to the American Bar Association Standing Committee on Law and National Security (Feb. 24, 2004), *available at* <http://www.fas.org/irp/news/2004/02/gonzales.pdf>.

⁷⁰ Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) [hereinafter "2001 AUMF"].

⁷¹ JOHN YOO, WAR BY OTHER MEANS: AN INSIDER'S ACCOUNT OF THE WAR ON TERROR 142 (2006). The task force researched whether courts would have jurisdiction over the facility, wary of the possibility that federal courts would substitute peacetime standards for the current military needs. *Id.* While no location was perfect, the U.S. Naval Station at Guantá-

transferred its first twenty detainees to Guantánamo Bay Naval Base in early 2002⁷² and al-Qahtani followed shortly thereafter.⁷³ As detainees refused to cooperate with interrogators, the Joint Task Force at Guantánamo began to consider the use of harsher techniques, including sleep deprivation and waterboarding—activities that could violate the Geneva Conventions.⁷⁴ In December 2002, Secretary of Defense Donald Rumsfeld responded by approving a list of sixteen techniques in December 2002 that military personnel at Guantánamo Bay could utilize aside from the methods contained in the Army Field Manual.⁷⁵ One of al-Qahtani's interrogators described his subsequent interrogation as a "free for all,"⁷⁶ utilizing twenty-hour-per-day interrogations for fifty days, coupled with isolation, sensory deprivation, and extreme temperatures.⁷⁷ Interrogators forced al-Qahtani to wear women's underwear, sexually harassed him, forced him to perform dog tricks, and administered enemas.⁷⁸ Al-Qahtani

namo Bay "seemed to fit the bill." *Id.* Ret. Rear Admiral John Hutson, a former Judge Advocate General with 30 years military experience, said in his interview for TAXI TO THE DARK SIDE that upon hearing the United States was shipping high-value detainees to Guantánamo, he thought

'Good, safe place! You know, put them there, barbed wire all over.' Then it became apparent that the reason we were doing it was because we were going to argue that there's no law. You know, Cuban law didn't apply. U.S. law didn't apply. Well, that was a big step down the slippery slope.

TAXI TO THE DARK SIDE, *supra* note 2.

⁷² FLETCHER & STOVER, *supra* note 3, at 5.

⁷³ Neil A. Lewis, *Fresh Details Emerge on Harsh Methods at Guantánamo*, N.Y. TIMES, Jan. 1, 2005, at A11, available at <http://www.nytimes.com/2005/01/01/national/01gitmo.html>. The U.S. military had al-Qahtani in custody for over eight months before it realized he might be the twentieth hijacker. TAXI TO THE DARK SIDE, *supra* note 2.

⁷⁴ Email from Peter Zolper, Assistant Chief Counsel, Office of Legal Counsel, to Mark Fallon, Deputy Commander, Criminal Investigation Task Force (Aug. 27, 2003, 4:02PM), available at <http://torturingdemocracy.org/documents/20021002.pdf> (Counter Resistance Strategy Meeting Minutes).

⁷⁵ Lewis, *supra* note 73. The sixteen approved techniques included forced nudity, stress positions, religious humiliation, isolation of up to thirty days (with possible extensions after command approval), light and sound deprivation, exploitation of phobias and "mild non-injurious physical contact." Declaration of Gitanjali S. Gutierrez, Esq., Lawyer for Mohammed al Qahtani, available at http://ccrjustice.org/files/Publication_DeclarationonAlQahtani.pdf (last visited Oct. 15, 2011).

⁷⁶ Interview by investigating officer with LTG Randall M. Schmidt at Davis Mountain Air Force Base, Ariz. (Aug. 24, 2005) available at <http://www.gwu.edu/~nsarchiv/torturingdemocracy/documents/20050825.pdf> (last visited Oct. 15, 2011) (declassified version). In his oral report before Congress, Schmidt concluded that while each of these individual techniques might not amount to torture, cumulatively they had abusive and degrading effects on detainees. *Id.*

⁷⁷ TAXI TO THE DARK SIDE, *supra* note 2.

⁷⁸ *Id.*; CTR. FOR THE STUDY OF HUMAN RIGHTS IN THE AMERICAS, TESTIMONY OF AN INTERROGATION LOG (Jan. 11, 2003), <http://humanrights.ucdavis.edu/projects/the-guantanamo-testimonials-project/testimonies/testimony-of-an-interrogation-log>. "There are at least ten separate instances when the interrogation log reports that interrogators used a technique labeled 'invasion of space by a female' . . . [including] a female interrogator straddling Mr. al Qahtani and molesting him while other military guards pin his body to the floor against his will." Declaration of Gitanjali S. Gutierrez, *supra* note 75, at 6. The log also details an incident where interrogators placed a mask on al Qahtani and forced him to undergo "dance instruction" with a male interrogator. *Id.*

began to exhibit behavior consistent with extreme psychological trauma, “talking to non-existent people, reportedly hearing voices, crouching in a corner of the cell covered with a sheet for hours on end.”⁷⁹ The military suspended these techniques the next month after navy lawyers complained the methods were definitely excessive, and possibly illegal under Geneva.⁸⁰ Upon review, Rumsfeld issued a final policy in April 2003 consisting of twenty-four approved techniques,⁸¹ many of which were already being used without authorization at Bagram.⁸²

The al-Qahtani interrogation and the interrogation techniques used in Bagram and Abu Ghraib prompted policymakers in the Bush administration to consider the legal ramifications of the interrogators’ actions more closely.⁸³ Bush’s legal advisors ultimately exploited the legal vacuum surrounding armed conflict between a state and a non-state entity (the U.S. and al Qaeda), which did not fit neatly into Geneva Common Articles 2 or 3.⁸⁴ The administration eventually argued that the conduct of interrogators did not violate international humanitarian law, and even if it did, it was justifiable as military necessity.⁸⁵

However, as international scrutiny of interrogation techniques and detention conditions increased,⁸⁶ many members of the legal community became dissatisfied with the Bush administration’s justifications and filed habeas actions on behalf of the Guantánamo detainees.⁸⁷ The resulting line of cases—*Rasul v. Bush*,⁸⁸ *Hamdi v. Rumsfeld*,⁸⁹ *Hamdan v. Rumsfeld*,⁹⁰ and *Boumediene v. Bush*⁹¹—eventually concluded that Guantánamo detainees could challenge their detentions in federal court.⁹² However, by the time the Supreme Court reached its decision in *Boumediene*, it had created a framework littered with unforeseen pitfalls that would soon reveal themselves in the *Al Maqaleh* decisions.

⁷⁹ Declaration of Gitanjali S. Gutierrez, *supra* note 75, at 3.

⁸⁰ Lewis, *supra* note 73; *see also* Declaration of Gitanjali S. Gutierrez, *supra* note 75, at 2.

⁸¹ Lewis, *supra* note 73. The new list of techniques included environmental manipulation and threats to send the detainee to a country allowing torture; Declaration of Gitanjali S. Gutierrez, *supra* note 75, at 2.

⁸² TAXI TO THE DARK SIDE, *supra* note 2.

⁸³ JORDAN J. PAUST, BEYOND THE LAW: THE BUSH ADMINISTRATION’S UNLAWFUL RESPONSES TO THE “WAR” ON TERROR 25–34 (2007).

⁸⁴ *See supra* Part I.

⁸⁵ Corn, *Introduction*, *supra* note 53, at xiv.

⁸⁶ For example, in 2002, Lieutenant Colonel Diane Beaver of the Army’s Judge Advocate General Corps (JAG) told military and intelligence officials that, “[w]e may need to curb the harsher operations with the ICRC [International Commission of the Red Cross] is around. . . . it is better not to expose them to any controversial techniques. . . . This would draw a lot of negative attention.” Email from Peter Zolper to Mark Fallon, *supra* note 74, at 3.

⁸⁷ The Center for Constitutional Rights was the main organization spearheading the habeas actions. For a list of all fifty-seven of its cases, *see Guantánamo Bay Habeas Decision Scorecard*, CENTER FOR CONST. RTS., <http://ccrjustice.org/GTMOscorecard> (last visited Oct. 17, 2011).

⁸⁸ *Rasul v. Bush*, 542 U.S. 466 (2004).

⁸⁹ *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

⁹⁰ *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

⁹¹ *Boumediene v. Bush*, 553 U.S. 723 (2008).

⁹² *Id.* at 732, 798.

C. *Judicial-Executive Tug-of-War: The Guantánamo Bay Challenges*

The first challenges to the detention program came in the form of *Rasul* and *Hamdi*, both decisions handed down on June 28, 2004, by the Supreme Court.⁹³ Sixteen detainees—two British, two Australian, and twelve Kuwaiti citizens—brought the *Rasul* action, seeking a writ of habeas corpus in federal court.⁹⁴ In the 6 to 3 *Rasul* decision, the Supreme Court held Guantánamo prisoners could challenge the lawfulness of their detention in federal court because Cuba's "ultimate sovereignty" over the base did not preclude access.⁹⁵

On the other hand, in *Hamdi*, a plurality of the Court found the government could detain an American citizen as an enemy combatant pursuant to the AUMF, but had to offer him the opportunity to challenge the factual basis for his detention with the benefit of a fair hearing before a neutral tribunal and access to counsel.⁹⁶ Justice O'Connor's plurality opinion warned "a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens."⁹⁷ O'Connor thought the war against the Taliban closely resembled wars of the past, and the president's traditional war powers likely did not apply in the war against al Qaeda or in conflicts against other non-state actors.⁹⁸ Furthermore, as critical as the Government's interest may have been in addressing immediate threats to national security, "history and common sense teach us that an unchecked system of detention carries the potential to become a means for oppression and abuse of others who do not present that sort of threat."⁹⁹ O'Connor concluded enemy combatant proceedings should be carefully tailored to alleviate "their uncommon potential to burden the Executive at a time of ongoing military conflict."¹⁰⁰ Therefore, the Court attempted to strike a balance in *Rasul* and *Hamdi*: although the president could detain unlawful combatants, the administration needed to provide basic due process for captured persons.

In response to the *Rasul* and *Hamdi* decisions, the government responded twofold to limit due process for Guantánamo detainees: first with the Combatant Status Review Tribunal ("CSRT")¹⁰¹ and then with the Detainee Treatment Act of 2005 ("DTA").¹⁰² A mere nine days after the *Rasul* and *Hamdi* decisions, Deputy Secretary of Defense Paul Wolfowitz issued a memo that

⁹³ *Rasul*, 542 U.S. at 466; *Hamdi*, 542 U.S. at 507.

⁹⁴ *Rasul*, 542 U.S. at 470–72.

⁹⁵ *Id.* at 471, 484–85. Kennedy stressed the significance of the 1903 lease agreement between the United States and Cuba, which allows the United States indefinite control over the base for "two thousand dollars, in gold coin of the United States" per year. *Id.* at 471 n.2 (internal quotation marks omitted). A 1934 treaty between the two countries effectively stripped Cuba of any rights as a sovereign unless the two parties agree to modify the 1903 lease, which they have not. *Id.* at 471.

⁹⁶ *Hamdi*, 542 U.S. at 509, 517.

⁹⁷ *Id.* at 536.

⁹⁸ *See id.* at 521.

⁹⁹ *Id.* at 530.

¹⁰⁰ *Id.* at 533.

¹⁰¹ Memorandum from Paul Wolfowitz, Deputy Secretary of Defense, to the Secretary of the Navy, Order Establishing Combatant Status Review Tribunal (July 7, 2004), <http://www.defense.gov/news/Jul2004/d20040707review.pdf> [hereinafter Wolfowitz].

¹⁰² Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2739 (2006) (codified as amended at 10 U.S.C. § 801 and 28 U.S.C. § 2241 (2006)) [hereinafter DTA].

allowed Guantánamo detainees to contest their designations as enemy combatants.¹⁰³ The CSRT allowed the detainees to consult a “personal representative” (a military officer “with the appropriate security clearance”) to review “any reasonably available information” possessed by the Department of Defense regarding the detainee’s classification.¹⁰⁴ After a preparation and consultation period of thirty days, the Department of Defense would convene a tribunal, composed of three neutral commissioned military officers, to review the detainee’s status.¹⁰⁵ However, the rules of evidence did not apply and the tribunal allowed admission of hearsay.¹⁰⁶ The detainee could only call “reasonably available” witnesses and the memo created a rebuttable presumption in favor of the government’s evidence.¹⁰⁷ Therefore, although the executive branch complied with the Court’s mandate for a neutral tribunal before which detainees could challenge their classifications as “enemy combatants,” the limited due process protections led to criticism that the CSRTs were not in place to discover the truth about the detainees, but rather to prolong their detentions.¹⁰⁸

Anticipating more judicial challenges from Guantánamo detainees due to the shortcomings of the CSRT process, Congress finally entered the fray on December 30, 2005, by passing the Detainee Treatment Act.¹⁰⁹ The Act amended 28 U.S.C § 2241, the federal habeas statute, and stripped federal courts of their jurisdiction to hear habeas petitions filed by detainees.¹¹⁰ Couched in language about prohibiting “cruel, inhuman, or degrading treatment” of persons in the United States’ custody,¹¹¹ the Act codified Wolfowitz’s CSRT memo¹¹² and provided, “no court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantánamo Bay, Cuba.”¹¹³

The DTA threw pending habeas claims by Guantánamo detainees, like that of Salim Ahmed Hamdan (allegedly Osama bin Laden’s chauffeur and bod-

¹⁰³ Wolfowitz, *supra* note 101, at 1.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 2–3.

¹⁰⁷ *Id.*

¹⁰⁸ DARREN A. WHEELER, *PRESIDENTIAL POWER IN ACTION: IMPLEMENTING SUPREME COURT DETAINEE DECISIONS* 40 (2008). Joseph Blocher argues the CSRT actually had the perverse effect of solidifying Guantánamo detainees’ claims to POW status

because of the substantial similarities between the definitions of ‘enemy combatant’ and ‘prisoner of war[.]’ Classification as an enemy combatant by a CSRT actually supports, rather than precludes, a finding of POW status. Thus, the CSRTs could not strip detainees of their presumptive POW status simply by finding them to be enemy combatants.

Joseph Blocher, Comment, *Combatant Status Review Tribunals: Flawed Answers to the Wrong Question*, 116 *YALE L.J.* 667, 671 (2007).

¹⁰⁹ DTA, *supra* note 102, at § 1001.

¹¹⁰ *Id.* § 1005(e)(1). The DTA was part of a Department of Defense Appropriations Act for “Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico and Pandemic Influenza.” *Id.*

¹¹¹ *Id.* § 1003.

¹¹² *Id.* § 1005(a).

¹¹³ *Id.* § 1005(e)(1).

yguard),¹¹⁴ into chaos because it was unclear if pending claims could still be heard by federal courts.¹¹⁵ The Supreme Court, in its 5 to 3 *Hamdan v. Rumsfeld* decision, found the DTA did not retroactively strip habeas jurisdiction over pending cases.¹¹⁶ Furthermore, the Court invalidated the system of military tribunals the Bush administration created in the wake of 9/11 because the system violated Article 3 of the Geneva Conventions.¹¹⁷ The administration modeled these tribunals after those President Roosevelt used to try the prisoners in *Quirin* and *Eisentrager*, but the new tribunals lacked the express authorization from Congress, either by statute or declaration of war.¹¹⁸

At President Bush's behest, Congress responded yet again, this time in the form of the Military Commissions Act of 2006 ("MCA"), which scholars have called "a harsh rebuke of the Hamdan court."¹¹⁹ In order to provide President Bush with the "tools he need[ed] to protect [the] country" by allowing military tribunals to provide swift justice for terrorists and to combat future attacks,¹²⁰ Section 7 of the MCA struck the DTA's amendment to the federal habeas statute and inserted a new subsection:

[N]o court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such a determination.¹²¹

The MCA avoided the pitfalls of *Hamdan's* challenge by ensuring that its provisions would apply to pending cases as well.¹²² The Act also defined new offenses the Commission could try,¹²³ permitted testimony obtained through coercive techniques,¹²⁴ and even prohibited combatants from invoking the protections of the Geneva Conventions.¹²⁵ The jurisdiction-stripping provisions of the MCA triggered Suspension Clause concerns, setting the stage for *Boumediene*, the principal case in the Guantánamo litigation.

¹¹⁴ *Hamdan v. Rumsfeld*, 548 U.S. 557, 570 (2006).

¹¹⁵ *Id.* at 574–75.

¹¹⁶ *Id.* at 584 n.15. Chief Justice John Roberts recused himself from consideration of the case due to his participation in the Court of Appeals decision.

¹¹⁷ *Id.* at 631–32.

¹¹⁸ *See id.* at 563, 567, 597, 627.

¹¹⁹ Military Commissions Act, Pub. L. No. 109-366, § 7, 120 Stat. 2600 (2006), [hereinafter MCA]; Michael Greenberger, *You Ain't Seen Nothin' Yet: The Inevitable Post-Hamdan Conflict Between the Supreme Court and the Political Branches*, 66 MD. L. REV. 805, 811 (2007).

¹²⁰ Carl Hulse & Kate Zernike, *Legislation Advances On Terrorism Trials*, N.Y. TIMES, Sept. 28, 2006, at A1, available at <http://www.nytimes.com/2006/09/28/washington/28detain.html>.

¹²¹ MCA, *supra* note 119, at § 950j(b). The removal of specific geographic references in the new language indicated Congress's awareness of the administration's intent to move the bulk of detention activities away from Guantánamo.

¹²² *Id.*

¹²³ *Id.* § 950v. These offenses include torture, cruel or inhuman treatment, murder or destruction of property in violation of laws of war, providing material support for terrorism, and wrongfully aiding the enemy. *Id.*

¹²⁴ *Id.* § 949a.

¹²⁵ *Id.* § 948b(g). Sec. 948a(I)(i) defines unlawful enemy combatants as members of the Taliban, al Qaeda, or associated forces, meaning that a determination of membership in either group automatically results in a status determination of unlawful enemy combatant.

Born in Algeria, Bosnian citizen Lakhdar Boumediene had his habeas claim joined with those of approximately seventy other Guantánamo detainees by the time it reached the Supreme Court.¹²⁶ Boumediene challenged his detention on the grounds that Section 7 of the MCA violated the Suspension Clause by denying habeas rights without an adequate alternative.¹²⁷ In a 5 to 4 decision, the Supreme Court rejected the Bush administration's argument that noncitizen enemy combatants at Guantánamo are not entitled to the writ of habeas corpus or Suspension Clause protection because Guantánamo was outside the United States' territorial borders.¹²⁸ The Court dismissed the government's claims that the de jure sovereignty (legal control) over Guantánamo Bay was more important than de facto (practical) control because questions of extraterritoriality actually "turn on objective factors and practical concerns, not formalism."¹²⁹ According to Justice Kennedy, "Even when the United States acts outside its borders, its powers are not 'absolute and unlimited' but are subject 'to such restrictions as are expressed in the Constitution.'"¹³⁰ The government could not claim that Guantánamo Bay's location within the borders of another country limited the reach of constitutional rights to persons held by the United States.¹³¹ Rather, the Suspension Clause protects the detainee's right to use the judiciary to call the jailor (the United States) to account for the detention when circumstances so warrant.¹³²

Consequently, the Court crafted a test for determining the reach of the Suspension Clause in the absence of American de jure sovereignty, consisting of at least three factors: "(1) the citizenship and status of the detainee and the adequacy of the process through which the 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."¹³³ In analyzing these factors, the Court analogized the Guantánamo detainees to the World War II prisoners in *Eisentrager* and the conditions at Landsberg Prison in order to determine if access to federal courts would be appropriate for detainees given the degree of U.S. control at Guantánamo.¹³⁴

Under the first factor, although the Guantánamo detainees were not American citizens, they lacked an adequate forum to challenge their classifications as enemy combatants.¹³⁵ The CSRT did not provide a remotely adequate alternative to habeas review because the "personal representatives" did not act as advocates and detainees could not overcome the evidentiary burdens placed on

¹²⁶ *Boumediene v. Bush*, 553 U.S. 723, 732 (2008).

¹²⁷ *Id.*

¹²⁸ *Id.* at 739, 771.

¹²⁹ *Id.* at 764.

¹³⁰ *Id.* at 765 (quoting *Murphy v. Ramsey*, 114 U.S. 15, 44 (1885)).

¹³¹ *Id.* at 755.

¹³² See *Rumsfeld v. Padilla*, 542 U.S. 426, 439–41 (2004); *In re Jackson*, 15 Mich. 417, 439–41 (1867); *Preiser v. Rodriguez*, 411 U.S. 475, 484 (1973).

¹³³ *Boumediene*, 553 U.S. at 766.

¹³⁴ *Id.* at 766–70.

¹³⁵ *Id.* at 766. Furthermore, the review process could not cure all defects of an earlier proceeding because the CSRT process did not provide for an appeal that would consider the initial status determination. *Id.* at 767.

them.¹³⁶ Therefore, although the petitioners were noncitizens, the process through which their status determination as enemy combatants was made lacked basic due process.¹³⁷

The Court's application of the second factor stressed that the *Boumediene* detainees were similar to the *Eisentrager* prisoners "in that the sites of their apprehension and detention [were] technically outside the sovereign territory of the United States."¹³⁸ This fact would weigh against extending habeas rights to the petitioners, except the Court had to deal with the "critical differences" between Landsberg Prison in 1950 and Guantánamo Bay in 2008.¹³⁹ The United States' control over Landsberg Prison in *Eisentrager* was neither "absolute nor indefinite," as the U.S. military had to share control of the area with the combined Allied forces¹⁴⁰ and the Court had no need to extend constitutional protections to territories the United States did not intend to govern indefinitely.¹⁴¹ On the other hand, Guantánamo Bay was "no transient possession" of the United States and "[i]n every practical sense, Guantánamo [was] not abroad; it [was] within constant jurisdiction of the United States"¹⁴² because the base was under complete and total American control¹⁴³ and occupied on an indefinite basis.¹⁴⁴ Therefore, the government could not deny the protections of domestic law to the detainees.¹⁴⁵

The Court's analysis of the third factor highlighted the great monetary and tactical costs of holding the Suspension Clause applicable to military detentions abroad,¹⁴⁶ but the costs were not dispositive in Kennedy's mind because civilian courts and the armed forces had functioned alongside each other in the past.¹⁴⁷ The Government presented "no *credible* arguments that the military mission at Guantánamo would be compromised if" the detainees had access to federal courts, due to the United States' plenary control over the Guantánamo

¹³⁶ *Id.* at 767.

¹³⁷ *Id.*

¹³⁸ *Id.* at 768.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.* See also the Insular Cases: *De Lima v. Bidwell*, 182 U.S. 1, 181 (1901); *Dooley v. United States*, 182 U.S. 222, 235 (1901); *Armstrong v. United States*, 182 U.S. 243, 244 (1901); *Downes v. Bidwell*, 182 U.S. 244, 249 (1901); *Hawaii v. Mankichi*, 190 U.S. 197, 211 (1903); *Dorr v. United States*, 195 U.S. 138, 139 (1904). The Insular Cases lay out the doctrine of territorial incorporation, where the constitution applies in full in incorporated territories surely destined for statehood, but only in part in unincorporated areas. *Boumediene*, 553 U.S. at 757. In unincorporated areas, the United States must provide noncitizen inhabitants guarantees of certain fundamental personal rights declared by the Constitution. *Id.* *Reid v. Covert*, 354 U.S. 1, 74–76 (1957), outlined four factors to determine which rights would be provided to noncitizens: (1) practical circumstances, (2) practical necessities, (3) possible alternatives Congress had before it, and (4) whether judicial enforcement of the Constitutional provision would be impractical and anomalous. *Id.* at 759–60. *Boumediene*'s three-part test seems to be a refinement of these factors. See *id.*

¹⁴² *Boumediene*, 553 U.S. at 768–69.

¹⁴³ *Id.* at 771.

¹⁴⁴ *Id.* at 768.

¹⁴⁵ *Id.* at 771.

¹⁴⁶ *Id.* at 769.

¹⁴⁷ *Id.* Unfortunately, the Court's emphasis on tactical, rather than monetary costs makes dollar-to-dollar comparison between cases difficult.

base.¹⁴⁸ The Court analyzed the tactical nature of the Guantánamo Bay Naval Base and Landsberg Prison and found the security threats posed by post-World War II German occupations justified denying the *Eisentrager* prisoners access to U.S. courts.¹⁴⁹ However, the same practical concerns were not present at Guantánamo because the detainees were “contained in a secure prison facility located on an isolated and heavily fortified military base.”¹⁵⁰ Thus, the Suspension Clause had full effect at Guantánamo¹⁵¹ and because the CSRT process was not an adequate habeas alternative,¹⁵² the Guantánamo prisoners could challenge their detentions in federal court.¹⁵³ In language that would later prove problematic in *Al Maqaleh*, the Court speculated: “if the detention facility were located in an active theater of war, arguments that issuing the writ would be ‘impracticable or anomalous’ would have more weight.”¹⁵⁴

While the Supreme Court’s ruling appeared to be a victory for proponents of international humanitarian obligations, Kennedy’s analysis misrepresented the weight of the three factors and thus set the stage for the conflict in *Al Maqaleh*. Even though the geographic location of the detention center is important, geography alone never determines the reach of the habeas writ.¹⁵⁵ Furthermore, the Supreme Court’s framework fails to specifically account for the duration of a detainee’s incarceration—as the length of detention increases, the government’s war powers justification for denying due process rights weakens as the prisoner no longer poses an imminent threat to military personnel.¹⁵⁶

Finally, in analyzing the practical concerns of extending the writ, the focus of the inquiry is not whether allowing access to federal courts would disrupt the war effort as a whole, but rather if a reasonable relationship exists “between the government’s power to wage war and its efforts to suspend” the writ for the individual detainee.¹⁵⁷ For example, when the U.S. captures and detains a person outside the war zone, be it an enemy soldier or a civilian, a reasonable relationship likely does not exist between the two because it is improbable the person’s actions would have a direct impact on the war effort.¹⁵⁸ On the other

¹⁴⁸ *Id.* (emphasis added).

¹⁴⁹ *Id.* at 769–70. In post-World War II Germany, the United States became responsible for an occupation zone of more than 57,000 sq. mi. with a population of 18 million. *Id.* at 769. U.S. forces there faced a variety of enemy attacks, including guerilla-fighters and “werewolves,” *id.* at 769–70, a Nazi insurgency group. Perry Biddiscombe, *Donald and Me: The Iraq War and the “Werewolf” Analogy*, 59 INT’L J. 669, 669 (2004).

¹⁵⁰ *Boumediene*, 553 U.S. at 770.

¹⁵¹ *Id.* at 771.

¹⁵² *Id.* at 792.

¹⁵³ *Id.* at 798.

¹⁵⁴ *Id.* at 770.

¹⁵⁵ Marc D. Falkoff & Robert Knowles, *Bagram, Boumediene, and Limited Government*, 59 DEPAUL L. REV. 851, 891–92 (2010).

¹⁵⁶ *Id.* at 892. In the district court opinion, Judge Bates read *Boumediene*’s language about “at least three factors” as an invitation to add another factor he viewed as relevant—the length of detention. *Al Maqaleh v. Gates*, 604 F. Supp.2d 205, 214–16 (D.D.C. 2009) (emphasis added). However, with such flexible language, an appellate court could just as easily determine that the additional factor improperly expanded the scope of the test, which is exactly what the D.C. Circuit did. *See Al Maqaleh*, 605 F.3d at 95.

¹⁵⁷ Falkoff & Knowles, *supra* note 155, at 892.

¹⁵⁸ *Id.* at 890.

hand, when the U.S. captures and detains a person inside the war zone, the constitutional grounds for the government's actions are much stronger because the individual's detention is more closely related to prosecution of the war effort.¹⁵⁹ In determining the reasonability of the relationship, the interplay between the government's ability to wage war, the length of detention of the prisoners, and the practical implications of the ruling are all relevant concerns.¹⁶⁰

These nuances, taken together, indicate the true aim of the *Boumediene* test is not a formalistic review of each factor. Rather, *Boumediene* recognizes government power, regardless of whom it is exercised against, remains constrained by the Constitution even in an extraterritorial setting.¹⁶¹ The degree to which this power is constrained, however, depends on the scope of Congress's Suspension Clause power, the process Congress provides as an alternative to the writ, and the executive's military mission.¹⁶² Therefore, while Justice Kennedy's three-factor test may be the most practical means of analyzing the habeas privileges of military detainees, his actual analysis of Guantánamo detention did not correspond with the underlying policy concerns motivating the factor test in the first place. This mismatch between analysis and policy explains the difficulties the courts faced in analyzing Fadi Al Maqaleh's claim.

III. BAGRAM: OBAMA'S LEGAL BLACK HOLE

A. *The New Guantánamo*

Bagram Airfield, forty miles north of Kabul, Afghanistan, became the "next front in the battle over the extraterritorial reach of the Constitution"¹⁶³ in 2006, when Ahmad Al Maqaleh, father of twenty-five-year-old Yemeni citizen and Bagram detainee Fadi Al Maqaleh, filed a writ of habeas corpus on behalf of his son with the United States District Court for the District of Columbia.¹⁶⁴ The airfield had played a central role in the United States' military conflict since 2001, when the army took control of the dilapidated former Soviet site and converted the aircraft machine shop into temporary housing for detainees.¹⁶⁵ The "Bagram Collection Point" initially screened "prisoners who would be detained long-term elsewhere."¹⁶⁶ However, by May 2002, the "Bagram Theater Internment Facility" became the "primary collection and interrogation point" for detainees, and by mid-2004, transfers to Guantánamo Bay declined while prisoner populations in Bagram, as well as Saraposa Prison in Kandahar, began to rise.¹⁶⁷ Detainees lived in "cage-like cells bathed continuously in

¹⁵⁹ *Id.*

¹⁶⁰ *Cf. id.* at 892.

¹⁶¹ *Id.* at 867–68.

¹⁶² *Id.* at 886.

¹⁶³ *Id.* at 851.

¹⁶⁴ Petition for Writ of Habeas Corpus at 1–2, *Al Maqaleh v. Rumsfeld*, 604 F. Supp. 2d 205 (D.D.C. Sep. 28, 2006) (No. 1:06-cv-01669-JDB).

¹⁶⁵ Falkoff & Knowles, *supra* note 155, at 856; *see also* Golden, *supra* note 5.

¹⁶⁶ Falkoff & Knowles, *supra* note 155, at 856; *see also* Golden, *supra* note 5.

¹⁶⁷ Falkoff & Knowles, *supra* note 155, at 856. Until January 2010, the military refused to release the identities of prisoners being held at Bagram or the population numbers. *Id.* at 857. Falkoff and Knowles estimate "the prison population grew from about 300 prisoners in

white light”¹⁶⁸ and “[slept] on the floor on foam mats . . . often using plastic buckets for latrines”¹⁶⁹ until 2009, when the United States opened a new prison facility on the base.¹⁷⁰ The conditions at Bagram gained international attention in 2005, following the deaths of Dilawar and another prisoner.¹⁷¹ Allegations of abuse persisted, including “striking shackled detainees, sleep deprivation, stress positions, prolonged hanging by the arms, beatings, use of dogs to terrorize detainees, and sexual abuse.”¹⁷²

The *New York Times* caught wind of the abuse stories at Bagram and reporter Tim Golden published a series of investigative reports on the prison in early 2005.¹⁷³ Shortly thereafter, independent filmmaker Alex Gibney traveled to Afghanistan to interview Dilawar’s family and his interrogators as a part of his documentary film *Taxi to the Dark Side*.¹⁷⁴ With public scrutiny increasing, four Bagram prisoners (including Al Maqaleh) filed habeas claims with the District Court, which merged the cases together and eventually heard oral arguments in response to the government’s motion to dismiss for lack of jurisdiction on January 7, 2009.¹⁷⁵

While all four detainees alleged they were captured outside Afghanistan, the government claimed it captured Fadi al Maqaleh in Zabul, Afghanistan, on September 10, 2004.¹⁷⁶ The CIA captured Haji Wazir, an Afghan citizen, in

early 2004[,] to about 600 prisoners in July 2008,” and to about 645 prisoners in September 2009, when the article was written. *Id.*

¹⁶⁸ Anand Gopal, *Afraid of the Dark in Afghanistan*, CBSNEWS.COM (Jan. 29, 2010, 5:02 PM), <http://www.cbsnews.com/stories/2010/01/29/opinion/main6155116.shtml>.

¹⁶⁹ Tim Golden & Eric Schmitt, *A Growing Afghan Prison Rivals Bleak Guantánamo*, N.Y. TIMES, Feb. 26, 2006, § 1, at 1, available at <http://www.nytimes.com/2006/02/26/international/26bagram.html?ref=bagramairbaseafghanistan>.

¹⁷⁰ Alissa J. Rubin, *U.S. Readies New Facility for Afghanistan Detainees*, N.Y. TIMES, Nov. 16, 2009, at A8, available at <http://www.nytimes.com/2009/11/16/world/asia/16bagram.html?ref=bagramairbaseafghanistan>. The facility cost \$60 million to build, occupies 40 acres, Falkoff & Knowles, *supra* note 155, at 857, and can house up to 1,140 prisoners, Rubin, *supra*. It “includes classrooms, vocational-technical training areas and fully equipped medical facilities.” *Id.*

¹⁷¹ See Golden, *supra* note 5. Mullah Habibullah died of a blood clot caused by severe injuries to his legs. *Id.* His leg injuries stemmed from a barrage of peroneal strikes delivered over a number of days while Habibullah was tethered to the wire ceiling of his cage “by two sets of handcuffs and a chain around his waist.” *Id.* Like Dilawar, the coroner also ruled Habibullah’s death a homicide. *Id.*

¹⁷² FLETCHER & STOVER, *supra* note 3, at 32.

¹⁷³ See Golden, *supra* note 5. For a listing of articles, see *Times Topics: Bagram Detention Center (Afghanistan)*, N.Y. TIMES, http://topics.nytimes.com/top/reference/timestopics/subjects/b/bagram_air_base_afghanistan/index.html (last updated Nov. 16, 2009).

¹⁷⁴ TAXI TO THE DARK SIDE, *supra* note 2. The film won a variety of awards, including the 2007 Academy Award for Best Documentary Feature. *Complete List of Academy Award Nominees and Winners*, CNN.COM (Jan. 22, 2008, 15:56), <http://www.edition.cnn.com/2008/SHOWBIZ/Movies/02/24/oscar.complete.list/index.html>.

¹⁷⁵ Order Inviting Respondent to Refine Position at 2, *Al Maqaleh v. Gates*, 629 F. Supp. 2d 63 (D.D.C. Jan. 22, 2009) (No. 1:06-cv-01697-JDB), available at <https://sites.google.com/aijnetwork.org/bagram-public-library/Home/maqaleh>.

¹⁷⁶ *Al Maqaleh v. Gates*, 604 F. Supp. 2d 205, 209 (D.D.C. 2009); Decl. of Colonel James W. Gray at 7, *Al Maqaleh v. Gates*, 604 F. Supp. 2d 205 (D.D.C. Mar. 3, 2007) (No. 1:06-cv-01669-JDB); Second Decl. of Colonel James W. Gray, 604 F. Supp. 2d 205 (D.D.C. Apr. 19, 2007) (No. 1:06-cv-01669-JDB).

2002 while he was on a business trip to Dubai.¹⁷⁷ The CIA captured Yemeni citizen Amin al Bakri in Thailand in 2002.¹⁷⁸ Redha al-Najar, a Tunisian citizen, resided in Karachi, Pakistan, until he disappeared in 2002.¹⁷⁹ The government did not dispute the sites of capture for Wazir, Al Bakri, or al-Najar.¹⁸⁰

B. The District Court Opinion: Reining in the President

Judge John D. Bates, the District Court judge (and Bush appointee) assigned to the case, sought to determine whether foreign nationals designated as enemy combatants and held at Bagram could invoke the writ of habeas corpus in U.S. federal courts.¹⁸¹ Bates first dismissed *Boumediene* as a facial rejection of Section 7 of the MCA because the Supreme Court's analysis in *Boumediene* was Guantánamo-specific.¹⁸² Consequently, unless the MCA abridged the constitutional right to habeas corpus, as protected by the Suspension Clause, the MCA stripped federal courts of the power to hear Bagram statutory habeas claims.¹⁸³ Bates ultimately concluded that the sanctity of habeas protection outweighed the need for executive deference at Bagram and denied the government's motion to dismiss for all of the detainees but Wazir.¹⁸⁴

However, Bates's analysis applied a different framework than the simple three-factor test in *Boumediene*. Instead, Bates used six separate factors: (1) the citizenship of the detainee; (2) the status of the detainee; (3) the adequacy of the process used to make the status determination; (4) the site of capture; (5) the site of detention; and (6) any practical obstacles inherent in allowing the detainee access to the writ.¹⁸⁵ Bates also mentioned a seventh factor implied by the Court in *Boumediene*: "the length of the prisoner's detention without adequate review."¹⁸⁶ Although this approach was more complicated than the Court's approach in *Boumediene*, the factors Bates used actually resulted in a more thorough analysis of the United States' de facto control at Bagram by carefully considering the interplay between the government's ability to wage war, the length of detention of the prisoners, and the practical implications of the ruling.

In the case of the Bagram detainees, their citizenship, status, and site of capture factors were all the same as the Guantánamo detainees, although Bates pointed out that *Boumediene* set forth these factors without analyzing them in

¹⁷⁷ *Al Maqaleh*, 604 F. Supp. 2d at 209.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 230.

¹⁸¹ *Id.* at 207.

¹⁸² *Id.* at 214.

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 235–36.

¹⁸⁵ *Id.* at 215. One author referred to the breakdown as "a helpful distillation of *Boumediene*'s functional model." Justin D. D'Aloia, Note, *From Baghdad to Bagram: The Length & Strength of the Suspension Clause After Boumediene*, 33 *FORDHAM INT'L L.J.* 957, 1014 (2010). Another author, however, referred to Bates's application of the test as "poorly-reasoned [and] poorly-explained." James Thornburg, Comment, *Balancing Act in Black Robes: Extraterritorial Habeas Corpus Jurisdiction Beyond Boumediene*, 48 *DUQ. L. REV.* 85, 103 (2010).

¹⁸⁶ *Al Maqaleh*, 604 F. Supp. 2d at 216.

any depth, nor were they particularly determinative, so it is difficult to accord them any amount of weight.¹⁸⁷ However, in the Bagram context, the interplay between the site of capture and the site of detention factors was different because detainees were shuttled to Bagram, *into* a theater of war with which they had no previous connection.¹⁸⁸ Bates paid particular attention to this fact, as he explained:

It is one thing to detain those captured on the surrounding battlefield at a place like Bagram, which respondents correctly maintain is in a theater of war. It is quite another thing to apprehend people in foreign countries—far from any Afghan battlefield—and then bring them to a theater of war, where the Constitution arguably may not reach.¹⁸⁹

Therefore, Bates accorded more weight to the sites of the detainees' apprehension than the Court gave the petitioners in *Boumediene* or the D.C. Circuit accorded the Bagram detainees.¹⁹⁰

The site of detention, Bagram Internment Facility, required Bates to place Bagram on what he called the "Guantánamo-Landsberg spectrum" of objective control by the United States for the purposes of determining de facto sovereignty, since Bagram was not located within the official territory (de jure sovereignty) of the United States.¹⁹¹ While the United States had so much control over Guantánamo Bay for an indefinite period of time that the Supreme Court concluded it was "not abroad" for habeas purposes in *Boumediene*, the United States only shared control with Allied forces at Landsberg for a short period of time in *Eisentrager*.¹⁹² Bagram fell somewhere between these extremes—while the United States shared some amount of legal (de jure) jurisdiction with Afghanistan, it retained a high degree of objective control.¹⁹³ Although Bagram did not parallel either Guantánamo or Landsberg perfectly, Bates could not conclude that Bagram, like Guantánamo, was "not abroad."¹⁹⁴ However, Bagram was still more similar to Guantánamo than Landsberg because the United States expressed a high degree of objective control there, which would cut in favor of invoking the Suspension Clause for the detainees.¹⁹⁵

¹⁸⁷ See *id.* at 218, 231. *Boumediene* reasoned that "[t]he Executive is entitled to a reasonable period of time to determine a detainee's status before a court entertains that detainee's habeas corpus petition" but the Guantánamo cases "do not involve detainees who have been held for a short period of time." *Boumediene v. Bush*, 553 U.S. 723, 794–95 (2008).

¹⁸⁸ *Al Maqaleh*, 604 F. Supp. 2d at 220. Essentially, the United States took war on terror detainees and transferred them to a holding area for the U.S.-Afghanistan war. This shift further complicates the legal framework because it forces courts to consider subjects of a state/non-state actor conflict under the detention laws of a state/state conflict, revealing just how convoluted the administration's policy is. For discussion, see *infra* Section V.

¹⁸⁹ *Al Maqaleh*, 604 F. Supp. 2d at 220. These separation of powers concerns about limiting executive discretion might be another factor in the *Boumediene* analysis, as the three factors were not exhaustive. See Baher Azmy, *Executive Detention, Boumediene, and the New Common Law of Habeas*, 95 IOWA L. REV. 445, 494–95 (2010).

¹⁹⁰ *Al Maqaleh*, 604 F. Supp. 2d at 221.

¹⁹¹ *Id.* at 221–22.

¹⁹² *Id.* at 221, 225.

¹⁹³ *Id.* at 223.

¹⁹⁴ *Id.* at 225.

¹⁹⁵ *Id.* at 224. U.S. officials at Bagram are not answerable to the Afghan government for acts committed on the base, even for torture or prisoner abuse. Azmy, *supra* note 189, at

Bates concluded under the fourth factor, the adequacy of process, that the Bagram detainees received far less due process than petitioners in either *Eisen-trager* or *Boumediene*.¹⁹⁶ In *Eisen-trager*, the military charged the prisoners by a bill of particulars with detailed factual allegations against them, afforded prisoners counsel to rebut those allegations, and allowed them to introduce evidence and cross-examine the prosecution's witnesses.¹⁹⁷ The *Boumediene* petitioners' CSRTs lacked due process, but the procedures there were more protective than those afforded to the Bagram prisoners.¹⁹⁸ The Unlawful Enemy Combatant Review Board ("UECRB") governed the status determinations at Bagram; after soldiers made an initial field determination, the UECRB reviewed the detainee's status seventy-five days later and reevaluated the determination every six months "with all relevant information reasonably available."¹⁹⁹ Detainees could make written statements for the UECRB to read before it sent a majority vote to the commanding general.²⁰⁰ The process offered no appeal, and Bates found it to be "less sophisticated and more error-prone" than the Guantánamo CSRTs, especially considering the detainees' self-representation, linguistic and cultural barriers, and limited access to evidence.²⁰¹ Therefore, the adequacy of process factor more strongly favored extending the Suspension Clause to cover Bagram detainees than it did the Guantánamo detainees in *Boumediene*.²⁰²

The part of Bates's opinion the D.C. Circuit took most offense with on appeal was the analysis of the sixth factor: the practical obstacles of extending the writ to the petitioners. Bates reasoned that even though Bagram was in an active theater of war and subject to occasional attacks from the enemy (similar

494. Under the terms of the lease, the Afghan government may only have "concurrent jurisdiction over Afghans who commit crimes on the Airfield." *Id.*

¹⁹⁶ *Al Maqaleh*, 604 F. Supp. 2d at 226–27. The Status of Forces Agreement (SOFA) governs the Bagram lease. See generally Agreement Regarding the Status of United States Military and Civilian Personnel of the U.S. Department of Defense Present in Afghanistan in Connection with Cooperative Efforts in Response to Terrorism, Humanitarian and Civic Assistance, Military Training and Exercises, and Other Activities, U.S.-Afg., May 28, 2003, State Dep't No. 03-67, 2003 WL 21754316.

¹⁹⁷ *Al Maqaleh*, 604 F. Supp. 2d at 226.

¹⁹⁸ *Id.* at 226–27. For details on the CSRT, see *supra* notes 103–08 and accompanying text.

¹⁹⁹ *Al Maqaleh*, 604 F. Supp. 2d at 227.

²⁰⁰ *Id.*

²⁰¹ *Id.* In an interview with Salon.com, a representative of Human Rights First (an international watchdog group) described the UECRB hearings as follows:

The hearings sound good on paper but then when you actually attend them—I hate to use the cliché—it's Kafkaesque. They're not allowed to see much of the evidence against them because it's classified. So a military person will stand up and read the charges—say that the detainee was found to be an IED maker. And the accused will say, 'Well what is the evidence against me?' And the military won't produce it because it's classified. . . . [The personal representative is] a field-grade soldier who is assigned to represent a detainee—but they have no legal training beyond a 35-hour course. Many former detainees told me they did not trust their representatives, who are uniformed soldiers. And at least in the public sessions, we did not see the representatives ever challenge evidence.

Justin Elliott, *The Gitmo No One Talks About*, SALON.COM (Jun. 4, 2011, 8:01 AM), http://www.salon.com/2011/06/04/bagram_obama_gitmo/.

²⁰² *Al Maqaleh*, 604 F. Supp. 2d at 227.

concerns the Supreme Court accorded weight to in *Eisentrager*),²⁰³ real-time videoconferencing provided a workable alternative to an in-court appearance that would require physical transfer out of the secure zone.²⁰⁴ Furthermore, the burden of detainee litigation would fall on lawyers and administrative personnel, not on soldiers who would otherwise be pulled from the battlefield.²⁰⁵ Therefore, while Bagram's location in an active theater of war posed more practical difficulties than the situation at Guantánamo, the complications did not rise to a level that precluded the application of the Suspension Clause.²⁰⁶

However, Bates found insurmountable practical difficulties in terms of potential friction with the host Afghan government over Afghan citizens in U.S. custody at Bagram.²⁰⁷ At the time, the U.S. military was trying to transfer custody of its Bagram prisoners to Afghan officials and Bates speculated U.S. courts would probably come to different conclusions in habeas proceedings than Afghan courts because the two systems used different legal standards.²⁰⁸ Furthermore, if some prisoners were released, their destinations would be Afghanistan.²⁰⁹ Such a unilateral decision on the United States' part could upset the "delicate diplomatic balance" between the United States and Afghanistan by refusing Afghanistan courts jurisdiction and control over their own citizens.²¹⁰ These particular concerns, however, only applied to the Afghan detainee, Wazir.²¹¹ Therefore, Bates found non-Afghan citizens could invoke the Suspension Clause, which made Section 7 of the MCA unconstitutional as applied to them because no adequate alternative existed.²¹² Bates expressly limited his holding to the three specific detainees at Bagram—Al Maqaleh, Al Bakri, and Al Jaujar—in order to preserve the concept that the U.S. Constitu-

²⁰³ "[I]n *Eisentrager*, the Allied Forces administering Landsberg Prison were threatened by 'enemy elements, guerilla fighters, and 'werewolves.'" *Id.* at 228 (citing *Boumediene v. Bush*, 553 U.S. 723, 769 (2008)); see *supra* note 149 and accompanying text.

²⁰⁴ *Al Maqaleh*, 604 F. Supp. 2d at 228. Following recommendations by the ICRC, the Pentagon is already considering using videoconferencing to allow families of Guantánamo detainees to communicate with prisoners at the base. See Peter Finn & Julie Tate, *Guantánamo Bay Detainees' Family Members May Be Allowed to Visit*, WASH. POST (May 11, 2011), <http://www.bbc.co.uk/news/world-us-canada-13382294>. The Uniform Code of Military Justice already allows for videoconferencing in limited circumstances. See Exec. Order No. 13430, 72 Fed. Reg. 20,213, 20,213–14 (Apr. 18, 2007).

²⁰⁵ *Al Maqaleh*, 604 F. Supp. 2d at 228–29. This alleged practical concern was especially irrelevant to Bates because the detainees had been captured outside the active theater of war, which meant the personnel involved in their capture were highly unlikely to be engaged in battlefield activities in Afghanistan six years later. See *id.*

²⁰⁶ *Id.* at 229.

²⁰⁷ *Id.* at 229–30. In late February 2009, at least 20 of the approximately 650 detainees in Bagram were not Afghans. See Karen DeYoung & Del Quentin Wilber, *Britain Acknowledges 2 Detainees Are in U.S. Prison in Afghanistan*, WASH. POST, Feb. 27, 2009, at A4. No such friction existed at Guantánamo because no Cuban court had jurisdiction over any of the detainees. *Boumediene*, 553 U.S. at 751.

²⁰⁸ *Al Maqaleh*, 604 F. Supp. 2d at 229.

²⁰⁹ *Id.* at 229–30.

²¹⁰ *Id.* at 230.

²¹¹ *Id.*

²¹² *Id.* at 232, 235.

tion does not reach to the “four corners of the earth.”²¹³ Thus, all petitioners except Wazir were entitled to habeas review in U.S. federal court.²¹⁴

IV. *INTER ARMA, SILENT LEGES*²¹⁵—BATES REBUKED

Even in light of a reasonable and well-supported opinion by Bates, the D.C. Circuit overruled the District Court on May 21, 2010.²¹⁶ Rather than beginning its inquiry with *Boumediene*, the opinion, penned by Judge David B. Sentelle (a Reagan appointee), framed the Suspension Clause analysis by devoting a large portion of the preliminary inquiry to the district and Supreme Court opinions in *Eisentrager* and the D.C. Circuit’s opinion in *Rasul*, all of which emphasized the unavailability of habeas rights to enemy detainees during times of military conflict.²¹⁷ However, dicta like habeas “cannot be ‘made available to aliens abroad when basic constitutional protections are not’”²¹⁸ was not the controlling standard.²¹⁹ Furthermore, the D.C. Circuit repeatedly emphasized the *Rasul* decision did not overrule *Eisentrager*, and *Eisentrager* therefore remained binding precedent, even though the statutory basis for the case had largely been rebuked by *Braden v. 30th Judicial Court of Kentucky*.²²⁰ In *Boumediene*, the D.C. Circuit had insisted that *Eisentrager* held “constitutional habeas rights did not extend to any aliens who had never been in or brought into the sovereign territory of the United States” only to be rebuked by the Supreme Court again.²²¹ According to the D.C. Circuit, *Boumediene*

²¹³ See *id.* at 231. While Bates’ concern about the extraterritorial reach of the Constitution addressed some of the government concerns, *Boumediene* repeatedly emphasized “even when the United States acts outside its borders, its powers are not ‘absolute and unlimited’ but are subject to such ‘restrictions as are expressed in the Constitution.’” 553 U.S. 723, 765 (2008). Therefore, while courts continue to use dicta that the Constitution does not extend across the globe, *Boumediene* recognizes it does, at least to the degree that the United States’ *de facto* or *de jure* power operates around the globe.

²¹⁴ *Al Maqaleh*, 604 F. Supp. 2d at 235.

²¹⁵ Cicero’s famous saying, roughly translated, means “During War, Law is Silent.” See ANTHONY EVERITT, *CICERO: THE LIFE AND TIMES OF ROME’S GREATEST POLITICIAN* 96–99 (2003).

²¹⁶ *Al Maqaleh v. Gates*, 605 F.3d 84, 99 (D.C. Cir. 2010).

²¹⁷ See *id.* at 87–91.

²¹⁸ *Id.* at 90 (quoting *Al Odah v. United States*, 321 F.3d 1134, 1411 (D.C. Cir. 2003)).

²¹⁹ This is not the first time the D.C. Circuit has held fast to its own interpretation of the Constitution despite Supreme Court language to the contrary. See Daniel Michael, *The Military Commissions Act of 2006*, 44 HARV. J. ON LEGIS. 473, 482–85 (2007).

Although the D.C. Circuit felt free to dismiss without explanation these determinations as dicta, it later relied on Supreme Court dictum because ‘firm and considered dicta . . . binds this court.’

The D.C. Circuit gave no explanation for why it considered the exhaustive analysis and unqualified findings in *Rasul* less ‘firm and considered’ than the dicta later respected by the court.

Id. at 483 (footnotes omitted).

²²⁰ *Al Maqaleh*, 605 F.3d at 90; *Braden v. 30th Judicial Dist. Circuit Court of Ky.*, 410 U.S. 484, 495 (1973) (finding the language of the federal habeas statute “requires nothing more than the court issuing the writ to have jurisdiction over the custodian” of the prisoner, not the prisoner himself). But see Justice Scalia’s dissent in *Rasul v. Bush*, 542 U.S. 466, 488–89 (2004): “The Court’s contention that *Eisentrager* was somehow negated by *Braden*—a decision that dealt with a different issue and did not so much as mention *Eisentrager*—is implausible in the extreme.” (citations omitted).

²²¹ *Al Maqaleh*, 605 F.3d at 92.

“explored the breadth of the Court’s holding in *Eisentrager* (still not overruled)” rather than providing for a modern approach to accessing habeas rights extraterritorially.²²² The D.C. Circuit’s logic again highlights the problems with relying on World War II precedent in a twenty-first century world. While the World War II cases “provide limited, superficial support for the Administration’s position[,] [u]ltimately, however, it is the differences that count. The Bush Administration’s claim of executive detention power eclipses anything that has come before it and distorts these cases beyond recognition.”²²³

The D.C. Circuit’s subtle, yet continual emphasis on *Eisentrager* foreshadowed its ultimate conclusion that the Bagram detainees did not have access to federal courts. The D.C. Circuit formally stuck with the familiar three-factor *Boumediene* analysis rather than adopting Bates’s six to seven factor inquiry.²²⁴ The D.C. Circuit’s analysis of the first *Boumediene* factor paralleled Bates’s, concluding the petitioners “differ in no material respect from the petitioners at Guantánamo who prevailed in *Boumediene*”²²⁵ in terms of citizenship and status and were “in a stronger position for the availability of the writ than were either the *Eisentrager* or *Boumediene* petitioners” because the UECRBs offered less due process than even the CSRT.²²⁶

On the other hand, the D.C. Circuit found the second factor, “‘the nature of the sites where apprehension and then detention took place,’ weigh[ed] heavily in favor of the United States.”²²⁷ Rather than recognizing, as Bates did, that all three remaining petitioners claimed to be captured outside the field of battle (and were subjects of the borderless war on terror, not the geographically-defined U.S.-Afghanistan war), the D.C. Circuit simply stated that “[l]ike all petitioners in both *Eisentrager* and *Boumediene*, the petitioners here were apprehended abroad.”²²⁸ However, the *Al Maqaleh* petitioners were not apprehended in a theater of war, as were the petitioners in *Eisentrager* (China) and some of the petitioners in *Boumediene* (Afghanistan).²²⁹ Instead, the D.C. Circuit focused solely on how the United States lacked the same degree of legal sovereignty over Bagram as it maintained at Guantánamo, rather than looking at de facto elements, as Bates did.²³⁰

Rather than placing Bagram on a spectrum of control between Guantánamo and Landsberg, the D.C. Circuit instead approached the question as an “either/or” analysis—either Bagram was like Guantánamo, or it was like Landsberg. As the United States expressed “no indication of any intent to occupy the base . . . permanent[ly],” Bagram fell into the Landsberg category.²³¹ The D.C. Circuit’s analysis of the sites of detention and apprehension factor highlights the benefits of using a six to seven factor test versus the Supreme Court’s three-factor approach, which is difficult to balance given the

²²² *Id.*

²²³ Hafetz, *supra* note 38, at 366.

²²⁴ *Al Maqaleh*, 605 F.3d at 94.

²²⁵ *Id.* at 96.

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ See *Al Maqaleh v. Gates*, 604 F. Supp. 2d 205, 220 (D.D.C. 2009).

²³⁰ *Al Maqaleh*, 605 F.3d at 97.

²³¹ *Id.*

unclear weights of each factor. Bates was able to distinguish the sites of apprehension and detention from *Boumediene* and *Eisentrager* by looking at the historical context of each site, which weighed in the *Al Maqaleh* petitioners' favor, and concluded the site of detention was neither like Guantánamo nor Landsberg. This tipped the scale slightly in favor of the petitioners. The D.C. Circuit, on the other hand, was able to ignore the issue of the apprehension sites by completely focusing on a cursory analysis of the site of detention, which it concluded weighed in the United States' favor, and then qualify its decision by citing to *Boumediene*'s limited dicta regarding the theater of war.²³²

Thus, the D.C. Circuit's broad brushstrokes in its analysis of the second factor characterized the prisoners' detention site within the theater of war subject to a more cooperative leasing agreement with the host government as dispositive. This reasoning stands in juxtaposition with the D.C. Circuit's narrow application of *Boumediene* as extending only to Guantánamo, rather than applying the case to prison sites with similar functions, but which lack the unique leasing characteristics of the naval base (like Bagram). Ultimately, the outcome in *Al Maqaleh* reveals the practical flaw in the Supreme Court's *Boumediene* test: Are the factors within each factor supposed to be evaluated with equal weight? If they are not, what is the point of including them in the first place, other than sheer lip service? For some courts, the test may lack clarity, resulting in constructions like Bates's six-to-seven factor approach, which attempt to deconstruct the test in order to sharpen the analysis. On the other hand, some courts, like the D.C. Circuit, might find the three factors flexible enough to determine the extraterritorial reach of the Constitution's protections. However, one thing is for sure: as applied by the D.C. Circuit, the *Boumediene* test fails to reach consistent outcomes in the face of extremely similar detention conditions at both Guantánamo and Bagram. Unfortunately, more litigation will be necessary to determine the true workability of the Supreme Court's framework.

The D.C. Circuit's analysis of the third factor—"the practical obstacles inherent in resolving the prisoner's entitlement to the writ"²³³—reveals the true divergence in the two *Al Maqaleh* opinions. The analysis begins with the proposition that "Bagram, indeed the entire nation of Afghanistan, remains a theater of war. Not only does this suggest that the detention at Bagram is more like the detention at Landsberg than Guantanamo [sic], the position of the United States is even stronger in this case than it was in *Eisentrager*."²³⁴

The D.C. Circuit goes on to recite Kennedy's language in *Boumediene* that speculated if the United States was answerable to another sovereign for its acts on the Guantánamo Base, "or if the detention facility were located in an active theater of war, arguments that issuing the writ would be 'impractical or

²³² See *id.* at 97-98. (The Supreme Court expressly stated in *Boumediene* that at Guantánamo, "[w]hile obligated to abide by the terms of the lease, the United States is, for all practical purposes, answerable to no other sovereign for its acts on the base. Were that not the case, or 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." (internal citations omitted)).

²³³ *Id.* at 97.

²³⁴ *Id.*

anomalous' would have more weight" and the Suspension Clause would be less likely to operate.²³⁵ However, rather than simply affording the theater of war status of Bagram more weight, the D.C. Circuit made this fact determinative.²³⁶ It held "under both *Eisentrager* and *Boumediene*, the writ does not extend to the Bagram confinement in an active theater of war in a territory under neither the *de facto* nor *de jure* sovereignty of the United States and within the territory of another *de jure* sovereign."²³⁷ Quoting *Eisentrager's* language about trials "hamper[ing] the war effort" and "bring[ing] aid and comfort to the enemy" by "allow[ing] the very enemies [a field commander] 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,"²³⁸ the D.C. Circuit seemed to be adhering to a mindset so many legal scholars have warned against: *inter arma, silent leges* (in war, law is silent).²³⁹

The D.C. Circuit's misplaced reliance on *Eisentrager* highlights the problems of analogizing to military case law from the 1950s in the twenty-first century. The biggest difference between the two eras is that Congress had recognized and approved of the executive's practical concerns in *Eisentrager* by issuing a declaration of war in World War II.²⁴⁰ Furthermore, the Supreme Court was only able to engage in dicta about keeping military men out of the courtroom because the *Eisentrager* petitioners had already obtained due process—trial and conviction by a military commission satisfying basic requirements of Geneva.²⁴¹ However, the situation at Landsberg is not analogous to the current conflict in Afghanistan. Congress has not declared war. The United States is not fighting another state in the war on terror. Despite the practical challenges of declaring war against a non-state actor or a failed state, Congress has done little since the 2001 AUMF to oversee the president's use of his commander-in-chief powers, even in the face of news story after news story about prisoner abuse.²⁴² In light of these international humanitarian failures, perhaps a reconsideration of the declaration of war is necessary.²⁴³

Furthermore, the Bush (and now Obama) administration went out of its way to avoid the requirements of Geneva,²⁴⁴ a fact the D.C. Circuit recognized when it agreed both the CSRT and UECRB fail to satisfy basic due process.²⁴⁵

²³⁵ *Id.* at 97–98 (emphasis omitted) (citing *Boumediene v. Bush*, 553 U.S. 723, 770 (2008)).

²³⁶ *See id.*

²³⁷ *Id.*

²³⁸ *Johnson v. Eisentrager*, 339 U.S. 763, 779 (1950).

²³⁹ *See* REHNQUIST, *supra* note 51, at 218–25.

²⁴⁰ S.J. Res. 116, 77th Cong. (1941).

²⁴¹ *See* Hafetz, *supra* note 38, at 370, 372–73.

²⁴² *See* Golden, *supra* note 5; Neil Lewis & Douglas Jehl, *Files Show New Abuse Cases in Afghan and Iraqi Prisons*, N.Y. TIMES, Feb. 18, 2005, at A11 available at <http://www.nytimes.com/2005/02/18/politics/18abuse.html>; Mark Mazzetti, *Report Provides New Details on C.I.A. Prison Abuses*, N.Y. TIMES, Aug. 23, 2009, at A4, available at <http://www.nytimes.com/2009/08/23/us/politics/23cia.html>; Thom Shanker & Jacques Steinberg, *The Struggle For Iraq: Captives; Bush Voices 'Disgust' at Abuse of Iraqi Prisoners*, N.Y. TIMES, May 1, 2004, available at <http://www.nytimes.com/2004/05/01/world/the-struggle-for-iraq-captives-bush-voices-disgust-at-abuse-of-iraqi-prisoners.html>.

²⁴³ *Infra* Part V.

²⁴⁴ *See* Corn, *What Law Applies*, *supra* note 14, at 4–9.

²⁴⁵ *Al Maqaleh v. Gates*, 605 F.3d 84, 96 (D.C. Cir. 2010).

While the petitioners in *Eisentrager* were seeking *another* forum for their claims to be heard, the *Al Maqaleh* petitioners were seeking *any* way to escape legal limbo. Therefore, by relying on *Eisentrager's* practical concerns as opposed to *Boumediene's* more applicable and current analogies, the D.C. Circuit came to a conclusion unsupported by common law or common sense. Without specific allegations by the government of prohibitive cost or impossible allocation of military resources, the administration's practical concerns were just as unfounded as the prisoners' concerns about being transported into a theater of war and cut off from the reach of U.S. courts.²⁴⁶ The blanket claim of "war" cannot constitute a determinative factor, even under *Boumediene's* dicta about a theater of war.

Finally, the D.C. Circuit addressed Bates's concerns about shuttling prisoners from outside the combat zone into Bagram in order to refuse them the protections of the Constitution. The D.C. Circuit thought the idea was ludicrous because it "remains only a possibility; its resolution can await a case in which the claim is a reality rather than a speculation."²⁴⁷ The D.C. Circuit thought the idea that "the United States deliberately confined the detainees in [a] theater of war rather than at . . . Guantánamo, is not only unsupported by evidence, it is not supported by reason."²⁴⁸ The court erred when it ignored allegations of the rather well-known practice, known as "extraordinary rendition," of capturing terror suspects abroad and then placing them in strategically chosen locations (such as Guantánamo²⁴⁹ or countries that condone torture) to either avoid the reaches of federal courts or to avoid international legal ramifications.²⁵⁰ By ignoring this policy concern for want of objective facts of a nefarious plan, which would be difficult for the prisoners to obtain without further discovery, the D.C. Circuit overlooked the important separation of powers analysis central to Bates's opinion as well as the *Boumediene* decision and sent its analysis down a slippery slope.²⁵¹

Furthermore, the D.C. Circuit supported the government's paradoxical argument that the practical concerns of housing detainees in a theater of war—a problem the executive created by moving detainees there in the first place—outweighed the detainees' due process rights.²⁵² If the D.C. Circuit was looking for objective facts to support the prisoners' contentions, it need only have looked to the population statistics at Guantánamo and Bagram. As Guantánamo litigation increased, its prisoner population began to decrease while, at the same

²⁴⁶ As of February 15, 2011, the *Al Maqaleh* detainees filed with the D.C. District Court again, requesting amendment of the habeas petitions in light of new evidence bearing on their claims of the executive's design to transport them into a theater of war in order to deny them access to federal courts. *Al Maqaleh v. Gates*, No. 06-1669, 2011 WL 666883, at *1–2 (D.D.C. Feb. 15, 2011). Judge Bates denied the government's motion to dismiss, and the claim is still pending as of this publication. *Id.*

²⁴⁷ *Al Maqaleh*, 605 F.3d at 98.

²⁴⁸ *Id.* at 99.

²⁴⁹ See *supra* note 71 and accompanying text.

²⁵⁰ See Editorial, *Malign Neglect*, N.Y. TIMES, May 21, 2011, available at <http://www.nytimes.com/2011/05/22/opinion/22sun1.html>.

²⁵¹ See *supra* note 189 and accompanying text.

²⁵² *Al Maqaleh*, 605 F.3d at 97.

time, the population at Bagram increased.²⁵³ The correlation cannot be accidental and requiring prisoners to present evidence of a concerted effort by the executive to circumvent international and domestic law is unrealistic and sets the bar too high for detainees who lack the opportunity for discovery.

The D.C. Circuit's opinion in *Al Maqaleh v. Gates* ultimately demonstrates the sort of convoluted logic governing the prosecution of military conflicts in the twenty-first century. Although the president balks at the idea of officially recognizing the conflict in Afghanistan as a "war," which would invoke the humanitarian obligations of Geneva, he is more than willing to hide behind the "But it's War!" excuse when called into court to justify withholding fundamental protections. Unfortunately, as President Obama attempts to close Guantánamo, the implications of *Al Maqaleh* will become all the more clear when Bagram becomes the primary storage facility for detainees in the war on terror, even though the detainees have no legal status to challenge their confinement there.

V. THE WAR THAT ISN'T: AFGHANISTAN, THE WAR ON TERROR, AND GENEVA

By endorsing the government's paradoxical reasoning in *Al Maqaleh*, the D.C. Circuit took a dangerous step towards reorienting the legal and moral compasses for the United States' involvement in current and future international armed conflicts. The D.C. Circuit should have affirmed the District Court's decision to allow three of the *Al Maqaleh* petitioners access to habeas rights not only under the Suspension Clause analysis, but also to support the United States' international humanitarian obligations.

Two sources of international humanitarian law²⁵⁴ bind the United States: formal treaties, like the Geneva and Hague Conventions, as well as customary law, or *jus cogens*.²⁵⁵ By abiding by these sources of law in the past, the U.S.

²⁵³ See Falkoff & Knowles, *supra* note 155, at 857 (discussing changing populations at Guantánamo and Bagram); see also Azmy, *supra* note 189 at 495 ("The Bagram prison population has been growing steadily, ever since the Court's decision in *Rasul* effectively stopped the transfer of prisoners to Guantanamo.").

²⁵⁴ This Note uses "international humanitarian law" for the sake of clarity, but the principals discussed are also applicable to the "law of armed conflict" (a term used by the Geneva Conventions) as well, which also has origins in treaty-based and customary law. International humanitarian law seeks "to limit the violence [in] armed conflicts by protecting those taking no active part in hostilities, by protecting property not considered [a part of] military objectives, and by . . . restricting the . . . methods of warfare [parties can use]." GARY D. SOLIS, *THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR* 23 (2010). It also distinguishes between international armed conflict (to which the four Geneva Conventions and Additional Protocol I apply) and non-international armed conflict (to which a more limited range of protections applies, particularly Common Article 3 and Additional Protocol I). *Id.* The law of armed conflict (formerly the "laws of war"), on the other hand, addresses the specifics of *jus in bello* and *jus ad bellum*, the conditions and means by which nations may go to war. *Id.* at 22.

²⁵⁵ The Army Field Manual recognizes, "the law of war is derived from two principal sources: . . . Treaties (or Conventions), such as the Hague and Geneva Conventions [and] . . . Custom. . . . [T]his body of unwritten or customary law is firmly established by the custom of nations and well defined by recognized authorities on international law." DEP'T OF THE ARMY, *FIELD MANUAL 27-10, THE LAW OF LAND WARFARE* 4 (1956). International custom

recognized international human rights during wartime and peace not only as a signatory of major treaties, but also because such “civilized” behavior is consistent with American values.²⁵⁶ For example, far before treaties bound the U.S. to recognize respect for human dignity and an aversion to suffering on prisoners’ behalf in war, George Washington ordered Hessian (German mercenary) captives to be treated “with the same rights of humanity for which Americans were striving.”²⁵⁷ After the Battle of Princeton, Washington ordered his officers to care for 221 British prisoners and “[t]reat them with humanity, and Let them have no reason to Complain of our Copying the brutal example of the British army.”²⁵⁸ Therefore, from the founding of the nation, military leaders have aspired to fight war in a way consummate with American values, be it pursuant to a treaty obligation or not.²⁵⁹

However, given the paradigm shift away from classifying combatants as if they were prisoners of war regardless of whether they met the Geneva criteria, the specific type of combat U.S. troops were experiencing in the Middle East suddenly became important because it dictated how the U.S. would treat prisoners.²⁶⁰ The United States’ multifaceted military mission in the Middle East complicates the legal detention analysis of alleged combatants in Bagram. Three different military missions are underway in the area: the removal of the Taliban in Afghanistan,²⁶¹ the insurgency battle in Iraq,²⁶² and the more global war on terror.²⁶³ The rules of conduct binding the United States depend largely on which conflict Bagram detainees are involved in; if it is the removal of the Taliban in Afghanistan, the more traditional rules of state-on-state warfare probably apply.²⁶⁴ On the other hand, if detainees are incarcerated as a part of

is evidence of a general practice that is extensive and virtually uniform, coupled with the subjective belief by states that such behavior is required by law. *See* Statute of the International Court of Justice, art. 38, June 26, 1945, 59 Stat. 1055, 1060.

²⁵⁶ *See* 152 CONG. REC. H7522-61, H7540 (daily ed. Sept. 27, 2006) (Statement of Rep. Steve Israel). During the House Floor Debate on Military Commissions Act, H.R. 6166, Israel stated, “If I am asking young men and women to die for what we stand for, I want to stand for something. If I am asking people to fight to kill terrorists, I want to be in the pursuit of our values, not the terrorist’s values.” *Id.*

²⁵⁷ DAVID HACKETT FISCHER, WASHINGTON’S CROSSING 378 (2004).

²⁵⁸ *Id.* at 379 (emphasis in original).

²⁵⁹ *Id.* at 375 (“In 1776, American leaders believed that it was not enough to win the war. They also had to win in a way that was consistent with the values of their society and the principles of their cause.”); *see also* Patterson, *supra* note 66, at 2.

²⁶⁰ *See* Corn, *Introduction*, *supra* note 53, at xv.

²⁶¹ *See* 2001 AUMF, *supra* note 70.

²⁶² Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498. Though the war in Iraq has officially ended, roughly 4,000 United States troops remain stationed there. Thom Shanker et al., *In Baghdad, Panetta Leads Uneasy Moment of Closure*, N.Y. TIMES, Dec. 15, 2011, at A19, available at <http://www.nytimes.com/2011/12/16/world/middleeast/panetta-in-baghdad-for-iraq-military-handover-ceremony.html>.

²⁶³ Bush, *supra* note 11.

²⁶⁴ Despite Alberto Gonzales’ insistence that the laws of war did not apply to conflict with the Taliban because Afghanistan was a failed state and the United States did not recognize it as a legitimate government, Colin Powell recommended the Geneva Conventions did in fact apply to the armed conflict with the Taliban, a position the White House eventually adopted. *See* Memorandum from Alberto R. Gonzales, U.S. Attorney Gen., to the President, Decision re: Application of the Geneva Convention on Prisoners of War to the Conflict with Al Qaeda

prosecuting the war on terror, the rules are less clear.²⁶⁵ Congress authorized use of military force against al Qaeda operatives and those who provide support to the organization, but the authorization falls short of a declaration of war.²⁶⁶

Declarations of war are strong evidence of a state of war and allow armed force to be applied consistent with the laws of war, including international humanitarian obligations.²⁶⁷ For nearly two centuries in America, traditional “war” was limited to situations where Congress passed an official declaration of war, pursuant to its Article I, Section 8, Clause 11 powers.²⁶⁸ While congressional declarations are strong evidence of a state of war, modern theories of warfare focus more on the existence of armed hostilities because states are simply less likely to declare war than in the past.²⁶⁹ Congress has not issued a declaration of war since 1941, after the bombing of Pearl Harbor.²⁷⁰ Thus, over the last 50 years, courts have struggled to determine if a state of war actually exists without a congressional declaration and, if it does, which humanitarian obligations apply.²⁷¹ In cases involving insurance or imposition of fines, courts

and the Taliban (Jan. 25, 2002), available at www.torturingdemocracy.org/documents/20020125.pdf; Memorandum from Colin L. Powell, U.S. Sec’y. of State, to Alberto R. Gonzales, U.S. Attorney General, Draft Decision Memorandum for the President on the Applicability of the Geneva Convention to the Conflict in Afghanistan (Jan. 26, 2002) available at www.torturingdemocracy.org/documents/20020126.pdf; *Fact Sheet: The Status of Detainees at Guantanamo*, AM. PRESIDENCY PROJECT (Feb. 7, 2002), <http://www.presidency.ucsb.edu/ws/index.php?pid=79402>.

²⁶⁵ When Michael Ratner was president of the Center for Constitutional Rights (the group litigating many of the Guantánamo Bay habeas cases), Ratner said the Bush administration used the 2001 AUMF to turn the hunt for those responsible for 9/11 into a war, even though it was not a war between nation states or a civil war, which would result in the applicability of the Geneva Conventions. RATNER & RAY, *supra* note 49, at 17–18. Rather, “[i]t is still an international law enforcement action to which normal criminal law applies.” *Id.*

²⁶⁶ See Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2066–70 (2005) (discussing the differences between traditional subjects of military authorization and al Qaeda).

²⁶⁷ *C.f.* Jinks & Sloss, *supra* note 50, at 101–04. However, the applicability of the laws of war no longer requires a declaration of war, as the threshold for imposing the Geneva Conventions on forces is merely “armed conflict.” *Id.* at 108–09.

²⁶⁸ See Paul W. Kahn, *War Powers and the Millennium*, 34 LOY. L.A. L. REV. 11, 16–17 (2000) (“Since the advent of the United Nations (UN) Charter, war has been abolished as a category of international law. A declaration of war serves no purpose under international law; it can have no bearing on the underlying legal situation.”); see also Michael D. Ramsey, *Presidential Declarations of War*, 37 U.C. DAVIS L. REV. 321, 322 (2003). *But see* Bradley & Goldsmith, *supra* note 266, at 2058–59 (arguing the formal declaration of war had fallen out of favor by the Founders’ time).

²⁶⁹ DETTER, *supra* note 59, at 12. Detter identifies Article 12 of the Covenant of the League of Nations and Briand-Kellogg Pact of 1928, both of which made war illegal, as the source of the modern tendency to commence war without an official declaration. *Id.*; see also J. Gregory Sidak, *To Declare War*, 41 DUKE L.J. 27, 49 (1991) (suggesting Congress’s reluctance to declare war stems from Cold War fears that such declarations against Communist adversaries would escalate tension between the United States and the Soviet Union, eventually placing the two in direct military conflict). Without an official declaration of war, both sides could retreat more easily from the danger of nuclear confrontation without one side “losing,” as they did in the Cuban Missile Crisis. *Id.*

²⁷⁰ S.J. Res. 116, 77th Cong. (1941).

²⁷¹ See *Mitchell v. Laird*, 488 F.2d 611, 616 (D.C. Cir. 1973) (declining to determine if the president’s military actions in Indo-China required a declaration of war by Congress); Del-

tended to limit the definition of “war” to conflicts stemming from a congressional declaration of war.²⁷² However, in cases of military discipline, the term “war” included de facto war and did not require a formal declaration.²⁷³

As declarations of war fell out of favor, the international community sought to create a framework to trigger humanitarian law without traditional legislative recognitions of military action, which previously were required to invoke such obligations.²⁷⁴ Before the 1990s, some legal scholars attempted to fill the gap between “war” and “peace” by using the term “armed conflict” to denote something less than war, assuming war implied a more intense or full-scale situation.²⁷⁵ Another approach was to treat these armed conflicts as wars for the purpose of binding the parties to international humanitarian law.²⁷⁶ At this point, however, the international consensus is that obligations under treaties like the Geneva Conventions operate in two cases: during interstate (Common Article 2) armed conflict and intrastate armed conflict (Common Article 3).²⁷⁷ Armed conflict exists subject to four conditions: (1) a contention, (2) between at least two nation-states, (3), wherein armed force is employed; with (4) intent to overwhelm.²⁷⁸

The battle between the Taliban and Northern Alliance troops was an intrastate conflict until the United States intervened in 2001, at which point the

lums v. Bush, 752 F.Supp. 1141, 1148 (D.D.C. 1990) (declining to determine if the president’s military actions in the First Gulf War required a declaration of war by Congress).

²⁷² See Robb v. United States, 456 F.2d 768, 770–71 (Ct. Cl. 1972) (military courts did not have jurisdiction over a civilian employee of the U.S. Navy because he was not “in time of war” when he violated a military command during his engagement in Vietnam); Hammond v. Nat’l Life & Accident Ins. Co., 243 So.2d 902, 904 (La. Ct. App. 1971) (decedent was not in service “in time of war” when he was killed aboard an aircraft carrier in the Gulf of Tonkin); Jackson v. N. Am. Assurance Soc’y, Inc., 183 S.E.2d 160, 160–61 (Va. 1971) (for the purposes of a life insurance policy that excluded benefits for death “by war or act of war,” decedent was not “in service in time of war” when he was killed in Vietnam).

²⁷³ See Broussard v. Patton, 466 F.2d 816, 819 (9th Cir. 1972) (airman’s desertion in the Gulf of Tonkin occurred “in time of war”); United States v. Shell, 23 C.M.R. 110, 114 (C.M.A. 1957) (soldier’s desertion from Alabama military base was “in time of war” due to the United States’ engagement in Korea); United States v. Bancroft, 11 C.M.R. 3, 4 (C.M.A. 1953) (charge against soldier stationed in Korea of “sleeping on post” was “in time of war”).

²⁷⁴ See Corn, *What Law Applies*, *supra* note 14, at 74; DETTER, *supra* note 59, at 12.

²⁷⁵ DETTER, *supra* note 59, at 19–20. For example, the bombing of Berlin, Dresden, and Tokyo in World War II were full-scale acts of war, with the aim of killing large scores of combatants (and arguably civilians) while targeting essential war-making infrastructure, like munitions plants, as well as destroying the enemy’s morale. See Chris af Jochnick & Roger Normand, *The Legitimation of Violence: A Critical History of the Laws of War*, 35 HARV. INT’L L.J. 49, 86–89 (1994).

²⁷⁶ The Geneva Conventions of 1949 changed the international vocabulary of military conflict

by making clear that their *jus in bello* rules applied not only to ‘cases of declared war’ but also more broadly to ‘any other armed conflict’ between states, regardless of whether a ‘state of war’ was recognized by one of the parties. Today, ‘armed conflict’—not ‘war’—is the relevant jurisdictional concept for *jus in bello*. As a result, it now appears that declarations of war serve little purpose under international law.

Bradley & Goldsmith, *supra* note 266, at 2061 (footnotes omitted).

²⁷⁷ Corn, *Introduction*, *supra* note 53, at xiii.

²⁷⁸ DEREK GRIMES ET AL., INTERNATIONAL AND OPERATIONAL LAW DEPARTMENT, LAW OF WAR HANDBOOK 4 (Keith E. Puls ed., 2005).

conflict became interstate.²⁷⁹ The Geneva Conventions' protections were certainly applicable in the latter case, as both Afghanistan and the United States were signatories of the four Geneva Conventions of 1949.²⁸⁰ At the time of the U.S. invasion, the Taliban regime—the de facto government of Afghanistan, in control of some 90 percent of its territory—deployed regular armed forces against the U.S. invasion and at least three countries recognized it as the de jure government of Afghanistan.²⁸¹ In 2002, after insisting the military mission in Afghanistan was not an armed conflict and the laws of war did not apply, the Bush Administration admitted its error, but still insisted captured combatants could not be provided with Geneva Conventions protection, a move one scholar has labeled “schizophrenic . . . illogical and devoid of legal merit.”²⁸²

Regardless of the Bush Administration's claims, the nature of the armed conflict suggests international humanitarian law applies to the U.S.-Afghanistan war and persons detained during the conflict should be treated as prisoners of war.²⁸³ As prisoners of war, detainees must be treated pursuant to Article 3 of the Geneva Conventions, which requires the capturer treat the prisoners humanely and protect them from danger²⁸⁴ as well as public curiosity,²⁸⁵ and supply them with food, clothing, and medical care.²⁸⁶ Prisoners are also entitled to due process rights, including trial by courts that respect the same standards of justice as those that would be used to try the military of the detaining state.²⁸⁷ Use of coercion to extract information is not allowed and the detaining state may only require prisoners to disclose their names, date of birth, and rank or position within the armed forces.²⁸⁸ Furthermore, prisoners may not be prosecuted for engaging with lawful acts of war, although serious violations of international humanitarian law may be prosecuted.²⁸⁹ Finally, when hostilities have ceased, prisoners must be repatriated.²⁹⁰ If any doubt exists about the

²⁷⁹ JENNIFER ELSEA, CONG. RESEARCH SERV., TREATMENT OF 'BATTLEFIELD DETAINEES' IN THE WAR ON TERRORISM 11 (2003), available at http://www.law.umaryland.edu/marshall/crsreports/crsdocuments/RL31367_09172003.pdf; see also Geneva Convention Relative to the Treatment of Prisoners of War, art. 2–3, Aug. 12, 1949, 6 U.S.T. at 3318–20, 75 U.N.T.S. at 136–38. However, the nature of the conflict may have changed as of June 19, 2002, once the Taliban government had been definitively ousted and a new government, friendly to the United States, took its place. For more discussion, see HELEN DUFFY, THE 'WAR ON TERROR' AND THE FRAMEWORK OF INTERNATIONAL LAW 256–57 (2005).

²⁸⁰ INT'L COMM. OF THE RED CROSS, *Geneva Conventions of 12 August 1949, List of State Parties and Signatories*, <http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=375&ps=P> (last visited Jan. 20, 2012).

²⁸¹ ELSEA, *supra* note 279, at 11; PAUST *supra* note 83, at 1–2.

²⁸² Jordan J. Paust, *War and Enemy Status After 9/11: Attacks on the Laws of War*, 28 YALE J. INT'L L. 325, 325–26 (2003).

²⁸³ See Memorandum from Colin L. Powell to Counsel to the President, *supra* note 264; *Fact Sheet: Status of Detainees at Guantanamo*, *supra* note 264; RATNER & RAY, *supra* note 49, at 10.

²⁸⁴ Geneva Convention Relative to the Treatment of Prisoners of War, art. 19, 6 U.S.T. at 3334, 75 U.N.T.S. at 152.

²⁸⁵ *Id.* art. 13, at 3328, 75 U.N.T.S. at 146.

²⁸⁶ *Id.* art. 20, at 3334, 75 U.N.T.S. at 152.

²⁸⁷ *Id.* art. 84, 99–108, at 3382–84, 3392–3400, 75 U.N.T.S. at 200–02, 210–18.

²⁸⁸ *Id.* art. 17, at 3330–32, 75 U.N.T.S. at 148–50.

²⁸⁹ *Id.* art. 82–88, at 3382–86, 75 U.N.T.S. at 200–04.

²⁹⁰ *Id.* art. 118, at 3406, 75 U.N.T.S. at 224.

entitlement to POW status, a competent tribunal must determine the prisoner's status; until it does, the prisoner is entitled to POW protections as a default rule.²⁹¹

The degree of armed conflict and the characteristics of the belligerent groups—traditional measures for a state of war²⁹²—also suggest that the U.S.-Afghanistan struggle rises to the level of conflict necessary to bind both parties to international humanitarian law obligations.²⁹³ The *Prize Cases*, which considered Lincoln's Confederate blockade during the Civil War, held "war may exist without a declaration on either side" if hostilities are sufficiently intense.²⁹⁴ While the Court did not provide examples of the types of actions that would result in a state of war without a declaration, the International Committee of the Red Cross's (ICRC) commentary to Common Article 3 of the Geneva Conventions lists a number of factors capable of invoking the Conventions' provisions,²⁹⁵ the most important of which is a state's response to a perceived threat.²⁹⁶ When a state uses regular or combat forces to respond to a threat, the laws of war apply rather than the principles of domestic law enforcement.²⁹⁷ Furthermore, when armed forces inflict death as a measure of first resort, especially when the determination is made solely based on an individual's status as a "hostile" or "enemy force" and not based on his or her threatening conduct, a state of war exists.²⁹⁸ The United States used military force against the threat posed by the Taliban's alleged harboring of al Qaeda operatives in Afghanistan and providing support to the group.²⁹⁹ While in Afghanistan, U.S. soldiers were instructed to inflict deadly force as a measure of first

²⁹¹ *Id.* art. 5, at 3322–24, 75 U.N.T.S. at 140–42.

²⁹² DETTER, *supra* note 59, at 18.

²⁹³ See DUFFY, *supra* note 279, at 257–58.

²⁹⁴ *The Amy Warwick*, 67 U.S. (2 Black) 635, 668 (1862).

²⁹⁵ See INT'L COMM. OF THE RED CROSS, COMMENTARY, CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD 49–50 (Jean S. Pictet ed., 1960), available at <http://www.icrc.org/ihl.nsf/COM/365-570006?OpenDocument>.

²⁹⁶ Corn, *What Law Applies*, *supra* note 14, at 17. The Correlates of War Project takes a numeric approach to the existence of war, which exists when 1000 battle fatalities have occurred. John Alan Cohan, *Legal War: When Does it Exist, and When Does it End?*, 27 HASTINGS INT'L & COMP. L. REV. 221, 253–54 (2004). Another approach is the subjective "state of war" doctrine, which dictates war exists when (1) a declaration of war is issued by one state against another; (2) one state commits an act of aggression against another state (i.e., blockade, interdiction, invasion by military troops, or other act typically regarded as aggression); or (3) a state commits an act of aggression against another state and the latter state, in deploying forces to repel the aggression, chooses to regard the circumstances as establishing a state of war. *Id.* at 254–55.

²⁹⁷ Cohan, *supra* note 296, at 255; see also *Prosecutor v. Tadic*, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72 (I.C.T.Y. Appeals Chamber 1995). In this first case adjudicated by the International Tribunal for the Former Yugoslavia, the tribunal concluded that "an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State." *Id.* (emphasis added).

²⁹⁸ Corn, *What Law Applies*, *supra* note 14, at 26–29. On the other hand, "[l]aw enforcement activities, regulated by domestic law and international human rights standards, reserve the use of deadly force as a measure of last resort." *Id.* at 29.

²⁹⁹ *Id.* at 96.

resort upon Taliban forces.³⁰⁰ Therefore, a state of war existed between the two countries under Common Article 3 and combatants on both sides should have received POW status upon capture.³⁰¹

While the Geneva Conventions are clearly triggered by interstate or intra-state warfare, al Qaeda is not a state actor and the pre-9/11 consensus was that international humanitarian law would not apply in a conflict with such a non-state actor; rather, domestic criminal law would govern as well as international human rights law.³⁰² The Bush administration, however, determined *no law* applied in the war on terror.³⁰³ This “lawless” situation created a third world outside the two traditional legal paradigms (the laws of war and domestic criminal law), one that depended entirely upon the executive’s discretion and notions of the laws of war, where the executive has complete discretion to apply the draconian aspects of the laws of war without providing prisoners due process under Geneva Article 3 and, as evidenced by Dilawar’s fate, without treating them with humanity or with dignity.³⁰⁴ The Supreme Court ultimately rebuked the President’s desire to deny Guantánamo prisoners due process in *Boumediene*, but as *Al Maqaleh* demonstrates, the tradition of selective application of the Geneva Conventions is still entrenched in the current administration.³⁰⁵

The Bush administration’s new paradigm—that no law applies in the war on terror—ignores modern realities of warfare, where states are far more likely to engage in armed conflicts with non-state actors than other states, and where the idea that only states may wage war is anachronistic, more suited to the high-sea battles of the sixteenth century than the transnational nature of belligerent groups in the twenty-first century.³⁰⁶ Following the end of the First World War and guided by a popular demand for self-determination by ethnographic groups, the hold of the state-centric system of international relations loos-

³⁰⁰ *Id.* at 33.

³⁰¹ DUFFY, *supra* note 279, at 256.

³⁰² RATNER & RAY, *supra* note 49, at 16; Corn, *Introduction*, *supra* note 53, at xv.

³⁰³ Corn, *Introduction*, *supra* note 53, at xv. Memorandum from John Yoo, Assistant Att’y Gen., Office of Legal Counsel, and Robert J. Delahunty, Special Counsel, Office of Legal Counsel, to William J. Haynes II, General Counsel, Dep’t of Def., on Military Interrogation of Alien Unlawful Combatants Held Outside the United States (Mar. 14, 2003), *available at* http://www.aclu.org/pdfs/safefree/yoo_army_torture_memo.pdf.

³⁰⁴ RATNER & RAY, *supra* note 49, at 17–18.

³⁰⁵ *Al Maqaleh v. Gates*, 604 F. Supp. 2d 205, 209 (2009). Judge Bates issued an order shortly after President Obama took office offering the new administration the opportunity to change or refine its position as to the Bagram detainees. Government’s Response to this Court’s Order of January 22, 2009, at 2, *Al Maqaleh v. Gates*, 604 F. Supp. 2d 205 (D.D.C. 2009) (No. 1:06CV01669), *available at* <http://legaltimes.typepad.com/files/dojorder.pdf>. The Justice Department decided to adhere to the Bush Administration’s previously articulated position. *Id.*

³⁰⁶ See DETTER, *supra* note 59, at 18. Detter uses the example of the Slovenian and Croatian conflict in Yugoslavia in the early 1990s, where the Serbian-dominated Yugoslav Federal Army unsuccessfully attempted a halt in the independence movement. *Id.* Although Slovenia and Croatia eventually emerged as sovereign States in 1991, the forces that stood against the Federal Army were non-state actors. *Id.* This conflict was apparently “war” because the subsequent trials before the International War Crimes Tribunal in The Hague applied the Laws of War to Slobodan Milošević and other officials. *Id.* at 18–19.

ened.³⁰⁷ Internal conflicts between rebel forces and colonial powers birthed the idea that non-state groups of individuals can bear international rights and duties without being direct parties to the treaties that establish them.³⁰⁸ The concept has only grown stronger as the age of modern warfare dawned.³⁰⁹ Therefore, al Qaeda's status as a non-state actor is irrelevant to the question of whether or not the United States is at "war" with the group. The United States chose military force as its weapon to combat the group and uses lethal force as a measure of first resort, as exemplified by the 2002 targeted killing of high-level al Qaeda member Qaed Senyan al-Harithi in Yemen³¹⁰ and the recent killing of Osama bin Laden in Pakistan.³¹¹ Furthermore, al Qaeda's relationship with the Taliban could make Common Article 4 of the Geneva Conventions applicable to its forces.³¹²

Since 9/11, the United States' military actions in Afghanistan and Iraq highlighted problems inherent in invoking the authority of the laws of war without the humanitarian obligations that such laws bring with them.³¹³ When armed conflicts are correctly categorized as "wars" and prosecuted pursuant to the Geneva Conventions or even customary law, armed forces may use military necessity to justify the employment of deadly force while still limiting the methods of warfare and establishing a baseline standard of humane treatment for captured and detained personnel.³¹⁴ While pure treaty-interpretation might lead to the conclusion that the United States is engaged in an armed conflict without being bound by the laws of war,³¹⁵ as the Bush administration argued, such an interpretation leads to problems in the field.³¹⁶ Without the obligations of international humanitarian law that come with a state of war, both combatants and non-combatants run the risk of unnecessary suffering, persons who fall

³⁰⁷ *Id.* at 27.

³⁰⁸ *Id.*

³⁰⁹ *Id.*

³¹⁰ David Johnston & David E. Sanger, *Yemen Killing Based on Rules Set Out by Bush*, N.Y. TIMES (Nov. 6, 2002), <http://www.nytimes.com/2002/11/06/international/middleeast/06YEME.html>.

³¹¹ Peter Baker et al., *Bin Laden is Dead, Obama Says*, N.Y. TIMES, May 1, 2011, at A1.

³¹² ELSEA, *supra* note 279, at 24. The ICRC's Commentary to Article 4 states, "Every person in enemy hands must have some status under international law: he is either a prisoner of war and, as such, covered by the Third Convention, [or] a civilian covered by the Fourth Convention There is no intermediate status; nobody in enemy hands can be outside the law." INT'L COMM. OF THE RED CROSS, COMMENTARY, CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 45 (Jean S. Pictet ed., 1960), <http://www.icrc.org/ihl.nsf/WebPrint/380-600007-COM?OpenDocument> (last visited Jan. 18, 2012).

³¹³ See ELSEA, *supra* note 279, at 19.

³¹⁴ *Id.* at 3 n.13.

³¹⁵ RATNER & RAY, *supra* note 49, at 16. *But see* Jinks & Sloss, *supra* note 50, at 109 ("[P]arties to these treaties remain mutually bound, even if an opposing state is not a party to the treaties.").

³¹⁶ RATNER & RAY, *supra* note 49, at 16. See discussion of how the Bush administration's policies led to Abu Ghraib in Reed Brody, *The Road to Abu Ghraib*, in AMERICA'S DISAPPEARED: DETAINEES, SECRET IMPRISONMENT, AND THE "WAR ON TERROR" 113, 113-16 (Rachel Meeropol, ed., 2005). See also Corn, *What Law Applies*, *supra* note 14, at 36 ("[A]ll warriors must understand that when they 'ruck up' and 'lock and load' to conduct operations during which an opponent will be destroyed on sight, the laws of war go with them.").

into the hands of the enemy might not receive basic human protections, and peace becomes more difficult to reestablish.³¹⁷

The United States is indeed engaged in a “war” in Afghanistan from both practical and legal standpoints. Thus, the D.C. Circuit was correct in *Al Maqaleh* when it correctly identified Bagram Airfield an active theater of war, as it is located in the Kandahar province, an “area of air, land, and water that is, or may become, directly involved in the conduct of the war.”³¹⁸ However, given this determination, the D.C. Circuit misidentified the consequences of the theater of war status and failed to bind the administration to the international humanitarian obligations attached to international warfare. Because Bagram is located within a theater of war, the laws of warfare must apply, including due process rights for detainees. Therefore, the D.C. Circuit should have affirmed the District Court’s habeas grant rather than denying it.

VI. SOLUTIONS: FIGHT TO PROTECT OUR LIVES, FIGHT TO PROTECT OUR PRINCIPLES

Treating detainees like prisoners from a legal standpoint by allowing them access to federal courts or providing them with Geneva protections would be the first step in the right direction of conducting the war in Afghanistan and on terror in a way consummate with American values. While the D.C. Circuit’s selective reading of *Boumediene* could easily be reversed if it were appealed to the Supreme Court, proposing a solution to the problem of litigating detainee actions in the twenty-first century is more difficult. Most scholars agree that the problem ultimately stems from legislative inaction, at best, or Congressional acquiescence to the whims of an executive seeking to push the limits of presidential power, at worst.³¹⁹

Thus, at first glance, the solution seems simple: have Congress declare war on Afghanistan and al Qaeda. A declaration of war would clearly invoke Geneva protections while providing for a higher level of congressional authorization to match the amount of discretion the president is currently utilizing. However, such an action could bring with it unintended consequences, such as symbolically aggrandizing al Qaeda’s status from a “sinister criminal organization” to a legitimate belligerent group, as well as immunizing its members from proportional attacks against American military targets.³²⁰ Furthermore, a decla-

³¹⁷ JEREMY BALL ET AL., JUDGE ADVOCATE GEN. LEGAL CTR. & SCH., OPERATIONAL LAW HANDBOOK 12 (John Rawcliffe ed., 2007).

³¹⁸ DAVID H. PETRAEUS & JAMES F. AMOS, THE U.S. ARMY MARINE CORPS COUNTERINSURGENCY FIELD MANUAL NO. 3-24 388 (2007).

³¹⁹ See, e.g., ELSEA, *supra* note 279, at 51 (“Despite the constitutional powers listed above, Congress has not generally taken an active rule [sic] in prescribing the treatment of prisoners of war.”); PAUST, *supra* note 83, at 131 (“Congress should revise the Military Commissions Act to comply with constitutional and international legal requirements.”); WHEELER, *supra* note 108, at 163 (“Many have pointed an accusing finger at Congress for the vague and wide-ranging grant of power given to the president in the AUMF. Such a grant was an open invitation to an executive already seeking opportunities to reclaim ‘lost’ presidential powers.”)

³²⁰ Derek Jinks, *September 11 and the Laws of War*, 28 YALE J. INT’L LAW 1, 20–21 (2003).

ration might have the perverse effect of enlarging the President's discretion to prosecute the global war on terror as he sees fit, without a meaningful counterbalance of Congressional oversight (although some might argue this phenomenon is already in effect). Given the declaration of war's status as a "moribund anachronism,"³²¹ a declaration of war would be an ineffective, post-facto attempt to correct the many mistakes the nation has made in prosecuting the military mission in the Middle East. Therefore, the wiser solution would be to return the United States' prisoner policy to its status before 9/11, where detainees are either treated "as if" they are prisoners of war or prosecuted criminally in domestic courts for actions on U.S. soil violating U.S. law. This approach would avoid problems of "legal black holes," regardless of where the executive chooses to house prisoners in the future while insuring a policy of humane treatment.

A more subtle solution to the problem involves reevaluating the ethical underpinnings of detainee treatment in general. As Justice O'Connor explained in *Hamdi*, "It is during our most challenging and uncertain moments that . . . we must preserve our commitment at home to the principles for which we fight abroad."³²² The United States, as a nation, must grapple with the difficult issues of approaching warfare in a way that respects the value of human life while simultaneously protecting the safety of its own citizens. Perhaps the ethical answers to society's future challenges lie in theories of the past. "Just war" theory, a doctrine of military ethics dating all the way back to Roman times, proffers that participants in armed conflict may engage in hostilities while still respecting human life and dignity.³²³ The theory is codified in international humanitarian law in the familiar phrase *jus in bello* (violence may be employed during war in ways commensurate with our values³²⁴), which is an organizing principle for many of the Geneva protections.³²⁵ The most useful parts of just war theory for modern society are the concepts of proportionality and discrimination, implemented to avoid total war and conflicts that target the lives and livelihoods of the enemy's citizenry and result in destructive battle-to-the-death scenarios.³²⁶

Just war theory proposes the means employed in war should be proportionate to the gravity of (1) the actual harm incurred and (2) the perceived

³²¹ Robert Turner, *The War on Terrorism and the Modern Relevance of the Congressional Power to "Declare War"*, 25 HARV. J.L. & PUB. POL'Y 519, 537 (2002).

³²² *Hamdi v. Rumsfeld*, 542 U.S. 507, 532 (2004).

³²³ See generally MICHEL WALZER, *JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS* (4th ed. 2006).

³²⁴ PATTERSON, *supra* note 66, at 2. Compare *jus ad bellum*, which asks under what conditions is it moral to go to war, and *jus post bellum*, which asks how we engage justice at the war's end. *Id.*

³²⁵ DUFFY, *supra* note 279, at 217.

³²⁶ PATTERSON, *supra* note 66, at 60–61. Patterson uses the example of the three Punic Wars, which resulted in the razing of Carthage in 146 B.C. and made the area uninhabitable for decades. *Id.* at 61. Another example of total war is the Pacific Theater in World War II, which included the Pearl Harbor attack, the Bataan Death March, and the atomic bombs in Nagasaki and Hiroshima. *Id.* These incidents were part of the American policy of unconditional surrender, which arguably resulted in a longer, costlier, and uglier conflict than was necessary or cost-efficient. *Id.* at 61.

threat.³²⁷ However, in the post-9/11 era, developing a proportionate response to terrorism has proven problematic. Al Qaeda is a group of “criminals and ideologues who not only speak of violence, but act upon it as well, [as it kills] men, women, and children in [its] own neighborhoods and abroad.”³²⁸ In the past, the United States has dealt with terrorists as criminals, not combatants. After 9/11, however, it became harder to conceptualize terrorists as mere criminals because members of al Qaeda engaged in traditional acts of warfare by killing thousands of American civilians, causing billions of dollars in damage, and trying to eliminate leaders of the American government.³²⁹ Furthermore, al Qaeda members continue to use the language of warfare, calling themselves the “army of Allah” and consistently refer to the *jihad* (holy war) with the West, making al Qaeda sound more like a group of combatants, not a group of criminals.³³⁰ However tempting it may be to use this language in order to justify an approach that throws international and domestic law out the window, as al Qaeda appears to have done, a proportionate response to this multidimensional threat cannot be restricted solely to the raw use of military power—rather, it must include diplomacy, economics, and politics as well.³³¹

Furthermore, discrimination means something more than distinguishing between civilians, who are supposed to be shielded from hostilities, and combatants; it means distinguishing those who constitute an active threat from those who do not.³³² Discrimination means that “when an enemy becomes a prisoner, he or she is treated like a prisoner,” but when the enemy returns to the battlefield, law enforcement procedures no longer apply.³³³ In most conflicts today, the discrimination decision is made by the soldier in the field, “at a roadblock or checkpoint as an unidentified person or vehicle approaches,” but a soldier ultimately relies on the policies and training provided by his superiors to make his decision.³³⁴ As evidenced by the abuse at Bagram and Abu Ghirab, soldiers have not been properly trained about the potential consequences of their actions under international law.³³⁵ Without sufficient information to deter-

³²⁷ *Id.* at 63.

³²⁸ *Id.* at 64.

³²⁹ See John Yoo’s interview justifying his interpretation of the Geneva Conventions in *TAXI TO THE DARK SIDE*, *supra* note 2.

³³⁰ DUFFY, *supra* note 279, at 64–65.

³³¹ PATTERSON, *supra* note 66, at 65. Stephen R. Shalom argues the failure of the United States to exhaust its nonmilitary remedies before going to war resulted in a disproportionate military response which allowed prisoner abuse and civilian suffering due to indiscriminate bombing and lack of food. Stephen R. Shalom, *Far from Infinite Justice: Just War Theory and Operation Enduring Freedom*, 26 *ARIZ. J. INT’L & COMP. L.* 623, 696–97 (2009).

³³² PATTERSON, *supra* note 66, at 70.

³³³ *Id.* at 72.

³³⁴ *Id.* at 73.

³³⁵ Sgt. Thomas Curtis, an MP at Bagram who interacted with Dilawar, told filmmakers, “I don’t remember hearing anything about Geneva Convention. Um—of course I’m familiar with it, but they didn’t go over that, you know, in-in any kind of detail.” *TAXI TO THE DARK SIDE*, *supra* note 2. Pfc. Damien Corsetti, an interrogator at Bagram, admitted,

I didn’t know what the Field Manual for Interrogation [was]. I didn’t know the proper nomenclature for it. I had seen it. There was a copy lying around, I’m sure, somewhere. And if I had chosen to, I could have picked it up and read it. But I was working sixteen-hour days. To sit down and read a Field Manual was not top of my priorities over there.

mine what level of force should be applied to whom, soldiers will continue to take the fall for administration-level mistakes in policy.³³⁶

The United States' policy needs to be clear, just, and realistic in order for soldiers in the field to apply the policy in a way that is consummate with our values and effective in promoting a workable peace. The tactics the military uses to incentivize capture of insurgents is flawed; large cash rewards are offered by way of flyers for the presentation of personnel with the simple declaration that they are members of the resistance, and no corroboration of the allegations is necessary before the military takes a person into custody.³³⁷ This policy led to the phenomenon of local warlords rounding up groups of civilians and presenting them to U.S. forces, claiming they participated in an attack.³³⁸ With up to \$5,000 in their pocket for each prisoner, the warlords returned to their territory and use the funds for a variety of purposes, including funding the insurgency.³³⁹ Many of these prisoners were completely innocent and were eventually released by the military, but only after the traumatic and resource-intensive booking and interrogation process.³⁴⁰

The failures of proportionality and discrimination at Bagram and Abu Ghirab resulted in the gratuitous abuse of prisoners in U.S. custody filling news feeds worldwide.³⁴¹ These incidents show U.S. policy about treatment of prisoners is not clear to the soldiers on the ground. Rumsfeld's memos regarding interrogation techniques at Guantánamo were vague,³⁴² probably on purpose to

Id.

³³⁶ At a press conference on September 15, 2006, President Bush responded to the Supreme Court's ruling in *Hamdan*:

This debate is occurring because of the Supreme Court's ruling that said that we must conduct ourselves under the Common Article 3 of the Geneva Convention. And that Common Article 3 says that . . . there will be no outrages upon human dignity . . . it's very vague. What does that mean, 'outrages upon human dignity'? That's a statement that is wide open to interpretation.

Transcript: President Bush Pushes Torture Rules and Tribunals Plan, PBS NEWSHOUR (Sept. 15, 2006), http://www.pbs.org/newshour/bb/politics/july-dec06/bush_09-15.html. Of the Bagram interrogators, Pfc. Willie Brand was convicted of assault, maiming, and maltreatment. TAXI TO THE DARK SIDE, *supra* note 2. Sgt. Anthony Morden pled guilty to assault and dereliction of duty. *Id.* Spc. Glendale Walls pled guilty to assault and dereliction of duty. *Id.*

³³⁷ FLETCHER & STOVER, *supra* note 3, at 20–21.

³³⁸ Gopal, *supra* note 168. The Northern Alliance and local warlords eventually picked up as many as 35,000 or 40,000 people in response to the United States flyers. RATNER & RAY, *supra* note 49, at 9. These groups "started turning over their enemies or anyone they didn't like, or finally, anyone they could pick up." *Id.*

³³⁹ FLETCHER & STOVER, *supra* note 3, at 19, 21.

³⁴⁰ Gopal, *supra* note 168. The detentions may have more sinister, unanticipated consequences of turning possible allies against the United States.

31 [Guantánamo detainees interviewed after their release] said their opinion of the United States changed from positive to negative as a result of their experiences in U.S. custody. . . . Many respondents expressed feelings of bitterness that, in their view, the United States had disregarded the rule of law and humanitarian principles. 'We never imagined Americans, the country that was the defender of democracy, would treat anybody like this,' remarked one. An Afghan respondent noted that the U.S. supported Afghan forces when they were fighting the Russians, but had turned on these same fighters after 9/11.

FLETCHER & STOVER, *supra* note 3, at 111.

³⁴¹ See Golden, *supra* note 4; see also Mazzetti, *supra* note 242.

³⁴² PAUST, *supra* note 83, at 14–15.

avoid Geneva implications. An interrogator at Bagram recounted the difficulty when dealing with detainees:

A lot of pressure came from the fact that we had a few high value detainees that gave a lot of good information. And when we started to lose those detainees due to going to Guantanamo Bay, that they expected this to come from everybody. . . . We would interrogate some of these guys just to interrogate them. And it was ridiculous. I mean, you'd get some of these guys in and you're like 'This is the wrong man. This is not who we're supposed to have' They'd be like 'Hey, we want you to go yell at this guy.' So I'd grab my box of Frosted Flakes that I was eating for breakfast that morning, and I'd go into the room, and I'd be like 'Alright, I have to yell at you today.' So I'd be like 'dehydrogenated salt substitute.' And just start yelling at them. And they'd be like, they'd look at me all crazy, and I'd be like 'Yeah! That's your fault they put that in my cereal now.' Or I'd yell at them if Elvis was really King of Rock, or if he was dead. Or stuff like that. And I'd write that in my interrogation summaries. And I'd send that up to higher that that's what I did for that two hours.³⁴³

Yelling at shackled prisoners about the ingredients in Frosted Flakes is neither proportionate nor discriminatory to the military mission in Afghanistan. Yet, soldiers were instructed these tactics were the only way to catch Osama bin Laden³⁴⁴ and were held solely accountable when things went wrong.³⁴⁵ The military's preoccupations with potentially low-level insurgents, especially in light of al Qaeda's decentralized command structure, are not discriminatory because interrogation and detention of such forces are unlikely to actively promote an end of hostilities.³⁴⁶

The detainee cases all stem from the administration's continued insistence on treating detainees like combatants, not prisoners. Once in custody, the detainees no longer pose an active threat to military personnel. They may have information useful to the military, but the sort of brute force publicized by the Dilawar and Abu Ghirab incidents is not the only tool in the military's information-gathering toolbox.³⁴⁷ As John McCain aptly stated during a Senate Armed Services committee meeting, "Now, they may be al Qaeda, they may be

³⁴³ Interviews with Pfc. Damien Corsetti, 519th Military Intelligence Unit, Bagram, and Spc. Glendale Walls, who interrogated Dilawar at Bagram. TAXI TO THE DARK SIDE, *supra* note 2.

³⁴⁴ "When was the last time you saw Osama bin Laden? When was the last time you saw Mohamed Atta?" Now, this was a standard question that they would ask of every detainee." *Id.* Yet, the intelligence that ultimately led U.S. forces to Osama's compound came not from coercive techniques, but from following Osama's courier's Suzuki as it drove through Abotobad, Pakistan. Mark Mazzetti et al., *Behind the Hunt for Bin Laden*, N.Y. TIMES, May 3, 2011, at A1, available at <http://www.nytimes.com/2011/05/03/world/asia/03intel.html>.

³⁴⁵ Interrogators at Bagram were charged with or convicted of assault, maiming, maltreatment, dereliction of duty, and performing an indecent act, and many of them sent to correctional facilities for their actions in the Dilawar and Habibullah cases. TAXI TO THE DARK SIDE, *supra* note 2. No officer, however, was ever convicted in Dilawar's case. *Id.* Following her management of the Abu Ghraib interrogators during the scandal, Capt. Carolyn Wood was given a staff position training new interrogators at the Army Interrogation School in Arizona. *Id.*

³⁴⁶ See Adam Klein, Note, *The End of Al Qaeda? Rethinking the Legal End of the War on Terror*, 110 COLUM. L. REV. 1865, 1885–86 (2010).

³⁴⁷ Jack Cloonan, of the Counterterrorism Task Force, outlined the FBI's approach to information gathering in his interview for TAXI TO THE DARK SIDE, *supra* note 2.

Taliban, they may be the worst people in the world—and I'm sure that some of them are—but there are certain basic rules and international agreements that the United States has agreed to, that we will observe."³⁴⁸ And these rules must be observed if the United States wishes to escape from the tricky corner it has painted itself into with its detainee policies.

CONCLUSION

In this age of terrorism and moral relativism, one conclusion emerges clearly: *Al Maqaleh* endorsed a distinctly un-American view of the fundamental rights of prisoners. By refusing to extend *Boumediene* beyond Guantánamo, the D.C. Circuit invited the executive to implement an “ends justifies the means” thinking about wartime detention, a position that runs contrary to two and a half centuries of legal thought and humanitarian values. Prisoners are prisoners, whether they are Americans or foreign nationals; the human impact of indefinite detention knows no state or military boundaries. Were Dilawar an American, his suffering would not have been any less tragic and offensive to basic concepts of justice. However, with no access to federal courts, similarly situated prisoners will effectively remain banished inside the razor-wire fences of Bagram.

The “practical concerns” at issue in *Al Maqaleh* may be compelling on their own, but taken in the context of the bigger picture of the United States’ conduct during the war on terror, they provide a dire warning. The modern imperial presidency can prosecute military endeavors as it sees fit, with little oversight, be it judicial, legislative, or international, so long as it claims military necessity. The *Al Maqaleh* District Court tried to draw a firm line in the sand for limiting executive power, but the D.C. Circuit dipped its brush into the sanitizing white paint of executive deference and erased that line, staining it instead with the mark of War.

However, if the United States is at war with al Qaeda, then the laws of war apply, including international humanitarian obligations. The president cannot and should not discount these obligations simply because they are difficult to afford.

You want to be able to build a rapport with somebody, you are their salvation, because their life as they know it is over. ‘Is there something I can do for your kids? You concerned about them? Do you want them educated? I’ll get them educated. What do you want? Tell me what you want. Script for me your exit strategy. How do you extricate yourself from this terrible situation that, by the way, you put yourself in? Now, you can’t go back home, can you? No. So let’s make peace with that. Let me help you find this strategy to give you a life.’ And that’s the way it worked. The amount of information that they were able to provide us, pre-9/11, to me it was extremely valuable. Who else was going to tell us about how you joined al Qaeda? . . . So when we got all that information, we were able to do certain operations. Cumbersome though it may be, it still to me was the way to do it. And we don’t have to apologize to anybody.

Id.

³⁴⁸ U.S. Senate Armed Services Committee, Hearing on Treatment of Guantanamo Bay Detainees, July 13, 2005 (transcript available at <http://humanrights.ucdavis.edu/projects/the-guantanamo-testimonials-project/testimonies/testimonies-of-the-defense-department/senate-armed-services-committee-hearing-on-guantanamo-bay-detainee-treatment>).