basis was statutory or constitutional.[234] This amendment was challenged in *Boumediene v. Bush*,[235] as a violation of the Suspension Clause.[236] Although the historical record did not contain significant common-law applications of the writ to foreign nationals who were apprehended and detained overseas, the Court did not find this conclusive in evaluating whether *habeas* applied in this case.[237] Emphasizing a "functional" approach to the issue,[238] the Court considered (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 detention took place; and (3) any practical obstacles inherent in resolving the prisoner's entitlement to the writ. As in *Rasul*, the Court distinguished previous case law, noting that the instant detainees disputed their enemy status, that their ability to dispute their status had been limited, that they were held in a location (Guantanamo Bay, Cuba) under the *de facto* jurisdiction of the United States, and that complying with the demands of *habeas* petitions would not interfere with the government's military mission. Thus, the Court concluded that the Suspension Clause was in full effect regarding these detainees.

Martial Law and Domestic Disorder.—President Washington himself took command of state militia called into federal service to quell the Whiskey Rebellion, but there were not too many occasions subsequently in which federal troops or state militia called

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[234] Detainee Treatment Act of 2005, Pub. L. 109–148, § 1005(e)(1) (providing that "no court . . . shall have jurisdiction to hear or consider . . . an application for a writ of habeas corpus filed by . . . an alien detained . . . at Guantanamo Bay"). After the Court decided, in Hamdan v. Rumsfeld, 548 U.S. 557 (2006), that this language of the Detainee Treatment Act did not apply to detainees whose cases were pending at the time of enactment, the language was amended by the Military Commissions Act of 2006, Pub. L. 109–366, to also apply to pending cases where a detainee had been determined to be an enemy combatant.

[235] 553 U.S. 723 (2008).

[236] U.S. Const. Art. I, § 9, cl. 2 provides: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." In *Boumediene*, the government argued only that the Suspension Clause did not apply to the detainees; it did not argue that Congress had acted to suspend *habeas*.

[237] "[G]iven the unique status of Guantanamo Bay and the particular dangers of terrorism in the modern age, the common-law courts simply may not have confronted cases with close parallels to this one. We decline, therefore, to infer too much, one way or the other, from the lack of historical evidence on this point." 553 U.S. at 752.

[238] 553 U.S. at 764. "[Q]uestions of extraterritoriality turn on objective factors and practical concerns, not formalism." Id.