

# University of Miami Law Review

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Volume 76 | Number 1

Article 7

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11-23-2021

## We'll Protect You! Oh, Wait, But Not You. Or You, You, or You: The Consequences of the Court's Major Undertaking in *Department of Homeland Security v. Thuraissigiam*

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**We'll Protect You! Oh, Wait,  
But Not You. Or You, You, or You:  
The Consequences of the Court's  
Major Undertaking in  
*Department of Homeland Security v.  
Thuraissigiam***

JAE LYNN HUCKABA \*

*For centuries, the writ of habeas corpus has been used to test the legality of restraints on a person's freedom. The Founders, recognizing the significance of the protection, incorporated the writ into the Suspension Clause of our Constitution. In the last century, the Supreme Court has repeatedly held that noncitizens may invoke the Suspension Clause. Courts, especially in the immigration context, also expanded the definition of "in custody" for the purpose of habeas corpus to include non-detained persons in removal proceedings. The Supreme Court has departed from such precedent and gave new meaning to habeas corpus in the immigration context—a major undertaking with serious consequences for asylum seekers.*

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*This Comment analyzes the Supreme Court's decision in Department of Homeland Security v. Thuraissigiam. It focuses on the Court's departure from precedent to project new meaning onto habeas corpus in the immigration context. In critiquing such departure, the Comment discusses the erosion of asylum protections in the last twenty-five years. This Comment suggests that Congress must take action to rebuild asylum law.*

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## INTRODUCTION

Asylum law in the United States derives from the International Refugee Convention and provides that any person “physically present in the United States or who arrives in the United States . . . may apply for asylum” irrespective of the person’s status.<sup>1</sup> Many foreign nationals cling to the hope that arriving in the United States will provide them with a safe haven from persecution, torture, and potential death.<sup>2</sup> But for most asylum seekers, making it to the United States marks the beginning of another tough battle against a relentless adversary: the United States immigration system.<sup>3</sup>

United States immigration law has always been a complex and challenging system, but since 2017, the federal government has increased its attacks on the asylum process.<sup>4</sup> The Trump administration issued executive orders increasing the use of expedited removal,<sup>5</sup> raised the threshold for credible fear interviews,<sup>6</sup> prolonged the detention of asylum seekers,<sup>7</sup> eviscerated asylum seekers’ due

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<sup>1</sup> 8 U.S.C. § 1158(a)(1) (2001).

<sup>2</sup> *Asylum Seekers and Refugees*, NAT’L IMMIGRANT JUST. CTR., <https://immigrantjustice.org/issues/asylum-seekers-refugees> (last updated Nov. 2020).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> Exec. Order No. 13,767, 82 Fed. Reg. 8793, 8793 (Jan. 25, 2017).

<sup>6</sup> Memorandum from the Sec’y of the Dep’t of Homeland Sec. to the Acting Comm’r of U.S. Customs & Border Protection, et al. 8 (Feb. 20, 2017).

<sup>7</sup> ICE launched the Family Case Management Program in 2017 to keep families seeking asylum together and out of detention. OFF. OF INSPECTOR GEN., DEP’T OF HOMELAND SEC., OIG-18-22, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT’S AWARD OF THE FAMILY CASE MANAGEMENT PROGRAM CONTRACT 2 (2017). The Trump administration ended the program and reduced the number of asylum seekers released on humanitarian parole in violation of ICE’s policy directive requiring the agency to release asylum seekers who have a sponsor and pose no risk to the community. Jane C. Timm, *This Obama-Era Pilot Program Kept Asylum-Seeking Migrant Families Together. Trump Canceled It.*, NBC NEWS (June 24, 2018, 8:02 AM), <https://www.nbcnews.com/storyline/immigration-border-crisis/obama-era-pilot-program-kept-asylum-seeking-migrant-families-together-n885896>.

process rights,<sup>8</sup> implemented a “zero-tolerance” policy,<sup>9</sup> and enforced case quotas.<sup>10</sup> In addition to these attacks, the administration also limited the availability of asylum for victims of domestic and gang violence,<sup>11</sup> issued an interim final rule that banned asylum,<sup>12</sup> implemented “Remain in Mexico,”<sup>13</sup> undermined the protections for unaccompanied children seeking asylum,<sup>14</sup> doubled the wait time for asylum seekers to apply for employment authorization,<sup>15</sup> and

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<sup>8</sup> In March of 2018, Attorney General Jeff Sessions vacated the Board of Immigration Appeals (BIA) decision in Matter of *E-F-H-L-*, 27 I. & N. Dec. 226, 226 (A.G. 2018). The vacatur denies asylum seekers the right to testify on their own behalf before being denied asylum or deported. *See id.*; *see also* Matter of *E-F-H-L-*, 26 I. & N. Dec. 319, 324 (B.I.A. 2014).

<sup>9</sup> Memorandum from Jeff Sessions, Off. of the Att'y Gen., to Federal Prosecutors Along the Southwest Border 1 (Apr. 6, 2018), <https://www.justice.gov/opa/press-release/file/1049751/download>.

<sup>10</sup> Joel Rose, *Justice Department Rolls Out Quotas for Immigration Judges*, NPR (Apr. 3, 2018, 1:09 PM), <https://www.npr.org/2018/04/03/599158232/justice-department-rolls-out-quotas-for-immigration-judges>.

<sup>11</sup> Matter of *A-B-*, 27 I. & N. Dec. 316, 320 (A.G. 2018). The Biden administration moved quickly to reverse former Attorney General Sessions’ vacatur of *Matter of A-B-*, concluding that rulemaking was the best way to consider the issues involved. Matter of *A-B-*, 28 I. & N. Dec. 307, 309 (A.G. 2021); *see also* Matter of *L-E-A*, 28 I. & N. Dec. 304, 305 (A.G. 2021) (finding the definition of “particular social group” would also be best addressed by issuing a final rule). These decisions reflect the shifting nature of immigration law when left in the hands of the executive. *See infra* Part IV.

<sup>12</sup> Proclamation No. 9822, 83 Fed. Reg. 57,661, 57,663 (Nov. 15, 2018).

<sup>13</sup> Memorandum from Kirstjen M. Nielsen, Sec'y of the Dep't of Homeland Sec., to L. Francis Cissna, Dir. Of U.S. Citizenship & Immigr. Servs., et al. (Jan. 25, 2019), [https://www.dhs.gov/sites/default/files/publications/19\\_0129\\_OPA\\_migrant-protection-protocols-policy-guidance.pdf](https://www.dhs.gov/sites/default/files/publications/19_0129_OPA_migrant-protection-protocols-policy-guidance.pdf) (requiring asylum seekers trying to enter the U.S. from the southern border to wait in Mexico for court hearings).

<sup>14</sup> Memorandum from John Lafferty, Chief, Asylum Division, U.S. Citizenship & Immigr. Servs., to All Asylum Office Staff (May 31, 2019), [https://www.uscis.gov/sites/default/files/document/memos/Memo\\_-\\_Updated\\_Procedures\\_for\\_I-589s\\_Filed\\_by\\_UACs\\_5-31-2019.pdf](https://www.uscis.gov/sites/default/files/document/memos/Memo_-_Updated_Procedures_for_I-589s_Filed_by_UACs_5-31-2019.pdf). In August of 2019, the United States District Court of Maryland issued a temporary restraining order, enjoining USCIS from applying the memorandum. *See generally* J.O.P. v. U.S Dep't of Homeland Sec., 409 F. Supp. 3d 367 (D. Md. 2019).

<sup>15</sup> Asylum Application, Interview, and Employment Authorization for Applicants, 85 Fed. Reg. 38,532, 38,533 (Aug. 25, 2020) (to be codified at 8 C.F.R. pt. 208, 274).

increased fees for asylum seekers.<sup>16</sup> Each of these actions was a part of the federal government's systematic attack on asylum, seeking to erode asylum protections completely.<sup>17</sup>

On June 25, 2020, the United States Supreme Court further eroded the asylum protections afforded to noncitizens by the Immigration and Nationality Act ("INA").<sup>18</sup> In *Department of Homeland Security v. Thuraissigiam*, the Court decided by a 7-2 vote that denials of asylum claims in expedited removal proceedings are not reviewable under the writ of habeas corpus.<sup>19</sup> This holding gave new meaning to habeas corpus relief in the immigration context and departed from over 100 years of precedent.<sup>20</sup> That departure, coupled with the court's refusal to extend constitutional due process protections to asylum applicants, allows officers employed by the executive branch to make arbitrary asylum adjudications without any accountability.<sup>21</sup> This Article analyzes the Court's opinion, the way it changed habeas corpus in the immigration context, and the consequences this major undertaking will cause.

Part I outlines the history of the writ of habeas corpus ("The Great Writ") and its constitutional foundation. It discusses the rare instances where the government has suspended the writ of habeas corpus, emphasizing the extraordinary circumstances required to justify a suspension. The section also briefly discusses legislative limits to habeas corpus, specifically focusing on the circumstances

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<sup>16</sup> U.S. Citizenship and Immigration Service Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements, 85 Fed. Reg. 46,788, 46,791 (Aug. 3, 2020) (to be codified at 8 C.F.R. pt. 103, 106, 204, 211, 212, 214, 216, 217, 223, 235, 236, 240, 244, 245).

<sup>17</sup> Colby Itkowitz, *Trump: Congress Needs to 'Get Rid of the Whole Asylum System'*, WASH. POST (Apr. 5, 2019, 4:54 PM), [https://www.washingtonpost.com/politics/trump-congress-needs-to-get-rid-of-the-whole-asylum-system/2019/04/05/700eac1a-57a5-11e9-8ef3-fbd41a2ce4d5\\_story.html](https://www.washingtonpost.com/politics/trump-congress-needs-to-get-rid-of-the-whole-asylum-system/2019/04/05/700eac1a-57a5-11e9-8ef3-fbd41a2ce4d5_story.html).

<sup>18</sup> See Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959, 1963–64 (2020); see also *infra* notes 280–82.

<sup>19</sup> See 140 S. Ct. at 1963–64.

<sup>20</sup> See *id.* at 1993 (Sotomayor, J., dissenting) (suggesting the majority's approach "flouts over a century of th[e] Court's practice"); see also *infra* notes 274–79.

<sup>21</sup> See Gerald Neuman, *The Supreme Court's Attack on Habeas Corpus in DHS v. Thuraissigiam*, JUST SEC. (Aug. 25, 2020), <https://www.justsecurity.org/72104/the-supreme-courts-attack-on-habeas-corpus-in-dhs-v-thuraissigiam/>.

surrounding the Antiterrorism and Effective Death Penalty Act of 1996.

Part II discusses the facts, relevant law, and holding of *Thuraissigiam*. This section focuses on the decision's separate opinions. It distinguishes between the justices' distinct framings of Thuraissigiam's claims. Only then does it become apparent how each framing impacts the Court's reasoning.

Part III addresses the Court's departure from habeas corpus precedent in the immigration context, as well as the due process implications of the Court's decision. This Article concludes by explaining how denying habeas review of asylum denials in expedited removal proceedings erodes noncitizens' right to asylum protection. It argues that unless the Supreme Court narrows or overturns *Thuraissigiam*, the current administration and Congress must act to rebuild the asylum system, including codifying noncitizens' rights to habeas corpus review of asylum denials in expedited removal proceedings.

## I. BACKGROUND

### A. *Origins and History of the Writ of Habeas Corpus*

As early as 1215, the Magna Carta embraced the concept that no person "shall be seized or imprisoned . . . except by the lawful judgment of his equals or by the law of the land."<sup>22</sup> However, it was not until 1600 that English courts began considering petitions for habeas corpus.<sup>23</sup> In anticipation of his brother succeeding him to the throne, King Charles II's Parliament passed the Habeas Corpus Act of 1679, fearing that King James II would violate English liberties.<sup>24</sup> The Act guaranteed the privilege of habeas corpus petitions and outlined the petition's requirements.<sup>25</sup> It remains in effect in England today.<sup>26</sup>

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<sup>22</sup> *Treasures in Full: Magna Carta*, BRITISH LIBR. (Sept. 27, 2007, 3:20 PM), <https://www.law.gmu.edu/assets/files/academics/founders/MagnaCarta.pdf>.

<sup>23</sup> *Habeas Corpus*, CORNELL L. SCH., [https://www.law.cornell.edu/wex/habeas\\_corpus](https://www.law.cornell.edu/wex/habeas_corpus) (last updated June 2017).

<sup>24</sup> *Magna Carta: Muse and Mentor*, LIBR. OF CONG., [https://www.loc.gov/exhibits/magna-carta-muse-and-mentor/writ-of-habeas-corpus.html#skip\\_menu](https://www.loc.gov/exhibits/magna-carta-muse-and-mentor/writ-of-habeas-corpus.html#skip_menu) (last visited Sept. 2, 2021).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

The Habeas Corpus Act of 1679 influenced the framers of the Constitution to incorporate the right of habeas corpus into the United States Constitution.<sup>27</sup> Habeas corpus encompasses a variety of writs that seek to bring a person within a court's power.<sup>28</sup> The most well-known writ is the writ of habeas corpus *ad subjiciendum*, also known as "The Great Writ."<sup>29</sup> The petition is used to determine whether a person imprisoned or detained is being lawfully held.<sup>30</sup> The right to habeas corpus is rooted in the Constitution's Suspension Clause<sup>31</sup> and federal statutes.<sup>32</sup> The Suspension Clause protects the right of the writ of habeas, preventing the federal government from suspending the right except in cases of rebellion, invasion, or where public safety requires it.<sup>33</sup> The framers, remembering their struggles under an oppressive government, valued The Great Writ and declared that it should be suspended only under extraordinary circumstances.<sup>34</sup>

## 1. SUSPENSION OF THE GREAT WRIT THROUGHOUT HISTORY

Since the Constitution's ratification, the government has suspended the writ of habeas corpus only three times prior to *Thurais-sigiam*.<sup>35</sup> The first time was during the Civil War when President Abraham Lincoln suspended the writ throughout the Union for

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<sup>27</sup> *Id.*

<sup>28</sup> *Habeas Corpus*, *supra* note 23.

<sup>29</sup> *Remarks on the Writ of Habeas Corpus ad Subjiciendum, and the Practice Connected Therewith*, 4 U. PA. L. REV. 257, 259–60 (1856) [hereinafter *Remarks on the Writ of Habeas Corpus*]; Ordan M. Steiker, *Habeas Corpus: Origins and History, Constitutional Protection of the Writ of Habeas Corpus, the Scope of Federal Habeas Corpus* (2021), <https://law.jrank.org/pages/1312/Habeas-Corpus.html>.

<sup>30</sup> *Remarks on the Writ of Habeas Corpus*, *supra* note 29, at 259–60.

<sup>31</sup> "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the Public Safety may require it." U.S. CONST. art. I, § 9, cl. 2.

<sup>32</sup> 28 U.S.C. § 2254 (2012).

<sup>33</sup> U.S. CONST. art. I, § 9, cl. 2.

<sup>34</sup> Amy Barrett & Neal K. Katyal, *Common Interpretation: The Suspension Clause*, NAT'L CONST. CTR., <https://constitutioncenter.org/interactive-constitution/interpretation/article-i/clauses/763#:~:text=The%20Suspension%20Clause%20protects%20liberty,the%20public%20safety%20requires%20it>.

<sup>35</sup> *See id.*

prisoners of war, spies, traitors, or soldiers.<sup>36</sup> Lincoln's decision spurred controversy about the president's authority to imprison people indefinitely without judicial review or authorization from Congress.<sup>37</sup> The debate centered on Lincoln's authority to suspend the writ absent congressional authorization.<sup>38</sup> Congress responded to those concerns on March 3, 1863, passing the Habeas Corpus Suspension Act, which authorizes the president of the United States to suspend the writ of habeas corpus.<sup>39</sup>

The other instances of suspension were more geographically limited.<sup>40</sup> During Reconstruction, President Ulysses S. Grant suspended the writ in nine South Carolinian counties with prevalent Ku Klux Klan ("KKK") activity.<sup>41</sup> He aimed to eliminate the KKK's presence and stop KKK violence.<sup>42</sup> Nearly seventy years later, relying on the Hawaiian Organic Act of 1900,<sup>43</sup> the governor of Hawaii declared martial law and suspended the writ of habeas corpus in the State.<sup>44</sup> Japan's attack on Pearl Harbor constituted a serious threat to public safety, justifying the writ's suspension.<sup>45</sup>

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<sup>36</sup> Abraham Lincoln, *A Proclamation (Sept. 24, 1862)*, in 6 COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1897, 98–99 (James D. Richardson ed., 1897).

<sup>37</sup> Rufus E. Foster, *The Suspension of the Writ of Habeas Corpus*, 2 S.L.Q. 269, 271–72 (1917) (explaining that Lincoln's issuance of the proclamation suspending the writ of habeas corpus in the entire United States was not met with unanimous approval of jurists).

<sup>38</sup> *Id.*

<sup>39</sup> Habeas Corpus Suspension Act, ch. 81, § 1, 12 Stat. 755, 755 (1863) (“[D]uring the present rebellion, the President of the United States, whenever, in his judgment the public safety may require it, is authorized to suspend the privilege of the writ of habeas corpus in any case throughout the United States”); Foster, *supra* note 37, at 271–72.

<sup>40</sup> See Barrett & Katyal, *supra* note 34.

<sup>41</sup> See Ulysses S. Grant, *A Proclamation (Oct. 17, 1871)*, in COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1897, *supra* note 36, at 136–38.

<sup>42</sup> See *id.*; Barrett & Katyal, *supra* note 34.

<sup>43</sup> “[T]he governor shall be responsible for the faithful execution of the laws of the United States and of the Territory of Hawaii within the said Territory, and whenever it becomes necessary . . . he may, in case of rebellion or invasion, imminent danger thereof, when the public safety requires it, suspend the privilege of the writ of habeas corpus.” Hawaiian Organic Act, Ch. 339, § 67, 31 Stat. 141, 153 (1900).

<sup>44</sup> See Barrett & Katyal, *supra* note 34.

<sup>45</sup> *See id.*

These instances show that suspension of the writ of habeas corpus must be justified by extraordinary circumstances that jeopardize public safety.<sup>46</sup> The rigor of that standard demonstrates the writ's importance in United States society and in protecting individual liberties; however, in the last three decades, more recent threats to public safety prompted Congress to further limit the writ's availability.<sup>47</sup>

## 2. LEGISLATIVE LIMITATIONS: AEDPA

On the morning of April 19, 1995, former soldier and security guard Timothy McVeigh bombed the Alfred P. Murrah Federal Building in Oklahoma City, killing 168 people, including sixteen children, and injuring hundreds more, while also destroying hundreds of nearby buildings.<sup>48</sup> One year later, Congress enacted the Antiterrorism and Effective Death Penalty Act ("AEDPA").<sup>49</sup> The Act purported "to deter terrorism" and "provide justice for victims" of terrorism.<sup>50</sup> To achieve those purposes, Title I of AEDPA amends the federal habeas corpus statute to include a one-year statute of limitations on the availability of habeas corpus relief.<sup>51</sup>

### B. *The Great Writ in Immigration*

Although the writ of habeas corpus is most commonly used to challenge the legality of criminal convictions and sentences,<sup>52</sup> it is also used in the immigration context to challenge the legality of

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<sup>46</sup> See *id.*

<sup>47</sup> See *infra* notes 48–51.

<sup>48</sup> *Oklahoma City Bombing*, FED. BUREAU OF INVESTIGATION: HIST., <https://www.fbi.gov/history/famous-cases/oklahoma-city-bombing> (last visited Sept. 3, 2021).

<sup>49</sup> Antiterrorism and Effective Death Penalty Act (AEDPA), Pub. L. 104-132, § 1, 110 Stat. 1214, 1217 (1996) (amended in 2016).

<sup>50</sup> *Id.* at 1214.

<sup>51</sup> "A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court." § 101, 110 Stat. at 1217.

<sup>52</sup> *Jurisdiction: Habeas Corpus*, FED. JUD. CTR., <https://www.fjc.gov/history/courts/jurisdiction-habeas-corpus>.

detention and orders of deportation.<sup>53</sup> A petition for a writ of habeas corpus is available to any person found to be in “custody.”<sup>54</sup> A detained noncitizen fits the “custody” requirement for the writ of habeas corpus.<sup>55</sup> But the meaning of “custody” is no longer limited to physical detention.<sup>56</sup> Noncitizens filing habeas corpus petitions seek initial review of administrative decisions.<sup>57</sup> In this context, no judicial proceedings have occurred, and often, no other review of the decision is available.<sup>58</sup> Habeas corpus in immigration underwent two major changes due to the passage of new legislation: the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”)<sup>59</sup> and the REAL ID Act of 2005.<sup>60</sup>

## 1. THE ILLEGAL IMMIGRATION REFORM AND IMMIGRANT RESPONSIBILITY ACT OF 1996

In 1996, Congress enacted the IIRIRA to improve the nation’s border control.<sup>61</sup> Under IIRIRA, certain applicants seeking admission into the United States are subject to expedited removal.<sup>62</sup> Expedited removal is a process designed to speed up immigration proceedings.<sup>63</sup> The process grants low-level immigration officers

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<sup>53</sup> AM. IMMIGR. COUNCIL, INTRODUCTION TO HABEAS CORPUS 2–4 (2008), [https://www.americanimmigrationcouncil.org/sites/default/files/practice\\_advisory/lac\\_pa\\_0406.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/lac_pa_0406.pdf) [hereinafter AM. IMMIGR. COUNCIL, INTRODUCTION TO HABEAS CORPUS].

<sup>54</sup> Charles A. Cushman, *The “Custody” Requirement for Habeas Corpus*, 50 MIL. L. REV. 1, 3–4 (1970).

<sup>55</sup> AM. IMMIGR. COUNCIL, INTRODUCTION TO HABEAS, *supra* note 53, at 3–4.

<sup>56</sup> In the absence of physical restraint, other restrictions on liberty may satisfy the custody requirement for habeas corpus purposes. *See Rumsfeld v. Padilla*, 542 U.S. 426, 437 (2004) (“[the Court’s] understanding of custody has broadened to include restraints short of physical confinement”).

<sup>57</sup> AM. IMMIGR. COUNCIL, INTRODUCTION TO HABEAS CORPUS, *supra* note 53, at 2.

<sup>58</sup> *Id.*

<sup>59</sup> *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 306, 110 Stat. 3009, 3009–610 (1996) (amending 8 U.S.C. § 1252).

<sup>60</sup> REAL ID Act of 2005, Pub. L. 109–13, § 106, 119 Stat. 231, 310–311 (2005) (amending 8 U.S.C. § 1252).

<sup>61</sup> Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 110 Stat. at 3009–553.

<sup>62</sup> *Id.* at 3009–580.

<sup>63</sup> *Id.* at 3009–580–81.

authority to quickly deport certain noncitizens who are either undocumented or have committed fraud or misrepresentation.<sup>64</sup> Immigration officials have conducted expedited removal proceedings since 2004, deporting many individuals entering without the proper documentation if apprehended within two weeks of their arrival and within 100 miles of the northern or southern borders.<sup>65</sup> The use of expedited removal saw a dramatic increase under the Trump Administration.<sup>66</sup>

On January 25, 2017, former President Donald Trump issued an executive order to improve border security and immigration enforcement.<sup>67</sup> Two years later, the Department of Homeland Security (“DHS”) announced that it would carry out the full expansion of expedited removal.<sup>68</sup> This meant that, as of July 23, 2019, expedited removal was applicable to individuals without documentation, individuals who have committed fraud or misrepresentation, and individuals who have not been physically present in the country for at least two years prior to apprehension.<sup>69</sup> The executive order greatly expanded the number of individuals subject to expedited removal.<sup>70</sup>

When an immigration officer decides that a noncitizen is subject to expedited removal, the government places the noncitizen in removal proceedings without allowing the noncitizen to secure an attorney or contest removal before a judge.<sup>71</sup> Some noncitizens

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<sup>64</sup> *Id.*

<sup>65</sup> Designating Aliens for Expedited Removal, 69 Fed. Reg. 48,877, 48,881 (Aug. 11, 2004).

<sup>66</sup> See JOHN. F. SIMANSKI & LESLEY M. SAPP, U.S. DEP’T OF HOMELAND SEC., IMMIGRATION ENFORCEMENT ACTIONS: 2012, at 6 (2014), [https://www.dhs.gov/sites/default/files/publications/Enforcement\\_Actions\\_2013.pdf](https://www.dhs.gov/sites/default/files/publications/Enforcement_Actions_2013.pdf); Erik Larson, *Trump Gets Path Cleared for Expedited Removal of Immigrants*, DET. NEWS (June 23, 2020, 2:04 PM), <https://www.detroitnews.com/story/news/politics/2020/06/23/trump-gets-path-cleared-expedited-removal-immigrants/112000884/>.

<sup>67</sup> Exec. Order No. 13,767, 82 Fed. Reg. 8793, 8793 (Jan. 25, 2017).

<sup>68</sup> See Designating Aliens for Expedited Removal, 69 Fed. Reg. at 48,877; AM. IMMIGR. COUNCIL, A PRIMER ON EXPEDITED REMOVAL 1 (2019), [https://www.americanimmigrationcouncil.org/sites/default/files/research/primer\\_on\\_expedited\\_removal.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/primer_on_expedited_removal.pdf) [hereinafter AM. IMMIGR. COUNCIL, A PRIMER ON EXPEDITED REMOVAL].

<sup>69</sup> AM. IMMIGR. COUNCIL, A PRIMER ON EXPEDITED REMOVAL, *supra* note 68, at 1.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

subjected to expedited removal are entitled to procedural protections before the noncitizen can be removed from the United States.<sup>72</sup> One way that a noncitizen can avoid expedited removal is through a showing of “credible fear of persecution” to an asylum officer.<sup>73</sup> If the asylum officer finds that the noncitizen has a credible-fear claim, the noncitizen is placed in formal removal proceedings, allowing the noncitizen to pursue asylum protection.<sup>74</sup> Even if the officer determines otherwise, the noncitizen maintains administrative review of the asylum claim before an Immigration Judge (“IJ”).<sup>75</sup> These procedural protections are intended to preserve the integrity of the asylum process.<sup>76</sup>

## 2. THE REAL ID ACT OF 2005

Before 2005, habeas corpus petitions in immigration fell under two categories: challenges to the legality of removal or challenges to detention.<sup>77</sup> With the passage of the REAL ID Act of 2005, Congress sought to eliminate habeas corpus jurisdiction over final orders of removal, deportation, and exclusion.<sup>78</sup> The Act also consolidated habeas review in the courts of appeals.<sup>79</sup> Nevertheless, habeas corpus remains available to challenge the length and conditions of immigration detention.<sup>80</sup> In the past two decades, the Supreme Court has consistently upheld the availability of habeas corpus to bring statutory and constitutional challenges to detention.<sup>81</sup>

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<sup>72</sup> See *id.* at 2.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> See *id.*

<sup>77</sup> AM. IMMIGR. COUNCIL, INTRODUCTION TO HABEAS CORPUS, *supra* note 53, at 2–4.

<sup>78</sup> REAL ID Act of 2005 § 106 (amending 8 U.S.C. § 1252).

<sup>79</sup> *Id.*

<sup>80</sup> AM. IMMIGR. COUNCIL, INTRODUCTION TO HABEAS CORPUS, *supra* note 53, at 2–4.

<sup>81</sup> See e.g., *Zadvydas v. Davis*, 533 U.S. 678, 688–89 (2001) (holding that habeas corpus may be used to challenge post-removal order detention and that the government cannot detain a removable noncitizen indefinitely); *Demore v. Kim*, 538 U.S. 510, 517 (2003) (finding that a noncitizen may use habeas corpus to bring constitutional challenges to pre-removal order detention); *Clark v. Martinez*, 543 U.S. 371, 386–87 (2005) (extending *Zadvydas v. Davis* to government detention of persons found to be inadmissible).

### C. Recent Supreme Court Precedent

Two Supreme Court decisions best exemplified the Court's interpretation of the Suspension Clause in the immigration context prior to *Thuraissigiam: Boumediene v. Bush* and *INS v. St. Cyr*.<sup>82</sup> The Court distinguished *Thuraissigiam* from *Boumediene* and *St. Cyr*, though the decisions represented the modern legal authority on the Suspension Clause as applied to noncitizens.<sup>83</sup> An explanation of these decisions further emphasizes the Court's departure from prior interpretations of habeas corpus and the Suspension Clause.

#### 1. *BOUMEDIENE V. BUSH*

In *Boumediene*, foreign nationals detained at Guantanamo Bay, Cuba, sought writs of habeas corpus after being captured and designated "enemy combatants."<sup>84</sup> The Court first decided whether Section 7 of the Military Commissions Act of 2006 ("MCA")<sup>85</sup> denied federal courts jurisdiction over habeas corpus actions.<sup>86</sup> Writing for the majority, Justice Kennedy noted that if the statute denied jurisdiction and was valid, the Court had to dismiss the case.<sup>87</sup> Kennedy found that the statute purported to preclude judicial review of habeas actions, defining habeas actions as cases "'which relate to . . . detention.'"<sup>88</sup>

After establishing that the statute deprived the federal courts of jurisdiction over habeas corpus actions, the Court then needed to determine whether "enemy combatants" at Guantanamo Bay could invoke the protections of the Suspension Clause.<sup>89</sup> The Government argued that "noncitizens designated as enemy combatants and detained in territory located outside our Nation's borders have no constitutional rights and no privilege of habeas corpus."<sup>90</sup> The Court

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<sup>82</sup> See *infra* notes 84–118 and accompanying text.

<sup>83</sup> *Id.*

<sup>84</sup> *Boumediene v. Bush*, 553 U.S. 723, 723 (2008).

<sup>85</sup> Military Commissions Act of 2006, Pub. L. 109–366, 120 Stat. 2600, 2600 (2006) ("[A]uthoriz[ing] trial by military commission for violations of the law of war . . .").

<sup>86</sup> *Boumediene*, 553 U.S. at 736.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 737 (quoting *Habeas Corpus*, Black's Law Dictionary 728 (8th ed. 2004)).

<sup>89</sup> *Id.* at 739.

<sup>90</sup> *Id.*

disagreed.<sup>91</sup> Relying on the Framers' intent and centuries of case law,<sup>92</sup> the majority held that foreign nationals detained outside of the United States could invoke the procedural protections of habeas corpus.<sup>93</sup> It established a test for determining when a petitioner may successfully invoke the protections of the Suspension Clause.<sup>94</sup> The test is comprised of two parts: (1) whether a petitioner can invoke the Suspension Clause<sup>95</sup> and (2) whether the statute in question limits habeas review so far as to effectively suspend the writ as applied to the petitioner.<sup>96</sup> The major takeaway from *Boumediene* is that the decision reaffirmed the court's interpretation of the Suspension Clause in *INS v. St. Cyr*.<sup>97</sup>

## 2. *INS V. ST. CYR*

Enrico St. Cyr, a citizen of Haiti and lawful permanent resident of the United States, pled guilty to selling a controlled substance in violation of Connecticut law.<sup>98</sup> St. Cyr's conviction made him deportable.<sup>99</sup> At the time of St. Cyr's conviction, he would have been eligible for a discretionary waiver of deportation by the Attorney General.<sup>100</sup> The government did not initiate removal proceedings against St. Cyr until after the passage of both AEDPA and IIRIRA.<sup>101</sup> Attorney General John Ashcroft argued that the two Acts

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<sup>91</sup> *Id.* at 748 (finding that common law evidence of writ's geographic scope was informative but not dispositive as to whether noncitizens may invoke the privilege of habeas corpus abroad).

<sup>92</sup> *Id.* at 739.

<sup>93</sup> *Id.* at 797–98.

<sup>94</sup> *See id.*

<sup>95</sup> *See id.* at 732 (presenting the issue of whether noncitizens detained at Guantanamo have the constitutional privilege to invoke habeas corpus).

<sup>96</sup> *See id.* at 736 (addressing whether MCA § 7 denies federal courts jurisdiction to hear habeas corpus actions, and therefore, effectively suspends habeas corpus actions as applied to the noncitizens detained at Guantanamo).

<sup>97</sup> *See infra* notes 98–118.

<sup>98</sup> *I.N.S. v. St. Cyr*, 533 U.S. 289, 293 (2001).

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 293–95 (citing Immigration and Nationality Act, Pub. L. 414, § 212, 66 Stat. 163, 187 (1952)) (explaining that prior to the enactment of AEDPA and the IIRIRA in 1996, § 212(c) of the Immigration and Nationality Act of 1952 was understood as granting the Attorney General the discretion to issue a waiver of deportation of resident noncitizens).

<sup>101</sup> *Id.* at 293.

stripped him of the discretion to grant a waiver of deportation.<sup>102</sup> In response, St. Cyr contended that the statutes' restrictions on discretionary relief from deportation do not apply to a noncitizen who was convicted of a deportable crime before the statutes' enactment.<sup>103</sup> The Supreme Court agreed.<sup>104</sup>

The majority held that discretionary waivers under INA Section 212(c) remained available to noncitizens who obtained convictions through plea agreements and would have been eligible for such relief at the time of their plea.<sup>105</sup> Justice Stevens, writing for the majority, first addressed whether the Court had jurisdiction to review St. Cyr's habeas petition after the passage of AEDPA and IIRIRA.<sup>106</sup> The Immigration and Naturalization Service ("INS") argued that the Court did not have jurisdiction under 28 U.S.C. Section 2241<sup>107</sup> to decide the legal issues in St. Cyr's petition.<sup>108</sup> To prevail on its claim, Stevens said, "[the INS] must overcome both the strong presumption in favor of judicial review of administrative action and the longstanding rule requiring a clear and unambiguous statement of congressional intent to repeal habeas jurisdiction."<sup>109</sup> The majority declined to interpret AEDPA and IIRIRA as stripping federal courts of habeas jurisdiction, finding that such an interpretation would raise serious constitutional issues under the Suspension Clause.<sup>110</sup>

Next, the INS argued that AEDPA and IIRIRA repealed St. Cyr's right to relief under former INA Section 212(c).<sup>111</sup> Stevens said that for a statute to be applied retroactively, the statute's language must require that it be applied retroactively.<sup>112</sup> The INS

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<sup>102</sup> *Id.* at 297.

<sup>103</sup> *Id.* at 293.

<sup>104</sup> *Id.* at 326.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 298.

<sup>107</sup> 28 U.S.C. § 2241 (granting the Supreme Court jurisdiction to grant or decline writs of habeas corpus).

<sup>108</sup> *St. Cyr*, 533 U.S. at 298. The government's position was that AEDPA and the IIRIRA's amendments to the INA precluded the Supreme Court from deciding the questions of law in St. Cyr's habeas corpus application. *Id.* at 293, 298.

<sup>109</sup> *Id.* at 298.

<sup>110</sup> *Id.* at 300.

<sup>111</sup> *Id.* at 315.

<sup>112</sup> *Id.* at 315–16 (quoting *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988)).

argued that Congress unambiguously communicated its intent to apply the provisions of IIRIRA's Title III-A to all removals initiated after the statute's effective date.<sup>113</sup> The Court found that Congress's intentions regarding the application of the "Cancellation of Removal" procedure were ambiguous.<sup>114</sup> The Court also concluded that interpreting the statute to apply retroactively would impose an impermissible effect on noncitizens who plead guilty to aggravated felonies, forfeiting the right to trial, in reliance on the possibility of Section 212(c) relief.<sup>115</sup> Therefore, the Court held that St. Cyr was still entitled to relief under INA Section 212(c).<sup>116</sup>

The Court's decision in *St. Cyr* was consistent with its tendency to uphold and protect habeas review, even in the immigration context. It was significant because it reinforced the critical point that "even in the narrowest interpretations, the writ of habeas corpus at common law . . . [did] not only apply to deportation proceedings or solely constitutional claims," reflecting the writ's broad scope.<sup>117</sup> This precedent further exemplifies the Court's major undertaking in *Thuraissigiam*.<sup>118</sup>

## II. DEP'T OF HOMELAND SECURITY V. THURAISIGIAM

### A. Background Facts

Vijayakumar Thuraissigiam, a Sri Lankan national, fled Sri Lanka in June of 2016 and headed for Mexico.<sup>119</sup> United States Border Patrol stopped Thuraissigiam only twenty-five yards from the southern border on the United States' side.<sup>120</sup> Thuraissigiam entered without inspection ("EWI") and did not have any of the necessary

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<sup>113</sup> *Id.* at 317.

<sup>114</sup> *Id.* at 315.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 326.

<sup>117</sup> Bernardo Villarreal Aguirre, *Immigration and the Suspension of the Writ of Habeas Corpus*, 44 T. MARSHALL. L. REV. 117, 125 (2020).

<sup>118</sup> See *infra* notes 274–79 and accompanying text.

<sup>119</sup> Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959, 1967 (2020).

<sup>120</sup> *Id.*

documentation to legally enter the country.<sup>121</sup> When border patrol apprehended him, Thuraissigiam made a credible-fear claim.<sup>122</sup>

Thuraissigiam is Tamil, an ethnic minority in Sri Lanka.<sup>123</sup> It is well-documented that the Sri Lankan government routinely subjects Tamil people to human rights violations.<sup>124</sup> Unfortunately, Thuraissigiam was a victim of such violations.<sup>125</sup> In his credible-fear claim, he said he was afraid to return to Sri Lanka because while he was working as a farmer, “a group of men had once abducted and severely beaten him.”<sup>126</sup> The group was comprised of government officials.<sup>127</sup> In addition to abducting and beating him, the government officials also subjected Thuraissigiam to simulated drowning and threatened to kill him.<sup>128</sup> He fled Sri Lanka to escape further persecution.<sup>129</sup>

### B. Procedural History

An asylum officer conducted a credible-fear interview.<sup>130</sup> The officer found that Thuraissigiam lacked credible fear of persecution based on one of the required protected grounds.<sup>131</sup> According to the asylum officer’s record, Thuraissigiam told the asylum officer that he did not know who his abductors were or why they had beaten him.<sup>132</sup> Thuraissigiam also told the asylum officer that he was not afraid of being harmed because of his political opinion.<sup>133</sup> The officer ultimately determined that even though Thuraissigiam testified

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<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Department of Homeland Security v. Vijayakumar Thuraissigiam*, AM. C.L. UNION <https://www.aclu.org/cases/department-homeland-security-v-vijayakumar-thuraissigiam> (last updated June 25, 2020); *see also* Brief for Respondent on Petition for a Writ of Certiorari at 5, Dep’t of Homeland Sec., v. Thuraissigiam, 140 S. Ct. 1959 (2020) (No. 19-161) [hereinafter Brief for Respondent].

<sup>124</sup> AM. C.L. UNION, *supra* note 123.

<sup>125</sup> *Id.*

<sup>126</sup> *Thuraissigiam*, 140 S. Ct. at 1967.

<sup>127</sup> AM. C.L. UNION, *supra* note 123.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*; *see* Brief for Respondent, *supra* note 123, at 5.

<sup>130</sup> *Thuraissigiam*, 140 S. Ct. at 1967–68.

<sup>131</sup> *Id.* at 1968.

<sup>132</sup> *Id.* at 1967.

<sup>133</sup> *Id.*

credibly, there was no nexus between the persecution and one of the protected grounds.<sup>134</sup> A supervising asylum officer agreed.<sup>135</sup>

Following the asylum officers' denial, Thuraissigiam requested *de novo* IJ review.<sup>136</sup> On March 17, 2007, an IJ reviewed the asylum officer's records and took testimony about Thuraissigiam's background and his fear of returning to Sri Lanka.<sup>137</sup> The IJ agreed that Thuraissigiam had not satisfied the nexus requirement for asylum.<sup>138</sup> Accordingly, the IJ affirmed the asylum officers' decision and returned the case to the DHS for Thuraissigiam's removal.<sup>139</sup>

Thuraissigiam responded by filing a petition for a writ of habeas corpus in the District Court for the Southern District of California, claiming that he feared being persecuted for his Tamil ethnicity and his political views.<sup>140</sup> He also contended that his “expedited removal order violated his statutory, regulatory and constitutional rights,” seeking vacatur of the order in addition to a “new, meaningful opportunity to apply for asylum and other relief from removal.”<sup>141</sup> He specifically alleged that the asylum officer failed to “elicit all relevant and useful information bearing on whether the applicant has a credible fear of persecution or torture.”<sup>142</sup> The petition also included allegations that both the asylum officers and IJ applied an incorrect legal standard in making the credible-fear determination, depriving Thuraissigiam “of a meaningful right to apply for asylum.”<sup>143</sup> The District Court for the Southern District of California dismissed the petition, finding the court lacked jurisdiction under Section 1252(e)(2).<sup>144</sup>

The district court held that Section 1252(e)(2) prohibited habeas review of Thuraissigiam's claims because the provision limited

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<sup>134</sup> See *id.* at 1967–68.

<sup>135</sup> *Id.* at 1968.

<sup>136</sup> See *id.*

<sup>137</sup> See *id.*

<sup>138</sup> See *id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> Thuraissigiam v. Dep't of Homeland Sec., 917 F.3d 1097, 1101–02 (9th Cir. 2019).

<sup>142</sup> *Id.* at 1102 (citing 8 C.F.R. § 208.30(d)).

<sup>143</sup> Thuraissigiam, 917 F.3d at 1102.

<sup>144</sup> Thuraissigiam v. Dep't of Homeland Sec., 287 F. Supp. 3d 1077, 1082 (S.D. Cal. 2018) (citing 8 U.S.C. § 1252(e)(2)).

review to three questions: (1) whether he was an alien; (2) whether he was “ordered removed under” Section 1225(b)(1); and (3) whether he had been previously admitted as a lawful permanent resident, refugee, or asylee.<sup>145</sup> The court then determined that these restrictions on habeas corpus review were constitutional.<sup>146</sup> It found that the restrictions did not violate the Suspension Clause because Thuraissigiam was subject to a final order of removal under expedited removal and Section 1252(e) “retains some avenues of judicial review” despite restricting habeas review.<sup>147</sup> The United States Court of Appeals for the Ninth Circuit reversed and remanded.<sup>148</sup>

While the Ninth Circuit agreed that 8 U.S.C. Section 1252(e)(2) precluded jurisdiction over Thuraissigiam’s claims, it disagreed with the district court’s holding that the provision does not violate the Suspension Clause as applied to Thuraissigiam.<sup>149</sup> Judge Tashima, writing for a three-judge panel, applied the two-step *Boumediene* test.<sup>150</sup> Thuraissigiam could invoke the Suspension Clause “[b]ecause in the finality era the Court permitted even arriving noncitizens to invoke habeas review.”<sup>151</sup> The next step required the Ninth Circuit to determine whether Section 1252(e) limited habeas review so far as to effectively suspend the writ as applied to Thuraissigiam.<sup>152</sup> It again relied on the finality era to determine the requirements of the Suspension Clause when a removal order is challenged.<sup>153</sup> Judge Tashima addressed the balance between plenary power concerns and the protections of habeas corpus:

[B]ecause §1252(e) prevents a court from reviewing claims of procedural error relating to a negative credible fear determination, it precludes review of the agency’s application of relevant law and thus raises

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<sup>145</sup> *Id.* at 1080.

<sup>146</sup> *Id.* at 1083.

<sup>147</sup> *Id.* at 1082 (quoting *Pena v. Lynch*, 815 F.3d 452, 456 (9th Cir. 2016)).

<sup>148</sup> *Thuraissigiam*, 917 F.3d at 1119.

<sup>149</sup> *Id.* at 1100.

<sup>150</sup> *Id.* at 1106.

<sup>151</sup> *Id.* at 1115.

<sup>152</sup> *Id.* at 1116.

<sup>153</sup> *Id.* at 1119. “Finality era” refers to the period after the Immigration Act of 1891—legislation making certain immigration decisions “final.” Dep’t of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959, 1975–76 (2020).

serious Suspension Clause questions. Plenary power concerns cannot in all circumstances overwhelm the “fundamental procedural protections of habeas corpus . . . , a right of first importance.”<sup>154</sup>

The Court of Appeals then declined to adhere to the canon of constitutional avoidance and interpreted Section 1252(e) to avoid the Suspension Clause issues, concluding that the statute could not be read to avoid the constitutional problems it created.<sup>155</sup>

DHS filed a petition for writ of certiorari with the Supreme Court of the United States to answer whether Section 1252(e)(2), as applied to Thuraissigiam, violates the Suspension Clause.<sup>156</sup> The Supreme Court granted certiorari and held oral arguments on March 2, 2020.<sup>157</sup> Justice Alito, writing for a 7-2 majority, delivered the opinion of the Court.<sup>158</sup>

### C. *The Supreme Court’s Majority Opinion*

From the very beginning, Justice Alito’s opinion of the IIRIRA, specifically its provisions for expedited removal, was clear. He claimed that the United States “lives up to its ideals and its treaty obligations” by granting asylum to those with valid claims, which he described as “some” of the “many.”<sup>159</sup> He used the same language in reference to the number of fraudulent asylum claims.<sup>160</sup> The IIRIRA “crafted a system for weeding out patently meritless claims and expeditiously removing the [noncitizens] making such claims from the country.”<sup>161</sup> In this way, the IIRIRA represented Congress’s judgment that such a system was necessary to avoid burdening the immigration system with the task of detaining all asylum seekers until the removal process was completed or releasing the

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<sup>154</sup> *Thuraissigiam*, 917 F.3d at 1119 (quoting *Boumediene v. Bush*, 553 U.S. 723, 798 (2008)).

<sup>155</sup> *Id.*

<sup>156</sup> Petition for Writ of Certiorari at I, Dep’t of Homeland Sec., v. Thuraissigiam, 140 S. Ct. 1959 (2020) (No. 19-161).

<sup>157</sup> *Thuraissigiam*, 140 S. Ct. at 1959.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* at 1963.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

asylum seekers, presenting the risk that they would not appear for removal proceedings.<sup>162</sup>

Alito conceded that most credible fear screenings, nearly seventy-seven percent, resulted in a finding of credible fear.<sup>163</sup> Then, he admitted that nearly half of the remainder of the total number of screenings, approximately eleven percent, were closed for administrative reasons.<sup>164</sup> In some instances, the noncitizens withdrew their claims.<sup>165</sup> These numbers suggest that, at a maximum, only eleven percent of credible fear screens resulted in expedited removal.<sup>166</sup> He contended that according to these numbers, most asylum seekers who would be “subject to expedited removal do not receive expedited removal.”<sup>167</sup> Instead, they are afforded the same procedural rights as other noncitizens.<sup>168</sup> Therefore, there is no reason to impose the burden of detaining these individuals pending full removal proceedings on the immigration system.<sup>169</sup>

Thuraissigiam relied on three bodies of case law to support his claim that Section 1252(e)(2) violates the Suspension Clause.<sup>170</sup> Specifically, Thuraissigiam argued that the bodies of case law show that the Suspension Clause guarantees a broader habeas right, extending beyond a means to seek release from unlawful detention.<sup>171</sup> First, he pointed to British and American cases decided prior to and around the Constitution’s adoption to show that some noncitizens used habeas to remain in the country.<sup>172</sup> Alito, however, argued that the relief granted in those cases was release from detention and not the ability to remain in the country.<sup>173</sup> He contended that all these cases show is that habeas can be used to seek release from detention in a variety of different circumstances, emphasizing that “[t]he relief a habeas court may order and the collateral consequences of that

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<sup>162</sup> *Id.*

<sup>163</sup> *Id.* at 1966.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> See *id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> See *id.* at 1966–67.

<sup>170</sup> *Id.* at 1971.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.* at 1974.

relief are two entirely different things.”<sup>174</sup> Therefore, Alito concluded that this body of case law did not support Thuraissigiam’s argument that the Suspension Clause guarantees a broader habeas right.<sup>175</sup>

The second body of case law Thuraissigiam used to support his argument fared no better before the Court.<sup>176</sup> Thuraissigiam relied on cases from the “finality era”<sup>177</sup> to show “the Suspension Clause mandates a minimum level of judicial review to ensure that the Executive complies with the law in effectuating removal.”<sup>178</sup> The majority disagreed with this interpretation of the holdings of the “finality era” cases.<sup>179</sup> Justice Alito said that those decisions were not based on the Suspension Clause.<sup>180</sup> Instead, they were decided based on the habeas statute and the immigration laws of the time.<sup>181</sup> At the time, the federal habeas statute was broad.<sup>182</sup> It authorized federal courts to review whether a noncitizen was being held in custody in violation of immigration law.<sup>183</sup> Therefore, when a noncitizen sought a writ of habeas corpus, federal courts had to consider whether based on the facts given by immigration authorities, detention was consistent with applicable immigration law.<sup>184</sup> According to Alito, this authority was based on federal statute and not the Suspension Clause.<sup>185</sup> None of the “finality era” cases mention the Suspension Clause as the basis for the Court’s authority.<sup>186</sup> Consequently, the majority found that the “finality era” cases offered no support for Thuraissigiam’s claim.<sup>187</sup>

The final body of case law on which Thuraissigiam relied was *Boumediene* and *St. Cyr*.<sup>188</sup> Alito dismissed *Boumediene*’s

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<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.* at 1976.

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> *Id.* at 1980–81.

<sup>188</sup> *Id.* at 1981.

relevance, claiming that the case was “not about immigration at all.”<sup>189</sup> He distinguished the foreign nationals in Guantanamo Bay from Thuraissigiam because the foreign nationals in Guantanamo were not apprehended while crossing the border.<sup>190</sup> Alito also noted that the foreign nationals in *Boumediene* were seeking release from detention and not permission to enter the United States.<sup>191</sup> He further emphasized that the Court’s decision did not mention, or even suggest, that the foreign nationals could have used habeas relief as a means of gaining entry.<sup>192</sup> Because Thuraissigiam was seeking review of an administrative decision and not release, the majority held that *Boumediene* did not support his Suspension Clause argument.<sup>193</sup>

The majority found that *St. Cyr* did not help Thuraissigiam either.<sup>194</sup> The Court relied heavily on the statement that “because of [the Suspension] Clause, some ‘judicial intervention in deportation cases’ is unquestionably ‘required by the Constitution.’”<sup>195</sup> Alito did not believe the statement did anything to support Thuraissigiam’s claim.<sup>196</sup> The Court reasoned that the statement in *St. Cyr* did not signify a broader habeas right, allowing noncitizens to challenge negative asylum determinations, but instead reaffirmed that the writ can be invoked by noncitizens held in custody pending deportation proceedings.<sup>197</sup> Finding that none of the three bodies of case law support Thuraissigiam’s claim, the Court held that Section 1252(e)(2)’s limit on judicial review does not violate the Suspension Clause.<sup>198</sup>

The Court then addressed Thuraissigiam’s claim that Section 1252(e)(2) violates the Due Process Clause by precluding judicial review of his credible-fear proceeding.<sup>199</sup> Alito criticized the Ninth Circuit’s holding, describing the notion that Thuraissigiam “had a

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<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> *See id.*

<sup>194</sup> *Id.*

<sup>195</sup> *Id.* (alteration in original) (quoting *St. Cyr*, 533 U.S. at 290–91).

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> *Id.* at 1983.

<sup>199</sup> *Id.*

constitutional right to expedited removal proceedings that conformed to the dictates of due process”<sup>200</sup> as “contrary to more than a century of precedent.”<sup>201</sup> He said that for foreign nationals who have neither obtained lawful admission nor acquired residence in the United States, the decisions of executive officers acting according to the powers given to them by Congress satisfy due process of law.<sup>202</sup> Alito rejected Thuraissigiam’s argument that because he was not apprehended the instant he tried to enter the country, he should be afforded more rights.<sup>203</sup> The Court concluded that a noncitizen who is apprehended and detained shortly after an unlawful entry cannot be said to have entered the United States, and accordingly, that Thuraissigiam’s only rights are those Congress provides to him by statute.<sup>204</sup> Here, Thuraissigiam was entitled to a determination of whether he had “a significant possibility” of “establish[ing] eligibility for asylum.”<sup>205</sup> The Court determined he was given that right, and because the Due Process Clause required no more, Thuraissigiam was not entitled to review of the determination.<sup>206</sup> Thus, the majority concluded that Section 1252(e)(2)’s preclusion of judicial review of asylum determinations does not violate the Suspension Clause or the Due Process Clause.<sup>207</sup>

#### D. *The Concurring Opinions*

##### 1. JUSTICE THOMAS

Justice Thomas agreed with the Court’s holding that Thuraissigiam’s Suspension Clause argument was invalid because

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<sup>200</sup> *Id.* at 1981–82 (quoting *Thuraissigiam*, 917 F.3d at 1111 n.15).

<sup>201</sup> *Id.* at 1982.

<sup>202</sup> *Id.* (citing *Nishimura Ekiu v. U.S.*, 142 U.S. 651, 660 (1892)); *see also Landon v. Plasencia*, 459 U.S. 21, 32 (1982) (finding that a noncitizen seeking initial admission to the United States has no constitutional rights regarding his application).

<sup>203</sup> The Ninth Circuit agreed that Thuraissigiam should be treated more favorably because he made it twenty-five yards into the United States before he was apprehended; however, the majority rejected the argument, stating the rule would be rendered “meaningless if it became inoperative as soon as an arriving [noncitizen] set foot on U.S. soil.” *Thuraissigiam*, 140 S. Ct. at 1982.

<sup>204</sup> *Id.* at 1983.

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

Thuraissigiam was not seeking a writ of habeas corpus.<sup>208</sup> The purpose of his concurring opinion was “to address the original meaning of the Suspension Clause.”<sup>209</sup> Thomas detailed the history of the writ of habeas corpus, beginning with the purpose of the writ in the King’s England.<sup>210</sup> He focused on the language of the Suspension Clause and supposed the Clause protects a substantive right.<sup>211</sup> He then asked what it means to “suspend” the writ.<sup>212</sup> Thomas determined that a suspension is “not necessarily an express limitation on the availability of the writ of habeas corpus,” but rather “a grant of power to detain based on suspicion of a crime or dangerousness without bail or trial.”<sup>213</sup>

According to Thomas, Section 1252(e)(2) did not invoke the Suspension Clause because an immigration officer’s determination of whether a noncitizen is inadmissible is based on more than mere suspicion or dangerousness.<sup>214</sup> An immigration officer makes the inadmissibility determination based on the applicant’s failure to provide valid documentation and satisfy a two-year continuous physical presence requirement.<sup>215</sup> Thomas concluded that the detainee’s lack of valid entry documents and the immigration officer’s finding that the detainee is not eligible for asylum requires the Executive power to have more than suspicion of a crime or dangerousness to detain a noncitizen.<sup>216</sup> Thus, he claimed the “statute bears little resemblance to a suspension as that term was understood at the founding.”<sup>217</sup> Applying this interpretation, Thomas concluded that 8 U.S.C. Section 1252 does not suspend the writ of habeas corpus.<sup>218</sup>

## 2. JUSTICE BREYER

Justice Breyer, joined by Justice Ginsburg, also concurred with the Court’s holding that the statute’s limits on habeas corpus review

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<sup>208</sup> *Id.* (Thomas, J., concurring).

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> *Id.* at 1984.

<sup>212</sup> *Id.* at 1986–87.

<sup>213</sup> *Id.* at 1988.

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

in expedited removal proceedings, as applied to Thuraissigiam, did not violate the Suspension Clause.<sup>219</sup> First, Breyer pointed to the limited amount of time Thuraissigiam spent in the United States before border patrol apprehended him.<sup>220</sup> He noted that Thuraissigiam was never lawfully admitted into the United States and never lived in the country.<sup>221</sup> Using these facts, Breyer distinguished Thuraissigiam's position as materially different than that of the noncitizens in prior cases for the purpose of the Suspension Clause.<sup>222</sup> He concluded that the scope of habeas review required by the Suspension Clause, given Thuraissigiam's position, was not as extensive as the scope of habeas review for noncitizens who had either been admitted or lived in the United States for a period of time before being apprehended.<sup>223</sup>

Second, Breyer was convinced that Supreme Court precedent demonstrates that the types of claims made by Thuraissigiam are the type that Congress may make unreviewable in habeas corpus proceedings.<sup>224</sup> Thuraissigiam relied on the "finality era" cases to support his argument for a constitutional minimum.<sup>225</sup> Breyer argued that even accepting the argument that the "finality era" cases support a constitutional minimum, Thuraissigiam's claims are substantially different than those reviewed in the "finality era."<sup>226</sup> He also said that even though Thuraissigiam's claims were disguised as legal

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<sup>219</sup> *Id.* (Breyer, J., concurring).

<sup>220</sup> *Id.* at 1990.

<sup>221</sup> *Id.*

<sup>222</sup> *Id.* (citations omitted); see *Rowoldt v. Perfetto*, 355 U.S. 115, 120 (1957) (finding that habeas corpus review of a deportation order was available to a noncitizen who had lived in the United States for forty years); *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 261–62 (1954) (allowing a noncitizen to attack the validity of the denial of his application for suspension of deportation by a writ of habeas corpus where the noncitizen had resided in the United States for over twenty years); *Bridges v. Wixon*, 326 U.S. 135, 137–38 (1945) (permitting habeas corpus review of a deportation order where the government initiated deportation proceedings eighteen years after the noncitizen's entry into the United States); *Hansen v. Haff*, 291 U.S. 559, 562–63 (1934) (granting a writ of habeas corpus to a noncitizen who was accused of prostitution, and accordingly, ordered deported after living in the United States for twelve years).

<sup>223</sup> *Thuraissigiam*, 140 S. Ct. at 1990 (Breyer, J., concurring).

<sup>224</sup> *Id.*

<sup>225</sup> See *id.*

<sup>226</sup> *Id.*

questions, both claims are actually “challenges to factual findings.”<sup>227</sup> According to Breyer, at the core of both the purported legal challenges, there actually “lie[d] a disagreement with immigration officials’ findings about the two brute facts underlying their credible-fear determination.”<sup>228</sup> These facts were the identity of Thuraissigiam’s attackers and the attackers’ motive.<sup>229</sup>

Breyer treated Thuraissigiam’s country-conditions claim the same.<sup>230</sup> He noted that Thuraissigiam did not point to evidence suggesting the immigration officials purposely disregarded facts presented to them or otherwise known to them.<sup>231</sup> Instead, Thuraissigiam argued that the credible-fear determination “was so egregiously wrong that immigration officials simply *must* not have known about conditions in Sri Lanka.”<sup>232</sup> Because nothing in the administrative record indicated an incorrect application of the law, Breyer concluded the country conditions claim was also a factual challenge, stating that it “boils down to a factual argument that immigration officials should have known who respondents’ attackers were and why they attacked him.”<sup>233</sup> Thuraissigiam conceded that he was not entitled to habeas review of the factual findings made by immigration officials during his credible-fear interview.<sup>234</sup> Breyer then found that Thuraissigiam’s procedural claims were also unlike those reviewed in habeas proceedings during the finality era.<sup>235</sup> As a result, neither Breyer nor Ginsburg believed Thuraissigiam’s position or habeas corpus precedent in immigration gave merit to his Suspension Clause challenge.<sup>236</sup>

The two justices believed the holding should be limited to the facts of this particular case.<sup>237</sup> Breyer argued that the Court should decline to go further in the future, as well.<sup>238</sup> He said, “[a]ddressing

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<sup>227</sup> *Id.*

<sup>228</sup> *Id.* at 1991.

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

<sup>232</sup> *Id.*

<sup>233</sup> *Id.*

<sup>234</sup> See *id.* at 1990.

<sup>235</sup> *Id.* at 1992.

<sup>236</sup> *Id.* at 1993.

<sup>237</sup> *Id.*

<sup>238</sup> *Id.* at 1988–89.

more broadly whether the Suspension Clause protects people challenging removal decisions may raise a host of difficult questions in the immigration context.”<sup>239</sup> Consequently, according to Breyer and Ginsburg, the Court should avoid the difficult constitutional issue, as it had avoided the “serious and difficult constitutional issue” in *St. Cyr* nearly two decades prior.<sup>240</sup> Thus, in their view, the Court should hold that Section 1252(e)(2)’s limits on habeas review does not violate the Suspension Clause based on the facts of Thuraissigiam’s case; however, the Court should not go further.<sup>241</sup>

#### E. *The Dissenting Opinion*

The dissent, written by Justice Sotomayor and joined by Justice Kagan, criticized the majority for departing from years of habeas precedent and settled constitutional law.<sup>242</sup> Unlike Breyer, Sotomayor believed that Thuraissigiam’s claims were indistinguishable from those before the Court in previous cases involving noncitizens seeking habeas corpus review.<sup>243</sup> She accused the Court of “skew[ing] the essence” of Thuraissigiam’s claims.<sup>244</sup> Her framing of the claims differed significantly from that of Justice Alito and Justice Breyer in three important respects.<sup>245</sup>

First, Justice Sotomayor disagreed with Justice Breyer’s contention that Thuraissigiam’s claims were challenges to factual determinations disguised as legal questions.<sup>246</sup> She believed the heart of Thuraissigiam’s claim was whether he was unlawfully denied admission under governing asylum statutes and regulations.<sup>247</sup> This presented a legal question of whether the immigration officials incorrectly applied the law in Thuraissigiam’s credible-fear proceedings.<sup>248</sup> Sotomayor found support for Thuraissigiam’s claim in the majority’s description of Thuraissigiam’s habeas petition.<sup>249</sup> She

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<sup>239</sup> *Id.* at 1989.

<sup>240</sup> *Id.* (citing *St. Cyr*, 533 U.S. at 305).

<sup>241</sup> *Id.* at 1993.

<sup>242</sup> *Id.* (Sotomayor, J., dissenting).

<sup>243</sup> *Id.*

<sup>244</sup> *Id.* at 1994.

<sup>245</sup> *See id.*

<sup>246</sup> *Id.*

<sup>247</sup> *Id.*

<sup>248</sup> *Id.*

<sup>249</sup> *Id.*

noted the Court's observation that Thuraissigiam's petition contained factual allegations that pointed to documented persecution on the basis of his Tamil ethnicity and his political opinion.<sup>250</sup> She accused the Court of refusing to admit that "its descriptions of [Thuraissigiam's] arguments illustrate[d] . . . claims that immigration officials legally erred in their review of his asylum application."<sup>251</sup> These descriptions undermined the Court's assertion that Thuraissigiam's claims had no merit beyond a mere plea to obtain authorization to remain in the United States.<sup>252</sup>

Second, in addressing Thuraissigiam's procedural claims, Sotomayor said that the Court misconstrued Thuraissigiam's procedural challenges to the expedited removal proceedings.<sup>253</sup> According to Sotomayor, this made a crucial difference in the Court's analysis because "a constitutional challenge to executive detention is just the sort of claim the common law has long recognized as cognizable in habeas."<sup>254</sup> On this point, Breyer, Ginsburg, and Sotomayor agreed, differing only in that Breyer and Ginsburg claimed Thuraissigiam's procedural challenges were not reviewable because the claims failed to allege sufficiently serious defects.<sup>255</sup> Sotomayor noted that the other justices were entitled to their conclusion about the merits of Thuraissigiam's procedural challenges but argued that those conclusions should not have foreclosed Thuraissigiam's ability to bring the challenges in the first place.<sup>256</sup>

Lastly, unlike the majority, Sotomayor and Kagan argued that Thuraissigiam's request to be freed from wrongful executive custody was indistinguishable from prior cases where noncitizens challenged restraints that prevented them from entering or remaining in the United States.<sup>257</sup> Sotomayor also emphasized that the Court had never designated "release" as the only remedy of a writ of habeas corpus.<sup>258</sup> Regardless, she argued, Thuraissigiam requested habeas relief in "whatever form available and appropriate, including, but

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<sup>250</sup> *Id.*

<sup>251</sup> *Id.*

<sup>252</sup> *Id.*

<sup>253</sup> *Id.*

<sup>254</sup> *Id.*

<sup>255</sup> *Id.* at 1995.

<sup>256</sup> *Id.* at 1996.

<sup>257</sup> *Id.*

<sup>258</sup> *Id.*

not limited to, release.”<sup>259</sup> Sotomayor cited *Boumediene* in support of her contention that release was only one form of habeas relief and *St. Cyr* for support that the writ of habeas corpus could be used to challenge erroneous applications or interpretations of the law.<sup>260</sup> She concluded that even accepting the Court’s improper framing of Thuraissigiam’s claims, the Court erred in determining that none of the Court’s precedents supported his claim that the Suspension Clause protected a habeas right to the type of relief that Thuraissigiam sought.<sup>261</sup>

Sotomayor recognized that no common law habeas cases were perfect analogs for Thuraissigiam’s case.<sup>262</sup> She argued that requiring a perfect analog contradicted the Court’s longstanding approach to immigration cases.<sup>263</sup> In so doing, she addressed the examples in English law, involving foreign nationals who were permitted to remain in England because of a release on habeas.<sup>264</sup> Justice Alito and the majority disagreed that the foreign nationals’ ability to remain in the country was due to writs of habeas corpus ordering their release, arguing instead that their ability to remain was a consequence of “the existing state of the law.”<sup>265</sup> However, Sotomayor countered that “[w]hat England’s immigration laws might have prescribed after the writ’s issuance did not bear on the availability of the writ as a means to remain in the country in the first instance.”<sup>266</sup> She then proceeded to cite two more classes of cases that supported the availability of habeas corpus to noncitizens who wish to remain in the country.<sup>267</sup>

Justice Sotomayor characterized the Court’s decision as an attempt to alleviate policy concerns.<sup>268</sup> She recognized that delays in asylum adjudications were undesirable, conceding that when asylum determinations are not timely, prolonged decision-making harms

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<sup>259</sup> *Id.*

<sup>260</sup> *Id.* at 1997.

<sup>261</sup> *Id.* at 1997–99.

<sup>262</sup> *Id.* at 1998.

<sup>263</sup> *Id.*

<sup>264</sup> See *id.* at 1999.

<sup>265</sup> *Id.*

<sup>266</sup> *Id.*

<sup>267</sup> *Id.* at 2000.

<sup>268</sup> *Id.* at 2013.

those eligible for protection.<sup>269</sup> However, she argued that Congress and the Executive were well-equipped to alleviate the strain on the asylum system.<sup>270</sup> The role of the Judiciary is simply to ensure that the laws passed by Congress are consistent with the Constitution.<sup>271</sup> In *Thuraissigiam*, the Court failed to uphold its obligation.<sup>272</sup> Consequently, Sotomayor dissented, disagreeing with the Court's interpretation of the scope of The Great Writ and the reach of the Due Process Clause.<sup>273</sup>

### III. COMMENT ON THE *THURAISIGIAM* DECISION

#### A. *Departure from Precedent*

The Court's decision to exclude habeas review where an asylum seeker is denied asylum in expedited removal proceedings completely disregards centuries of governing precedent.<sup>274</sup> Habeas relief extends as far back as the Habeas Corpus Act of 1679 passed by British Parliament to prevent a King from unreasonably locking up his people.<sup>275</sup> In modern times, habeas petitions are mostly used to review evidence of innocence after a criminal defendant has been convicted.<sup>276</sup> And while legislation passed in 1996 and 2005 severely limited The Great Writ,<sup>277</sup> the Court has consistently upheld the protections of the Suspension Clause, ensuring the constitutionality of legislation.<sup>278</sup> Therefore, the Court's suspension of the writ of habeas review in the immigration context constitutes a major departure from the writ's history and purpose.

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<sup>269</sup> *Id.* at 2014.

<sup>270</sup> *Id.* at 2014–15.

<sup>271</sup> *Id.* at 2015.

<sup>272</sup> *Id.*

<sup>273</sup> *Id.*

<sup>274</sup> See *id.* at 1993.

<sup>275</sup> See *supra* notes 24–25.

<sup>276</sup> *Habeas Corpus*, *supra* note 23.

<sup>277</sup> See *supra* notes 52–60 and accompanying text.

<sup>278</sup> See *Thuraissigiam*, 140 S. Ct. at 2015 (Sotomayor J., dissenting) (stating that role of judiciary when faced with policy choices is “to ensure that laws passed by Congress are consistent with the limits of the Constitution”).

The Court also departed from habeas precedent by limiting the writ of habeas corpus to only detained noncitizens.<sup>279</sup> This limitation was a major undertaking, considering the Court's previous assertion that its "understanding of custody has broadened to include restraints short of physical confinement . . . ."<sup>280</sup>

### B. *Consequences for Asylum Seekers*

The Court's decision in this case also denies due process protections to asylum seekers who have not yet been granted entry and wish to challenge asylum procedures.<sup>281</sup> Due process protection is crucial to the asylum-seeking process because the procedures in place determine whether an applicant facing persecution in the applicant's home country may seek refuge in the United States.<sup>282</sup> The consequences of making a wrong determination are too severe to not allow for review.<sup>283</sup>

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<sup>279</sup> Robert C. Gallup & Aaron D. Van Oort, *Supreme Court Decides Department of Homeland Security v. Thuraissigiam*, No. 19-161, NAT'L L. REV. (June 25, 2020), <https://www.natlawreview.com/article/supreme-court-decides-department-homeland-security-v-thuraissigiam-no-19-161> ("The Court held that Section 1252(e)(2) did not violate the Suspension Clause because, at the time the Constitution was adopted, the writ of habeas corpus was limited to challenging the legality of one's detention.").

<sup>280</sup> See *Rumsfeld v. Padilla*, 542 U.S. 426, 437 (2004); see also *supra* notes 54–56 and accompanying text.

<sup>281</sup> Gallup & Van Oort, *supra* note 279 (explaining Court's conclusion that Section 1252(e)(2) did not violate Thuraissigiam's due process rights because noncitizens who have not been granted entry have only the due process rights granted to them by Congress).

<sup>282</sup> See Kendall Coffey, *The Due Process Right to Seek Asylum in the United States: The Immigration Dilemma and Constitutional Controversy*, 19 YALE L. & POL'Y REV. 303, 306–07 (2001) (explaining that all noncitizens on U.S. soil have a due process right to seek asylum and that due process must recognize and protect that entitlement).

<sup>283</sup> Joel Rose & Marisa Peñaloza, *Denied Asylum, But Terrified to Return Home*, NPR (July 20, 2018, 5:17 PM), <https://www.npr.org/2018/07/20/630877498/denied-asylum-but-terrified-to-return-home> ("The consequences are dire for people who are turned around . . . . These people will be returned to persecution without even having the chance to have their claims for asylum assessed in U.S. immigration courts."').

Expedited removal raises substantial questions of due process in itself.<sup>284</sup> The authority of immigration officers to initiate expedited removal proceedings against a noncitizen is virtually unchecked.<sup>285</sup> As always, the burden of proof falls on the noncitizen to prove the noncitizen is not subject to expedited removal.<sup>286</sup> Because the process is so short, consisting only of an interview with an inspecting officer, there is often no opportunity for the noncitizen to speak with an attorney or gather evidence to prevent deportation.<sup>287</sup>

In the asylum context, the expedited process raises additional concerns.<sup>288</sup> Those seeking protection often experience trauma from either their travels to the United States or the harm they experienced in their home country.<sup>289</sup> Trauma victims experience significant difficulty when trying to explain why they need protection and when recounting important details of certain events.<sup>290</sup> Consequently, an asylum officer may issue a negative credible-fear determination due to an applicant's failure to provide evidence.<sup>291</sup> Applicants who fail to remember dates properly may even be accused of making a fraudulent claim and denied asylum where credible fear exists.<sup>292</sup> The Court in *Thuraissigiam* leaves such applicants without a means of judicial review, forcing them back to a home country where persecution, torture, and often, death, await them.<sup>293</sup>

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<sup>284</sup> AM. IMMIGR. COUNCIL, A PRIMER ON EXPEDITED REMOVAL, *supra* note 68, at 1.

<sup>285</sup> *Id.* at 2.

<sup>286</sup> *Id.* at 1.

<sup>287</sup> *Id.*

<sup>288</sup> *Id.* at 4; *see also* DAVID NGARURI KENNEY & PHILIP G. SCHRAG, ASYLUM DENIED: A REFUGEE'S STRUGGLE FOR SAFETY IN AMERICA 157 (2008) (explaining that trauma can affect asylum applicants' memory, causing denials of bona fide asylum claims due to errors and incorrect dates in asylum applications).

<sup>289</sup> AM. IMMIGR. COUNCIL, A PRIMER ON EXPEDITED REMOVAL, *supra* note 68, at 4.

<sup>290</sup> *See* KENNEY & SCHRAG, *supra* note 288, at 119.

<sup>291</sup> AM. IMMIGR. COUNCIL, A PRIMER ON EXPEDITED REMOVAL, *supra* note 68, at 3.

<sup>292</sup> *See* KENNEY & SCHRAG, *supra* note 288, at 121.

<sup>293</sup> *See* Rose & Peñaloza, *supra* note 283.

#### IV. CONCLUSION

The federal government has made numerous changes to the asylum system in the last decade, eroding asylum protections to the point that asylum in the United States is nothing more than an illusion.<sup>294</sup> Both Congress and the Executive have enacted legislation,<sup>295</sup> executive orders,<sup>296</sup> and final rules that limit asylum protections.<sup>297</sup> Now, with the *Thuraissigiam* decision, the Judiciary has no less blood on its hands. The Court failed to uphold its obligation to ensure that Congress and the Executive act consistent with the Constitution.<sup>298</sup> In failing to do so, the Court endangers the hundreds of noncitizens who approach our nation's borders, seeking refuge.<sup>299</sup>

Former President Donald Trump called the asylum system a scam, expressing his wish to eliminate the system completely.<sup>300</sup> But the only scam is that the United States claims to “live up to its ideals and its treaty obligations”<sup>301</sup> while expeditiously removing noncitizens who are claiming fear of persecution, after arbitrary, unchecked decisions by low-level asylum officials.<sup>302</sup> Unless the Supreme Court reverses course and either narrows or overturns its

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<sup>294</sup> Katrina Eiland, *Biden Must Restore and Rebuild Asylum*, AM. C.L. UNION (Jan. 12, 2021), <https://www.aclu.org/news/immigrants-rights/biden-must-restore-and-rebuild-asylum/> (emphasizing that it is “now nearly impossible for anyone to secure asylum, no matter how strong their claim of fear” after the Trump administration’s changes to the asylum system); Fatma Marouf, *Immigration Challenges of the Past Decade and Future Reforms*, 73 SMU L. REV. F. 87, 96–97 (Apr. 2020) (detailing the radical changes to the asylum process over the last decade, including cracking down on credible fear interviews, deciding cases quickly and at a higher rate, and imposing case quotes on IJs).

<sup>295</sup> See *supra* Part I.

<sup>296</sup> See *supra* note 5 and accompanying text.

<sup>297</sup> See *supra* note 12 and accompanying text.

<sup>298</sup> *Thuraissigiam*, 140 S. Ct. at 2015 (Sotomayor, J., dissenting).

<sup>299</sup> See Rose & Peñaloza, *supra* note 283.

<sup>300</sup> *Republican Jewish Coalition Leadership Meeting*, C-SPAN, at 00:41:53 (Apr. 6, 2019), <https://www.c-span.org/video/?459585-1/president-trump-asylum-program-scam>.

<sup>301</sup> See *Thuraissigiam*, 140 S. Ct. at 1963.

<sup>302</sup> Marouf, *supra* note 294, at 97 (explaining DHS’s use of CBP officers to conduct credible-fear interviews rather than using asylum officers trained in asylum law).

decision in *Thuraissigiam*,<sup>303</sup> the current Biden administration<sup>304</sup> and Congress must act to restore asylum seekers' right to habeas corpus review. The fate many noncitizens face upon return to their home countries after receiving denials of their asylum applications outweigh any potential burden on the immigration system.<sup>305</sup> Failure to act will endanger the lives of asylum seekers<sup>306</sup> and undermine the country's adherence to its treaty obligations.<sup>307</sup> Out of all the persecution, suffering, and challenges asylum seekers face, the United States immigration system should not be their biggest adversary.

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<sup>303</sup> See generally Coffey, *supra* note 282, at 339 ("[W]hatever may be the trepidations of implicating itself further in the human, moral and legal morass of immigration, the courts should stand firm to [the] responsibility" of enhancing "the consistency of the constitutional doctrine.").

<sup>304</sup> See Eiland *supra* note 294 (listing the ways in which the Biden administration must act to rebuild the asylum system).

<sup>305</sup> See Rose & Peñaloza, *supra* note 283; *Thuraissigiam*, 140 S. Ct. at 1966 (admitting that most credible-fear screenings either result in positive credible fear findings or are dismissed for administrative reasons, making it difficult to imagine how detaining individuals pending full removal proceedings would unduly burden the immigration system).

<sup>306</sup> See Rose & Peñaloza, *supra* note 283.

<sup>307</sup> See *supra* note 1.