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Limited Protection: The Impact of Illegal Entry on Due Process Rights in Expedited Removal Proceedings

Sun Shen

LIMITED PROTECTION: THE IMPACT OF ILLEGAL ENTRY ON DUE PROCESS RIGHTS IN EXPEDITED REMOVAL PROCEEDINGS

Sun Shen*

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INTRODUCTION

In January 2017, Vijayakumar Thuraissigiam, an asylum seeker from Sri Lanka, entered the United States without inspection or an entry document via the U.S.-Mexico

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border.[1] Shortly after his entry, Customs and Border Protection (CBP) officers arrested him just twenty-five yards from the border and placed him in expedited removal proceedings.[2] Thuraissigiam alleged that he is a Tamil, an ethnic minority group in Sri Lanka, and feared that he would face persecution if returned to his home country.[3] The immigration judge denied his asylum claim, but Thuraissigiam filed a petition for a writ of habeas corpus.[4] Unlike typical habeas petitions that limit the challenge to the lawfulness of detention, however, Thuraissigiam also sought judicial review of his expedited removal order and the underlying asylum claim.[5] When the case finally reached the Supreme Court in June 2020, a key issue before the Court was whether the Due Process Clause of the Fifth Amendment compelled judicial review of Thuraissigiam's asylum claim.[6] The majority found that it did not and that asylum seekers like Thuraissigiam lack the procedural due process right to judicial review of asylum determinations in federal court.[7] In the majority opinion, Justice Alito held that as an asylum seeker seeking initial admission, Thuraissigiam only has due process rights provided by statute,[8] and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 limits the review that asylum seekers may obtain in expedited removal proceedings via a habeas corpus petition.[9]

The implications of the ruling are profound. The decision raised concerns about asylum seekers' due process rights and will keep federal courthouse doors closed to asylum seekers in expedited removal processes who say they cannot return to their home countries due to a fear of torture or death.[10] Under *Thuraissigiam*, once immigration officials and judges determine that those in expedited removal proceedings do not qualify for asylum, there may not be further avenue for appeal in federal court going forward.[11]

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[1] Dep't of Homeland Sec. v. Thuraissigiam (*Thuraissigiam II*), 140 S. Ct. 1959, 1967 (2020).

[2] *Id.* at 1964.

[3] *See id.* at 1968; *see also* Ariane de Vogue & Priscilla Alvarez, *Supreme Court Rules Asylum Seeker Cannot Challenge Removal*, CNN (June 25, 2020, 12:50 PM), https://www.abc57.com/news/supreme-court-rules-asylum-seeker-cannot-challenge-removal [https://perma.cc/PYJ8-TYP3].

[4] *Thuraissigiam II*, 140 S. Ct. at 1968.

[5] *See id.*

[6] *Id.* at 1981–83 ("In addition to his Suspension Clause argument, respondent contends that IIRIRA violates his right to due process by precluding judicial review of his allegedly flawed credible-fear proceeding.").

[7] *Id.* at 1983 ("In respondent's case, Congress provided the right to a 'determin[ation]' whether he had 'a significant possibility' of 'establish[ing] eligibility for asylum,' and he was given that right. Because the Due Process Clause provides nothing more, it does not require review of that determination or how it was made.").

[8] *Id.* at 1964.

[9] *Id.* at 1966 ("The IIRIRA provision at issue in this case, § 1252(e)(2), limits the review that an alien in expedited removal may obtain via a petition for a writ of habeas corpus.").

[10] *See* De Vogue & Alvarez, *supra* note 3.

[11] *See Thuraissigiam II*, 140 S. Ct. at 1988.

The Fifth Amendment of the Constitution guarantees due process—no person can be "deprived of life, liberty, or property without due process of law."[12] Applied in the context of asylum, the Fifth Amendment should provide asylum seekers in removal proceedings with a full and fair opportunity to present their cases and to be heard in a meaningful manner.[13] To qualify for asylum, asylum seekers must show that there is a well-founded fear of persecution based on "race, religion, nationality, membership in a particular social group, or political opinion."[14] Theoretically, the legal standard is clear: asylum eligibility should only hinge on whether asylum seekers can establish a well-founded fear of persecution.[15] In reality, however, the outcomes of asylum applications can turn on the legality of entry.[16] This Note argues that illegal entry often limits the scope of asylum seekers' due process rights in court and negatively impacts the asylum process in a way that runs afoul with the spirit of due process and fairness.[17] Asylum eligibility should not hinge on whether entry is legal, but whether applicants are able to meet the evidentiary burden. Conditioning asylum seekers' procedural due process rights on the legality of entry creates arbitrary asylum results and carries high risks of sending back asylum seekers to danger, simply because they were not able to obtain valid travel documents from the governments that persecuted them. Furthermore, illegality of entry creates the concept of undeserving asylum applicants,[18] which often conflicts with the principle of fairness in removal proceedings.

This Note proceeds as follows. Part I discusses important legal issues relevant to understanding asylum seekers' due process rights in expedited removal proceedings, including Congress's plenary power over immigration, the asylum application process, and the statutory expedited removal framework.[19] Part II analyzes the Supreme Court's decision in *Department of Homeland Security v. Thuraissigiam*,[20] which reversed key determinations from the Ninth Circuit.[21] Part III advances this Note's main arguments.[22] Illegal entry significantly limits asylum seekers' due process rights by triggering expedited removal. However, giving the legality of entry undue weight in the asylum process leads to arbitrary adjudications and high risks of error. Asylum eligibility should not be contingent upon legal entry in a way that violates the Due Process Clause of the Fifth Amendment. Finally, Part IV examines how sociopolitical factors complicate the issue.[23]

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[12] U.S. CONST. amend. V.
[13] *See id.*
[14] 8 U.S.C. § 1158(b)(1)(B)(I).
[15] *See id.*
[16] *See infra* Section III.A.
[17] *See infra* Part III.
[18] *See infra* Part IV.
[19] *See infra* Part I.
[20] *Thuraissigiam II*, 140 S. Ct. 1959 (2020).
[21] *See infra* Sections II.A, II.B, II.C.
[22] *See infra* Part III.
[23] *See infra* Part IV.

I. BACKGROUND IN ASYLUM LAW AND EXPEDITED REMOVAL PROCEEDINGS

A. The Plenary Power Doctrine and Limited Judicial Review

The Supreme Court has long recognized that Congress possesses virtually unrestricted power over immigration.[24] Although the Constitution itself is largely quiet on which branch of the government holds authority over immigration, the Court has been deferential to the political branches on the admission and exclusion of foreign nationals because the power to admit or exclude is often associated with the concept of sovereignty.[25] The Supreme Court first articulated its unqualified deference to Congress in immigration in *Chae Chan Ping v. United States*.[26] In *Chae Chan Ping*, the Court upheld an order denying entry to a Chinese national based on the Chinese Exclusion Act of 1882.[27] The Court derived Congress's plenary power from extra-constitutional theories of sovereignty, meaning that the power to exclude is an unenumerated power, and reasoned that the decisions to exclude foreign nationals are directly related to national interests and defense.[28]

Early plenary power case law guided the Court through stare decisis in the twentieth century, though "sometimes seemingly to the Court's chagrin."[29] By the 1970s, although the Court began to review certain constitutional challenges in immigration cases, such judicial review was still very limited.[30] For instance, the Court entertained habeas petitions challenging asylum seekers' admission decisions but still upheld administrative decisions with little scrutiny.[31] In *Shaughnessy v. United States* ex rel. *Mezei*,[32] the Court acknowledged that Mezei challenged his detention by immigration

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[24] *See, e.g.*, Fong Yue Ting v. United States, 149 U.S. 698, 705 (1893) (noting that the power to make immigration policy belongs to the political branch of the government); Chae Chan Ping v. United States, 130 U.S. 581, 606–08 (1889) (holding that Congress has power to exclude foreign nationals, or prevent their return to, the U.S., for any reason it deems sufficient).

[25] *See* Peter Margulies, *The Boundaries of Habeas: Due Process, the Suspension Clause, and Judicial Review of Expedited Removal under the Immigration and Nationality Act*, 34 GEO. IMMIGR. L.J. 405, 412, 423 (2020).

[26] *Chae Chan Ping*, 130 U.S. at 599–600.

[27] *See id.* at 604, 606–07; Chinese Exclusion Act of 1882, 22 Stat. 58, 126 (1882) (repealed 1943).

[28] *See Chae Chan Ping*, 130 U.S. at 609 ("The power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States, as a part of those sovereign powers delegated by the Constitution, the right to its exercise at any time when, in the judgment of the government, the interests of the country require it, cannot be granted away or restrained on behalf of any one."); *see also* Kif Augustine-Adams, *The Plenary Power Doctrine After September 11*, 38 U.C. DAVIS L. REV. 701, 712–13 (2005).

[29] *See* Jessica Portmess, *Until the Plenary Power Do Us Part: Judicial Scrutiny of the Defense of Marriage Act in Immigration After* Flores-Villar, 61 AM. U. L. REV. 1825, 1834 (2012).

[30] *See id.*

[31] *See* Margulies, *supra* note 25, at 424.

[32] 345 U.S. 206, 216 (1953).

officials after he attempted to enter the United States but still denied his habeas corpus petition based on the Court's traditional deference to the political branches in immigration admission decisions.[33] In 2018, the Court reaffirmed the plenary power doctrine and emphasized limited judicial review in *Trump v. Hawaii*, reasoning that Congress's plenary power in the realm of immigration is a "fundamental sovereign attribute . . . largely immune from judicial control."[34]

B. The Asylum Application Process and Asylum Seekers' Due Process Rights

A person wishing to enter or remain in the United States to avoid persecution in a foreign country has several legal avenues available. For persons inside the United States, there are three avenues of relief—withholding of removal under 8 U.S.C. § 1231(b), under the Convention Against Torture, or a grant of asylum under 8 U.S.C. § 1158(a).[35] Pursuant to Immigration Nationality Act (INA) section 208(a)(1), "[a]ny alien who is physically present in the United States or who arrives in the United States . . . irrespective of such alien's status, may apply for asylum."[36] To qualify for asylum, an asylum seeker must show that he or she is a "refugee" as defined in section 101(a) of the INA, who is outside her country of nationality and who is unable or unwilling to return because of "past persecution" or a "well-founded fear" of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.[37]

First, to establish past persecution, an applicant must show an incident, or incidents, that: (1) rise(s) to the level of persecution; (2) was on account of a protected ground; and (3) was committed by the government or forces that the government was either unable or unwilling to control.[38] Although not defined in the INA, persecution has been defined as "the infliction of suffering or harm upon those who differ in a way that is regarded as offensive."[39] It is a threat to the life or freedom of those individuals.[40]

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[33] *See id.* at 209–10.

[34] 138 S. Ct. 2392, 2418 (2018) (internal quotations omitted) (quoting Fiallo v. Bell, 430 U.S. 787, 792 (1977)).

[35] 8 U.S.C. § 1231(b); 8 U.S.C. § 1158(a); *see also Real ID Act*, DEP'T. OF JUST., https://www.justice.gov/sites/default/files/eoir/legacy/2014/08/15/long-form-boilerplate.pdf [https://perma.cc/4PT4-BS23] (last visited Apr. 26, 2022).

[36] 8 U.S.C. § 1158(a)(1); 8 CFR § 208.13(a).

[37] 8 U.S.C. § 101(a)(42)(A); 8 CFR § 1208.13(b) (defining "well-founded fear" as "a fear of persecution in [their] country of nationality, or, if stateless, in [their] country of last habitual residence, on account of race, religion, nationality, membership in a particular social group, or political opinion" such that there is "a reasonable possibility of suffering such persecution if [they] were to return to that country," and "[they] are unable or unwilling to return to, or avail [themselves] the protection of, that country because of such fear").

[38] *See, e.g.*, Navas v. I.N.S., 217 F.3d 646, 655–56 (9th Cir. 2000).

[39] *See, e.g.*, Fisher v. I.N.S., 79 F.3d 955, 961 (9th Cir. 1996) (en banc) (internal quotations omitted) (quoting Ghaly v. I.N.S., 58 F.3d 1425, 1431 (1995)).

[40] *See, e.g.*, Sangha v. I.N.S., 103 F.3d 1482, 1487 (9th Cir. 1997).

Persecution can be physical, as well as emotional and psychological.[41] Past persecution generates a presumption in favor of well-founded fear of future persecution.[42] If an asylum seeker successfully demonstrates past persecution, the burden shifts to the government to establish by a preponderance of the evidence that either (1) there has been a change in circumstances "such that the applicant no longer has a well-founded fear of persecution" in the country at issue or; (2) "[t]he applicant could avoid further persecution by relocating to another part of the applicant's country of nationality" or habitual residence, and it would be reasonable for them to do so.[43]

Second, if an applicant cannot prove past persecution, she must demonstrate that she has a well-founded fear of future persecution, which must be both subjectively genuine and objectively reasonable fear.[44] An individual can satisfy the subjective component by presenting credible testimony that she genuinely fears persecution and the objective component by providing credible, direct, and specific testimony and evidence in the record of facts that would support a reasonable fear of persecution.[45] A well-founded fear may exist even when there is as little as a one-in-ten chance of future persecution.[46] If a reasonable person in similar circumstances would fear persecution upon returning to the native country, the standard is satisfied.[47] Additionally, there is a nexus requirement.[48] The Supreme Court requires an asylum seeker to provide some evidence, direct or circumstantial, that the persecutor is motivated to persecute the victim because the victim possesses or is believed to possess a protected characteristic.[49] Finally, as a threshold matter, an applicant seeking asylum and withholding of removal must persuade the Court that her evidence is credible.[50]

Based on the statutory provisions, as well as the legal standards set forth in case law, the essential purpose of asylum is to protect vulnerable individuals who face persecution abroad from being deprived of life and liberty.[51] For that reason, when

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[41] *See, e.g.*, Hernandez-Montiel v. I.N.S., 225 F.3d 1084, 1097–98 (9th Cir. 2000); Duarte de Guinac v. I.N.S., 179 F.3d 1156, 1163 (9th Cir. 1999).

[42] *See, e.g.*, Cao He Lin v. U.S. Dep't of Just., 428 F.3d 391, 399 (2d Cir. 2005) ("A showing of past persecution sets up a rebuttable presumption of a well-founded fear of future persecution . . . ."); *see also* 8 CFR § 1208.13(b)(1).

[43] 8 CFR § 1208.13(b)(1)(ii).

[44] *See* Arriaga-Barrientos v. I.N.S., 937 F.2d 411, 413 (9th Cir. 1991); I.N.S. v. Cardoza-Fonseca, 480 U.S. 421, 430–31 (1987); *supra* note 37 for full definition of "well-founded fear."

[45] *See, e.g.*, *Duarte de Guinac*, 79 F.3d at 1159.

[46] *See, e.g.*, *Cardoza-Fonseca*, 480 U.S. at 431; Arteaga v. I.N.S., 836 F.2d 1227, 1233 (9th Cir. 1988).

[47] *See, e.g.*, Matter of Mogharrabi, 19 I & N Dec. 439, 445 (B.I.A. 1987).

[48] *See, e.g.*, I.N.S. v. Elias-Zacarias, 502 U.S. 478, 482 (1992).

[49] *See, e.g.*, *id.* at 482–84.

[50] *See, e.g.*, Saballo-Cortez v. I.N.S., 761 F.2d 1259, 1262 (9th Cir. 1984).

[51] Whitfield v. Hanges, 222 Fed. 745, 748 (8th Cir. 1915) ("A full and fair hearing on the charges which threaten his deportation . . . [is] indispensable to the lawful deportation of an alien. . . . An alien, as well as a citizen, is protected by the prohibition of deprivation of life,

deciding asylum cases, courts should focus on the actual merits of applicants' claims. Indeed, many asylum seekers fleeing persecution had little or no time to get visas to enter the United States legally when their life and freedom were threatened in their home countries.[52] However, disregarding legal formalities for entry can have a direct, adverse impact on asylum seeker's ability to successfully obtain asylum.[53] Specifically, illegal entry as a violation of 8 U.S.C. § 1325 is weighed against claims for asylum and often limits the scope of due process rights that seekers are entitled to.[54]

C. Illegal Entry and Expedited Removal

Illegal entry imposes multiple hurdles throughout the asylum application process that others who enter legally may not have to face. Once at a port of entry or having crossed the border, asylum seekers must present themselves to a U.S. Customs and Border Protection (CBP) officer for referral to a protection screening or directly to asylum proceedings.[55] The CBP officers will initially screen the applications, usually with little oversight, and there is no opportunity for asylum seekers to advocate for themselves.[56] The challenge of such a screening process is that CBP performs an administrative function, as opposed to an evaluation of protection claims.[57] The CBP officers received extensive trainings to curb irregular immigration and to protect the safety of our nation's borders.[58] However, they do not necessarily have sufficient knowledge or resources to sort out frivolous asylum claims from meritorious ones.[59] Recently, a growing number of complaints by asylum seekers alleging that CBP promptly turned them away without giving adequate consideration to their cases raised concerns about the fairness of the screening process and the consequences of returning

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liberty, or property without due process and the equal protection of the law."); *see also* Bridges v. Wixon, 326 U.S. 135, 154 (1945); Hays v. Hatges, 94 F.2d 67, 68 (8th Cir. 1938); *Ex parte* Kurth, 28 F. Supp. 258, 260 (S.D. Cal. 1939); United States *ex rel.* Shaw v. Van De Mark, 3 F. Supp. 101, 102 (W.D.N.Y. 1933).

[52] *See* Sara Ramey, Opinion, *People Fleeing Persecution Have the Right to Seek Asylum*, THE HILL (June 5, 2018, 11:00 AM), https://thehill.com/opinion/immigration/390743-people-fleeing-persecution-have-the-right-to-seek-asylum [https://perma.cc/G6F4-PRNH].

[53] *See infra* Section I.C.

[54] *See infra* Section I.C.

[55] *See* B. Shaw Drake & Elizabeth Gibson, *Vanishing Protection: Access to Asylum at the Border*, 21 CUNY L. REV. 91, 122 (2017).

[56] *Id.* at 123–24.

[57] *Id.* at 123.

[58] *Id.* at 95; *see also National Border Patrol Council Endorses Donald Trump for President*, NAT'L BORDER PATROL COUNCIL, https://bpunion.org/newsroom/press-releases/1824-national-border-patrol-council-endorses-donald-trump-for-president [https://perma.cc/M79A-MZAY] (last visited Apr. 26, 2022) (noting the CBP union's opinion about the importance of securing the borders).

[59] *See also* Drake & Gibson, *supra* note 55, at 124.

migrants to persecution.[60] Although a supervisor usually reviews CBP officer's determination, this review does not allow asylum seekers to participate in any way.[61]

Beyond the initial stage of CBP referral, several other limitations make meaningful access to asylum difficult, including an ambiguous burden of proof, as well as limited access to counsel and opportunities for appeal.[62] After CBP officers refer anyone who expresses a fear of returning and an intent to apply for asylum to the asylum office, asylum officers trained in immigration law (although they are not required to be attorneys) then conduct a credible fear interview (CFI).[63] CFIs generally occur very quickly after CBP's referral, a period during which the asylum seeker is also detained.[64] Under those circumstances, "an asylum seeker has very little opportunity to prepare a case, consult with an attorney, and convey a story to the asylum officer."[65] Moreover, the asylum officers conduct many of the interviews telephonically, without the ability to see the asylum seeker's demeanor.[66] During these procedures, asylum officers and CBP officials have a wide discretion with regards to determining asylum eligibility.[67] There is also very little that detained asylum seekers can do to make sure that their claims receive adequate consideration.[68]

Immigrants whom CBP officers find to be inadmissible will be subject to expedited removal proceedings, an administrative proceeding that authorizes CBP officers to bypass immigration courts and issue independent orders of deportation.[69] Congress first enacted the process of expedited removal in 1996.[70] Expedited removal only takes weeks, rather than the years that it can take to resolve a full deportation case.[71] It does not involve a hearing before an immigration judge nor provide asylum seekers the right to counsel.[72] Expedited removal proceedings have traditionally been cursory and offer inadequate protection for asylum seekers.[73] In *Thuraissigiam*,

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[60] *Id.* at 125.
[61] *Id.* at 124.
[62] *Id.* at 127.
[63] *Id.*
[64] *Id.*
[65] *Id.*
[66] *Id.* at 128.
[67] *Id.*
[68] *Id.* at 129–30.
[69] *Id.* at 104.
[70] *See* Nicole Narea, *The Supreme Court Just Allowed Trump's Expansion of Deportations to Go Unchecked: Asylum Seekers Now Have Little Recourse to Challenge Fast-Tracked Deportations*, VOX (June 25, 2020, 11:45 AM), https://www.vox.com/policy-and-politics/2020/6/25/21302168/supreme-court-immigration-trump-deportation-thuraissigiam.
[71] *Id.*
[72] *Id.*
[73] *See, e.g.*, Jennifer Lee Koh, *When Shadow Removals Collide: Searching for Solutions to the Legal Black Holes Created by Expedited Removal and Reinstatement*, 96 WASH. U. L. REV. 337, 342–43 (2018) (arguing that expedited removal has historically been a border enforcement tool against persons with limited ties to the United States).

lawyers for the ACLU argued that such a quick and simplified process violated the constitutional principles of due process.[74]

Under the Supreme Court's decision in *Thuraissigiam*, asylum seekers' due process rights will become even more limited, since the majority held that asylum seekers in expedited removal proceedings will not be able to challenge removal in federal court, even though such judicial review was previously available to them.[75] Previously, appeals to federal court ensured that migrants with credible asylum claims were not erroneously turned away and would have access to a full and fair hearing.[76] Now, they will no longer have access to those procedural safeguards.[77] Among the asylum seekers placed in expedited removal proceedings, those who entered the country illegally constitute a significant proportion.[78]

II. *DEPARTMENT OF HOMELAND SECURITY V. THURAISSIGIAM*

A. Background

In January 2017, Vijayakumar Thuraissigiam, a Sri Lanka national, entered the United States without inspection or an entry document.[79] A CBP officer detained him only twenty-five yards from the U.S.-Mexican border for expedited removal.[80] Thuraissigiam claimed a fear of returning to his home country because a group of men had previously abducted and severely beaten him.[81] However, he was unable to ascertain the identity of the men, the reasons for the assault, and whether authorities in his home country could protect him from future harm.[82]

An asylum officer credited Thuraissigiam's account of the assault but still found no "credible" fear of persecution because he proffered no evidence.[83] The supervising officer agreed with the asylum officer's determination, and an immigration judge affirmed after hearing further testimony from Thuraissigiam.[84] The immigration judge

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[74] *See Thuraissigiam II*, 140 S. Ct. 1959, 1963–64, 1968 (2020).

[75] *See id.* at 1963 (refusing to grant additional administrative review of the respondent's asylum claim or authorization to stay in the U.S.); *see also* De Vogue & Alvarez, *supra* note 3; Kari Hong, *Opinion Analysis: Court Confirms Limitations on Federal Review for Asylum Seekers*, SCOTUSBLOG (Jun 26, 2020, 10:15 AM), https://www.scotusblog.com/2020/06/opinion-analysis-court-confirms-limitations-on-federal-review-for-asylum-seekers/ [https://perma.cc/7JTZ-2F8D].

[76] *See* Narea, *supra* note 70.

[77] *Id.*

[78] *Id.*

[79] *Thuraissigiam II*, 140 S. Ct. at 1967.

[80] *Id.*

[81] *Id.*

[82] *Id.*

[83] *Id.* at 1968.

[84] *Id.*

returned the case to the Department of Homeland Security for removal.[85] Thuraissigiam then filed a federal habeas petition and asserted for the first time a fear of persecution based on his Tamil ethnic identity, including torture and beatings.[86] While the typical habeas petitions only challenge the legality of an individual's confinement, Thuraissigiam's petition did not ask for release from custody, but instead for vacatur of his removal order.[87] He also alleged that the immigration officials deprived him of "a meaningful opportunity to establish his claims," and sought judicial review of the underlying asylum claim.[88]

The U.S. District Court for the Southern District of California dismissed Thuraissigiam's petition, holding that sections 1252(a)(2) and (e)(2) foreclosed review of the negative credible-fear determination.[89] When the case reached the Ninth Circuit, the central issue was whether the federal habeas statute's limitations on the judicial review of Thuraissigiam's removal order and asylum claim were constitutional.[90] The Ninth Circuit ruled that they were not, and that the restrictions violated the Suspension Clause and the Due Process Clause.[91] The Supreme Court, however, disagreed with the Ninth Circuit and held that the federal habeas statute was constitutional as applied.[92] The Court also ruled that Thuraissigiam was not entitled to judicial review of his expedited removal order.[93]

B. Ninth Circuit Rationale

Writing for the unanimous panel, Judge Tashima of the Ninth Circuit found that the federal habeas statute 8 U.S.C. § 1252(e)(2) violated the Suspension Clause and Due Process Clause.[94] The district court decision emphasized the narrow scope of § 1252(e)(2), which limits judicial review of habeas corpus proceedings to (1)

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[85] *Id.*

[86] *Id.*

[87] *Id.*

[88] *Id.*

[89] *Id.*; 8 U.S.C. § 1252(a)(2)(A) limits review of expedited removal orders to habeas review under § 1252(e). Section 1252(e)(2) states that:

> Judicial review of any determination made under section 1225 (b)(1) of this title is available in habeas corpus proceedings, but shall be limited to determinations of—(A) whether the petitioner is an alien, (B) whether the petitioner was ordered removed under such section, and (C) whether the petitioner can prove by a preponderance of the evidence that the petitioner is an alien lawfully admitted for permanent residence, has been admitted as a refugee under section 1157 of this title, or has been granted asylum under section 1158 of this title[.]

[90] *See generally* Thuraissigiam v. U.S. Dep't of Homeland Sec. (*Thuraissigiam I*), 917 F.3d 1097, 1104–19 (9th Cir. 2019).

[91] *Id.* 917 F.3d at 1118–19.

[92] *Thuraissigiam II*, 140 S. Ct. at 1963.

[93] *Id.*

[94] *Thuraissigiam I*, 917 F.3d at 1100.

whether the petitioner is an alien, (2) whether the petitioner had a removal order under § 1225(b)(1), and (3) whether the petitioner can prove by a preponderance of the evidence that he has permanent resident status, refugee status, or asylee status.[95]

In contrast, the Ninth Circuit found that the scope of § 1252 (e) is so narrow that it unconstitutionally suspended the writ of habeas as applied to Thuraissigiam.[96] After considering both *I.N.S. v. St. Cyr* and *Boumediene v. Bush*, the Ninth Circuit held that the scope of habeas corpus covered the review of mixed questions of law and fact and should allow Thuraissigiam to challenge the validity of his expedited removal order.[97] Citing *Boumediene*, the court reasoned that "at a minimum, the Suspension Clause entitles the [petitioner] to a meaningful opportunity to demonstrate that he is being held pursuant to erroneous application or interpretation of relevant law."[98]

Furthermore, as to Thuraissigiam's due process claim, the Ninth Circuit rejected the government's argument that Thuraissigiam was not entitled to procedural due process rights.[99] On the contrary, the court has held that individuals similarly situated as Thuraissigiam likely have a right "to expedited removal proceedings that conformed to the dictates of due process."[100]

C. Supreme Court Decision and Implications

The Supreme Court disagreed with the Ninth Circuit's decision and ruled that neither the Suspension Clause nor the Due Process Clause requires further review of Thuraissigiam's asylum claim, and that the federal habeas statute is constitutional as applied.[101]

DHS detained Thuraissigiam after he crossed the border and placed him in expedited removal proceedings, which the Court viewed as a tool for efficiently returning border crossers with no valid entry documents and dubious asylum claims.[102] Writing for the majority, Justice Alito argued that judicial review in expedited removal proceedings is limited.[103] Adopting an originalist approach, Justice Alito framed the

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[95] 8 U.S.C. § 1252(e)(2); *see Thuraissigiam I*, 917 F.3d at 1100 ("The [district] court dismissed the petition for lack of subject matter jurisdiction.").

[96] *Thuraissigiam I*, 917 F.3d at 1116–17.

[97] *Id.* at 1117.

[98] *Id.* at 1116 (quoting Boumediene v. Bush, 553 U.S. 723, 779 (2018)) (internal quotations omitted).

[99] *Id.* at 1111 n.15 ("[W]e disagree with the government's contention . . . that a person like Thuraissigiam lacks all procedural due process rights . . . . And we have held that a noncitizen situated almost exactly like Thuraissigiam had a constitutional right 'to expedited removal proceedings that conformed to the dictates of due process.'").

[100] *See id.*

[101] *Thuraissigiam II*, 140 S. Ct. 1959, 1961, 1963–64 (2020).

[102] *Id.* at 1964–65.

[103] *See id.* at 1963–65; *see also* HILLEL R. SMITH, CONG. RSCH. SERV., LSB10510, SUPREME COURT UPHOLDS LIMITED REVIEW OF EXPEDITED REMOVAL 1–2 (2020).

habeas corpus writ as it existed in 1789 and held that its inquiry should be restricted to the provisions of § 1252(e)(2), which prohibits the review of the asylum claim's merits or the expedited removal order's validity.[104] Based on Justice Alito's reasoning, the limited scope of review would allow the government to streamline consideration of frivolous asylum claims and ease administrative burden.[105]

However, the writ of habeas corpus has expanded since 1789, a possibility that the Supreme Court has held open in other cases.[106] For example, Justice Kennedy's majority opinion in *Boumediene v. Bush* stated that the Supreme Court "has been careful not to foreclose the possibility that the protections of the Suspension Clause have expanded along with post-1789 developments."[107] In *Thuraissigiam*, however, the Court adopted an originalist understanding of the writ as it existed in 1789 and did not clarify the role of post-1789 case law in its analysis or how it would affect Thuraissigiam's claim.[108] The Court's analysis could create unpredictability in future Suspension Clause inquiries.[109]

Also, Thuraissigiam's illegal entry seemed to weigh heavily on Justice Alito's decision.[110] The Court's analysis emphasized the circumscribed scope of due process protections for non-citizens in the respondent's position.[111] According to Justice Alito, immigrants seeking initial entry to the United States have due process only to the extent that the statutory provisions allow.[112] The Court cited "the century-old rule" that the political branch of the government decides the perimeters of due process for these asylum seekers, and they are entitled to "nothing more."[113] Furthermore, for the purpose of evaluating Thuraissigiam's claim, the entry fiction theory applies, meaning that even if he had successfully made it twenty-five yards into the U.S. territory, the scope of his due process rights would be the same as if he stopped at the border.[114] In other words, because the CBP officers apprehended Thuraissigiam shortly after he crossed the border illegally, he was still "on the threshold" of entry

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[104] *See Thuraissigiam II*, 140 S. Ct. at 1974.

[105] *See id.* at 1966, 1966–67 n.9 (citing Violent Crime Control and Law Enforcement Act of 1994, § 130010(a)(3)(C), 108 Stat. 2030 (legislative finding of "a drain on limited resources resulting from the high cost of processing frivolous asylum claims")).

[106] *See* Department of Homeland Security v. Thuraissigiam, *Leading Cases*, 134 HARV. L. REV. 410, 416–19 (2020); Amanda L. Tyler, *Thuraissigiam and the Future of the Suspension Clause*, LAWFARE (July 2, 2020, 12:31 PM), https://www.lawfareblog.com/thuraissigiam-and-future-suspension-clause [https://perma.cc/4ELC-KJUL].

[107] 553 U.S. 723, 746 (2008).

[108] *See* Tyler, *supra* note 106.

[109] Department of Homeland Security v. Thuraissigiam, *Leading Cases*, *supra* note 106, at 418.

[110] *See* Tyler, *supra* note 106.

[111] *See* SMITH, *supra* note 103, at 2.

[112] *Thuraissigiam II*, 140 S. Ct. 1959, 1983 (2020); *see* SMITH, *supra* note 103, at 2.

[113] *Thuraissigiam II*, 140 S. Ct. at 1978, 1982.

[114] *Id.* at 1982.

just as someone arriving at a port of entry.[115] The Court thus concluded that not allowing him to challenge his removal under the federal habeas statute does not violate the Due Process Clause.[116]

In her dissent, Justice Sotomayor expressed disappointment with the majority's decision, arguing that it "deprives [non-citizens] of any means to ensure the integrity of an expedited removal order. . . . In doing so, the Court upends settled constitutional law and paves the way towards transforming already summary expedited removal proceedings into arbitrary administrative adjudications."[117]

Indeed, the majority's decision has raised several important concerns about asylum seekers' due process rights. First, the Court's ruling will keep the federal courthouse doors closed for judicial review of asylum claims in expedited removal proceedings, curtailing asylum seekers' procedural due process.[118] The implication is that the government may deport certain detained immigrants without allowing them to challenge the validity of such administrative decisions in federal court.[119] Unlike immigrants who entered the United States legally, border crossers in expedited removal proceedings like Thuraissigiam who lacked valid entry documents may not have a full hearing before an immigration judge, appeal negative credible-fear findings, or seek judicial review in federal court on questions of law.[120]

Second, because the Court found that Thuraissigiam was still on the threshold of entry, it construed his due process rights narrowly.[121] Yet the case called into question whether these due process limitations apply to asylum seekers apprehended farther into the interior of the United States.[122] The scope of new entrants' due process rights has always been unclear, and it can turn on whether they have developed ties to the country.[123] In his concurrence, Justice Breyer acknowledged the possibility

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[115] *Id.* at 1983.

[116] *Id.*

[117] *Id.* at 1993 (Sotomayor, J., dissenting) ("[T]he Court . . . abdicates its constitutional duty and rejects precedent extending to the foundations of our common law. Making matters worse, the Court holds that the Constitution's due process protections do not extend to noncitizens like respondent, who challenge the procedures used to determine whether they may seek shelter in this country or whether they may be cast to an unknown fate. The decision deprives them of any means to ensure the integrity of an expedited removal order, an order which, the Court has just held, is not subject to any meaningful judicial oversight as to its substance.").

[118] *See* De Vogue & Alvarez, *supra* note 3; Mark Sherman, *Supreme Court Rules Some Asylum Seekers Cannot Challenge Removal*, WHYY (PBS) (June 25, 2020), https://whyy.org/articles/supreme-court-rules-some-asylum-seekers-cannot-challenge-removal/ [https://perma.cc/5JPM-73N8].

[119] *See* Sherman, *supra* note 118.

[120] *See* Margulies, *supra* note 25, at 417.

[121] *See Thuraissigiam II*, 140 S. Ct. at 1964, 1983.

[122] *See* Ahilan Arulanantham & Adam Cox, *Immigration Maximalism at the Supreme Court*, JUST SEC. (Aug. 11, 2020), https://www.justsecurity.org/71939/immigration-maximalism-at-the-supreme-court/ [https://perma.cc/927B-Q5AY].

[123] *See Thuraissigiam II*, 140 S. Ct. at 1963–64.

that the more established connections an person has in the United States, the more robust the due process protection will be, but still avoided resolving the issue.[124]

The Court's decision in *Thuraissigiam* reminds us that whether an asylum seeker's entry is legal can have a substantive impact on her due process rights.[125] Illegal entry triggers expedited removal and limits the scope of procedural due process.[126] For an asylum seeker who lacks valid entry document and is in expedited removal proceedings, any serious errors of administrative determinations, such as a false negative credible-fear finding, are now hard to rectify without opportunities to appeal in federal court.

D. Expansion of Expedited Removal

After the Ninth Circuit's *Thuraissigiam* decision, on July 23, 2019, DHS issued a Notice on Federal Register to expand the reach of expedited removal within the full extent that 8 U.S.C. § 1225 permits.[127] Before the DHS Notice, expedited removal applied only when (1) an immigration officer encountered the asylum seeker within 100 air miles of the border and (2) the asylum seeker was continuously present in the United States for less than fourteen days.[128] Under DHS's expanded framework, however, DHS can put foreign nationals who were inadmissible under the INA and whom they encountered *anywhere* in the United States in expedited removal proceedings.[129] On October 21, 2020, after an order of the Court of Appeals for the D.C. Circuit removed preliminary injunction, ICE implemented former Acting Secretary of Homeland Security Kevin K. McAleenan's July 23, 2019, Designation of Aliens for Expedited Removal.[130] The expanded expedited removal, combined with the Supreme Court's decision in *Thuraissigiam*, created increasing concerns about new entrants' due process rights and the impact of illegal entry on the asylum-seeking process.[131] After the Biden administration took office, it announced a review of the

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[124] *See id.* at 1989 (Breyer, J., concurring).

[125] *See id.* at 1983.

[126] *See* 8 U.S.C. § 1225.

[127] *See* Designating Aliens for Expedited Removal, 84 Fed. Reg. 35,409, 35,414 (July 23, 2019) ("This Notice . . . enables the Department of Homeland Security (DHS) to exercise the full remaining scope of its statutory authority to place in expedited removal, with limited exceptions, aliens determined to be inadmissible under section 212(a)(6)(C) or (a)(7) of the Immigration and Nationality Act.").

[128] *See* Designating Aliens for Expedited Removal, 69 Fed. Reg. 48,877, 48,879 (Aug. 11, 2004) ("[T]his notice applies only to aliens encountered within 14 days of entry without inspection and within 100 air miles of any U.S. international land border."); *see also* Margulies, *supra* note 25, at 416.

[129] *See* Designating Aliens for Expedited Removal, *supra* note 127, at 35,414.

[130] *See ICE Implements July 23, 2019 Expedited Removal Designation*, U.S. IMMIGR. & CUSTOMS ENF'T (Oct. 21, 2020), https://www.ice.gov/news/releases/ice-implements-july-23-2019-expedited-removal-designation [https://perma.cc/34XV-JENC].

[131] *See, e.g.*, Gerald Neuman, *The Supreme Court's Attack on Habeas Corpus in* DHS v.

DHS immigration policies, including the expansion of expedited removal.[132] In October 2021, an official from DHS stated that:

> DHS's review of the previous administration's expanded expedited removal [policies] is ongoing. This particular application of expedited removal was used in an exceedingly small number of cases under the Biden [a]dministration and will not be used moving forward until the Department's review is completed.[133]

III. THE IMPACT OF ILLEGAL ENTRY ON DUE PROCESS RIGHTS IN EXPEDITED REMOVAL PROCEEDINGS

This Note argues that illegal entry is given undue weight in the asylum process. It often triggers expedited removal and limits asylum seekers' procedural due process rights to meaningful judicial review.[134] When the legality of entry is given undue weight, arbitrary and erroneous asylum determinations are more likely to occur, and asylum seekers may have to face dire consequences including deportation and persecution abroad. Having a proper understanding of asylum seekers' due process rights requires a balancing analysis under *Mathews v. Eldridge*,[135] which takes into account private interests, government interests, as well as the risk of errors and probable value of additional procedure. Finally, this Part uses case law to illustrate why giving undue weight to the legality of entry in the asylum process can be problematic and highlights other relevant concerns.

Thuraissigiam, JUST SEC. (Aug. 25, 2020), https://www.justsecurity.org/72104/the-supreme-courts-attack-on-habeas-corpus-in-dhs-v-thuraissigiam/ [https://perma.cc/AE3B-YQHE] ("The foundation of expedited removal is a Supreme Court Decision of 1950, *United States ex rel. Knauff v. Shaughnessy*, denying the procedural due process rights of a first-time entrant; *Knauff* has never been overruled . . . . Applying expedited removal to the interior cannot be justified by the *Knauff* doctrine . . . [and will] deny procedural due process rights to broadened classes of noncitizens."); *Human Rights Watch Comment on Designating Aliens for Expedited Removal*, HUM. RTS. WATCH (Sept. 23, 2019, 9:00 AM), https://www.hrw.org/news/2019/09/23/human-rights-watch-comment-designating-aliens-expedited-removal [https://perma.cc/XJ5E-75BV] ("[N]ow that DHS has expanded the scope of expedited removal, [ ] tens of thousands more individuals each year could be forced through this flawed system that routinely deprives individuals of their right to have their claims examined in a credible fear interview with an asylum officer.").

[132] *See* Angela Mauroni, *Biden Signs Executive Order Undoing Trump's Anti-Immigration Efforts*, JURIST (Feb. 5, 2021, 08:53 AM), https://www.jurist.org/news/2021/02/biden-signs-executive-orders-undoing-trumps-anti-immigration-efforts/ [https://perma.cc/A5Y3-83WV].

[133] *See* Sarah Kimball Stephenson, *DHS Suspends Expedited Removal Policy Implemented by Trump*, JURIST (Oct. 15, 2021, 03:03 PM), https://www.jurist.org/news/2021/10/dhs-suspends-expedited-removal-policy-implemented-by-trump/ [https://perma.cc/F9EF-JNQS].

[134] *See* De Vogue & Alvarez, *supra* note 3.

[135] Mathews v. Eldridge, 424 U.S. 319, 321 (1976).

A. Legal or Illegal Entry: Similar Claims, Different Results

To qualify for a grant of asylum, an individual must meet the statutory definition of a refugee under 8 U.S.C. § 1101(a)(42) by proving past persecution or a well-founded fear of future persecution.[136] To convince the asylum officers or an immigration judge (IJ), applicants must show both a subjectively genuine and an objectively reasonable fear.[137]

The essential purpose of asylum is to protect individuals who would face persecution abroad, and for that reason, asylum eligibility should turn on whether applicants meet the evidentiary burden of proving past persecution or a fear for future persecution.[138] In reality, however, illegal entry often affects the asylum process by triggering expedited removal.[139] Combined with other factors including the location of arrest,[140] strength of domestic ties,[141] quality of asylum officers and IJs,[142] and asylum seekers' access to counsel and legal resources,[143] illegal entry increases the unpredictability of the discretionary asylum process. Theoretically, whether entry is legal should not affect asylum results. In practice, however, depending on whether entry is legal, those with similar claims may obtain very different asylum results.

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[136] *See* 8 U.S.C. § 1101(a)(42)(A) ("The term 'refugee' means (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion."); 8 C.F.R. § 1208.13(b). A nexus must be present between persecution and the characteristics. *See, e.g.*, Lukwago v. Ashcroft, 329 F.3d 157, 172 (3d Cir. 2003) (finding that a demonstration of past persecution would not be enough to qualify for asylum, and an applicant has the burden of showing that persecution was *on account of* the applicant's social group).

[137] *See* I.N.S. v. Cardoza-Fonseca, 480 U.S. 421, 430–31 (1987); Arriaga-Barrientos v. I.N.S., 937 F.2d 411, 413 (9th Cir. 1991).

[138] *See* 8 U.S.C. § 1101(a)(42)(A); 8 CFR § 1208.13(b).

[139] *See* 8 U.S.C. § 1225(b)(1)(A)(iii)(II) (2012).

[140] *See id.*

[141] *See* Castro v. United States Dep't of Homeland Sec., 835 F.3d 422, 448 (3d Cir. 2016) ("[A]liens receive constitutional protections when they have come within the territory of the United States and developed substantial *connections* with this country.") (emphasis in original); Kwong Hai Chew v. Colding, 344 U.S. 590, 597 n.5 (1953) (internal quotation omitted) (quoting Johnson v. Eisentrager, 339 U.S. 763, 770–71 (1950)) ("The alien, to whom the United States has been traditionally hospitable, has been accorded a generous and ascending scale of rights as he increases his identity with our society."); *see also Thuraissigiam II*, 140 S. Ct. 1959, 1963–64 (2020) ("While aliens who have established connections in this country have due process rights in deportation proceedings . . . an alien at the threshold of initial entry cannot claim any greater rights under the Due Process Clause.").

[142] *See* Margulies, *supra* note 25, at 410–11.

[143] *See id.*

Consider, applicant A and applicant B have virtually identical, nonfrivolous asylum claims, and both face persecution on account of race in their home country. Applicant A applied for a tourist B-2 visa a year ago, and it was still valid when she decided to flee her country. She then purchased a plane ticket and used the visa to enter the United States. Applicant B, however, did not have a valid visa in hand, and his passport also expired. When he feared for his life and had to flee persecution, time did not allow him to get valid travel documents. Feeling that he had no other choice, applicant B decided to cross the U.S. border illegally. After his entry, however, a CBP officer encountered applicant B and arrested him. Both applicants A and B now seeks asylum, but their paths to a grant of asylum and the procedural due process they are entitled to may turn out to be very different.

For applicant A, the path to asylum is more promising. If she files an application for asylum by submitting an I-589 application form to U.S. Citizenship and Immigration Services (USCIS) within one year of arrival,[144] she will then have the opportunity for an interview with an asylum officer, who will make a determination on her eligibility, and a supervisory officer will also review the decision to ensure compliance with the law.[145] If both officers find her to be ineligible for asylum, USCIS will refer applicant A to an IJ for a full hearing to establish her case.[146] Even if she also fails to prove her asylum claim to the IJ, applicant A can then appeal the IJ decision to the Board of Immigration Appeals (BIA) and eventually to federal court.[147] During these formal proceedings, applicant A has multiple procedural and substantive safeguards, including the right to counsel, the right to present testimony and evidence, and the right to appeal an adverse decision to the BIA and federal court.[148]

In comparison, applicant B's path to asylum is much more unpredictable. There are two scenarios: a CBP officer might have caught applicant B (1) within 100 air miles after his entry, or (2) beyond 100 air miles.

If a CBP officer apprehends applicant B within 100 air miles soon after he crossed the border, the hypothetical would be most similar to the facts in *Thuraissigiam*.[149] Under the Supreme Court's decision in *Thuraissigiamm*, applicant B will have limited

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[144] Form I-589 is the application form for asylum and withholding of removal. *See Obtaining Asylum Status*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/forms/explore-my-options/obtaining-asylum-status [https://perma.cc/EAC8-BXKF] (last updated July 9, 2020).

[145] *See The Affirmative Asylum Process*, U.S. CITIZENSHIP & IMMIGR. SERVS., https:// www.uscis.gov/humanitarian/refugees-and-asylum/asylum/the-affirmative-asylum-process [https://perma.cc/B2TY-RFLY] (last updated Sept. 22, 2020). For the purpose of this hypothetical, the statutory bars to asylum do not apply to the applicants.

[146] *See Obtaining Asylum Status*, *supra* note 144.

[147] *See Board of Immigration Appeals*, U.S. DEP'T OF JUST., https://www.justice.gov/eoir/board-of-immigration-appeals [https://perma.cc/V7WM-3GBX] (last updated Sept. 14, 2021).

[148] *See* HILLEL R. SMITH, CONGR. RSCH. SERV., LSB10336, THE DEPARTMENT OF HOMELAND SECURITY'S NATIONWIDE EXPANSION OF EXPEDITED REMOVAL 2 (June 2020).

[149] *Thuraissigiam II*, 140 S. Ct. 1959, 1961 (2020).

procedural due process rights as if he stopped at the border.[150] Like Thuraissigiam, applicant B lacks valid entry documents, and thus DHS can place him in expedited removal proceedings pursuant to 8 U.S.C. § 1225.[151] If applicant B expresses a fear of persecution abroad, the CBP officer must then refer him to an asylum officer for a credible fear interview.[152] Theoretically, CBP officers will always follow these procedures as required. However, there are many reports of officers refusing requests for referral after asylum seekers expressed fear of persecution abroad; some officers even harassed, threatened, and dissuaded asylum seekers from obtaining asylum.[153] Unlike applicant A, who will go through formal proceedings and will most likely be able to obtain an interview with an asylum officer if she timely files her asylum application, applicant B may not have an opportunity to appear before an asylum officer to assert his fear if the CBP officer fails or refuses to refer him for whatever reason. Therefore, applicant B, who entered the United States illegally, is now in a worse situation than applicant A, who entered legally with valid documents.

Next, imagine if the CBP officer arrested applicant B beyond, rather than within, 100 air miles. Under DHS's expanded expedited removal framework released during the Trump administration, applicant B might still be subject to expedited removal, because the summary process applied to any non-citizen apprehended *anywhere* within the United States who has not been admitted and who cannot prove that he has been present in the United States for two years or more.[154] Then, the critical question is how much due process protection applicant B will be entitled to if detained beyond 100 air miles. The answer rests on how far into the interior the entry fiction doctrine applies and how broadly other courts will construe the Supreme Court's decision in *Thuraissigiam*.[155] In *Thuraissigiam*, the majority and the dissent agreed that asylum

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[150] *Id.* at 1982–83.

[151] *See* 8 U.S.C. § 1225.

[152] *Id.*

[153] *See Human Rights Watch Comment on Designating Aliens for Expedited Removal*, *supra* note 131 ("Some would-be asylum seekers reported that Border Patrol officers harassed, threatened, and attempted to dissuade them from applying for asylum. One man told Human Rights Watch, 'The officers don't pay attention to you. If you say you are afraid they say they can't do anything . . . All they said to me was that if I came back they would give me six months in prison.'"); Michael Garcia Bochenek, *US: Separated Families Report Trauma, Lies, Coercion*, HUM. RTS. WATCH (July 26, 2018, 7:00 AM), https://www.hrw.org/news/2018/07/26/us-separated-families-report-trauma-lies-coercion [https://perma.cc/268E-2M9B]. In an investigation by Human Rights Watch, parents separated from their children reported that immigration officers induced them to waive rights to seek asylum and told them that it was the only and fastest way to reunite with their children. *See also* HUM. RTS. WATCH, IN THE FREEZER: ABUSIVE CONDITIONS FOR WOMEN AND CHILDREN IN US IMMIGRATION HOLDING CELLS (Feb. 28, 2018), https://www.hrw.org/report/2018/02/28/freezer/abusive-conditions-women-and-children-us-immigration-holding-cells [https://perma.cc/V75U-MH77] (some women in immigration holding cells told Human Rights Watch that immigration officials forced them to accept the outcome of returning to their home countries).

[154] *See* Designating Aliens for Expedited Removal, *supra* note 127, at 35,409.

[155] *See Thuraissigiam II*, 140 S. Ct. 1959, 1982 (2020).

seekers who had never come to the country or those "on the threshold of initial entry" do not have any due process with respect to their admission.[156] The disagreement was on how to apply the entry fiction doctrine.[157] Justice Alito construed the doctrine liberally, and to him, Thuraissigiam was still "on the threshold of initial entry,"[158] so his due process rights would be the same as if he stopped at the border.[159] In contrast, Justice Sotomayor disagreed with Alito's approach of "drawing the line for due process at legal admission rather than physical entry."[160] To Justice Sotomayor, procedural due process under the Fifth Amendment is not contingent upon legal entry but applies to all *persons* in the United States.[161] For that reason, it was enough that Thuraissigiam was physically within the U.S. territory.[162]

Returning to the hypothetical, if a CBP officer arrested applicant B beyond 100 miles from the border, farther into the interior of the United States than the location where the officers detained Thuraissigiam, it is unclear whether applicant B would still be on the threshold of initial entry based on Justice Alito's analysis.[163] It is also unclear whether applicant B's due process rights would be as limited as Thuraissigiam's.[164] Due to these ambiguities, it is possible for other courts to apply the *Thuraissigiam* decision in a way that affords applicant B very limited procedural protection.

Then, still assume that applicant A is in the regular asylum proceedings while applicant B in expedited removal, and both cases now reach an IJ after asylum officers found that neither applicant established credible fear. In that situation, applicant A will still have more procedural due process rights than applicant B. The reason is that applicant A will be able to participate in a full asylum hearing in front of the IJ, while applicant B will not have a full hearing because he is in expedited removal. In applicant B's case, the IJ will only review the asylum officer's credible fear decision and interview notes.[165] Applicant B can still have his attorney present at the hearing, but the attorney can only be with him as a consultant rather than an advocate as in applicant A's case.[166]

Finally, applicant A can appeal the IJ's adverse ruling to the BIA and federal court while applicant B does not have such a right to appeal.[167] Unfortunately for applicant B, who is in expedited removal, there is no procedural protection from any errors on

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[156] *See id.* at 1964; *see also* Arulanantham & Cox, *supra* note 122.

[157] *Thuraissigiam II*, 140 S. Ct. at 1963–64.

[158] *See id.*

[159] *Id.* at 1982–83.

[160] *Id.* at 2012–13 (Sotomayor, J., dissenting).

[161] *Id.*

[162] *Id.*

[163] *Id.* at 1964, 1967, 1982–83.

[164] *Id.*

[165] FLORENCE IMMIGR. & REFUGEE RTS PROJECT, WHAT TO DO IF YOU ARE IN EXPEDITED REMOVAL OR REINSTATEMENT OF REMOVAL 5 (last updated Oct. 2011) (on file with author).

[166] *Id.*

[167] *See* SMITH, *supra* note 148.

part of the IJ.[168] In recent years, many have raised concerns about the quality and independence of IJs, as well as the fairness of the asylum process due to political pressure, particularly from the previous Trump administration, to rush through cases and reduce backlog.[169] From 2019 to 2020, there was a rise in the hiring of new IJs when more experienced IJs were leaving the bench.[170] The Trump administration expanded the immigration bench by over a hundred since 2016; by comparison, the Obama administration only had a net gain of fewer than fifty judges from 2010 to 2016.[171] As a result, judges with limited experience as IJs are handling more cases.[172] Furthermore, the Trump administration has appointed more IJs with prosecutorial and law enforcement background and limited judicial experience.[173] "Nearly [one] in [five] sitting judges appointed under Trump was a military lawyer," and half worked for ICE in the past.[174] Consequently, applicant B might be exposed to personal bias against asylum seekers in expedited removal proceedings.[175]

The different paths of applicants A and B to asylum demonstrate that the legality of entry can have a substantive impact on asylum seekers' procedural due process. In the real world, different variables affect the asylum outcomes, and it is often difficult to isolate the effect of a single factor. The hypothetical nevertheless shows, with other variables controlled, how illegal entry may impact asylum proceedings. Applicants A and B can have virtually identical, meritorious claims, but their asylum procedures may differ depending on how they entered the country. Illegal entry triggers expedited removal, which often leaves arbitrary administrative decisions unchecked.[176] Such a de facto conditioning of due process on legal entry increases the risk of errors in asylum proceedings and is against the spirit of fairness. The essential purpose of asylum is to protect vulnerable individuals who face persecution abroad from being

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[168] *See id.* at 1–2.

[169] *See* Molly Hennessy-Fiske, *Immigration Judges Are Quitting or Retiring Early Because of Trump*, L.A. TIMES (Jan. 27, 2020, 4:00 AM), https://www.latimes.com/world-nation/story/2020-01-27/immigration-judges-are-quitting-or-retiring-early-because-of-trump [https://perma.cc/9UVR-K3FX].

[170] *More Immigration Judges Leaving the Bench*, TRAC IMMIGR., https://trac.syr.edu/immigration/reports/617/ [https://perma.cc/PA9G-E22N] (last updated July 13, 2020).

[171] Amy Taxin, *Trump Puts His Stamp on Nation's Immigration Courts*, AP NEWS (July 23, 2019), https://apnews.com/article/50e97a112fb142f2abffa061ed5737d6.

[172] *See More Immigration Judges Leaving the Bench*, *supra* note 170.

[173] *See* George Tzamaras & Belle Woods, *Trump Administration Makes Immigration Courts an Enforcement Tool by Appointing Prosecutors to Lead*, AM. IMMIGR. LAW. ASS'N (July 6, 2020), https://www.aila.org/advo-media/press-releases/2020/trump-administration-makes-immigration-courts-an-e [https://perma.cc/7KJH-ZUVB].

[174] *See* Taxin, *supra* note 171.

[175] *A Primer on Expedited Removal*, AM. IMMIGR. COUNCIL 1–5 (July 22, 2019), https://www.americanimmigrationcouncil.org/research/primer-expedited-removal [https://perma.cc/NQ4K-VPGY].

[176] *Id.* at 1.

deprived of life and liberty.[177] Giving the legality of entry undue weight sidetracks from the merits of the claims, which should be the most important factor in determining whom to grant asylum to.

B. Conditioning Due Process on Legal Entry: High Risks of Error and Dire Consequences

As Justice Sotomayor discussed in her dissent, the majority in *Thuraissigiam* drew the line for due process at legal entry, so that those who are on the threshold of entry are not entitled to further judicial review of their asylum claims in federal court.[178] The majority's reasoning gave much weight to the legality of entry, which restricts asylum seekers' due process rights in expedited removal proceedings and may increase the risk of errors.[179] However, the stakes in expedited removal proceedings are high, and when asylum seekers do not have the avenue of review in federal court to rectify mistakes in administrative decisions, dire consequences will result, including returning to home countries where they face treatment repugnant to American standards of justice.[180] Shocking cases where applicants were unable to obtain asylum largely due to illegal entry and had to face persecution abroad best illustrate the danger of giving the legality of entry undue weight in the asylum process.[181]

One early example is *Ex parte Kurth*,[182] a district decision in the late 1930s. Two men from Germany had engaged in anti-government political activities and came to the United States for asylum.[183] They arrived in San Francisco in September 1938 and were arrested eight days later in Santa Barbara, California.[184] The court found that the two men did not obtain permission for legal entry, and that consideration weighed heavily in the court's decision to deport them.[185] The court chose not to condone illegal entry, reasoning that "'[i]f the government becomes a lawbreaker, it breeds contempt for law' . . . . [N]othing encourages such disrespect, as the lawless

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[177] *See* Whitfield v. Hanges, 222 F. 745, 748 (8th Cir. 1915) ("A full and fair hearing on the charges which threaten his deportation . . . [is] indispensable to the lawful deportation of an alien . . . . An alien, as well as a citizen, is protected by the prohibition of deprivation of life, liberty or property without due process and the equal protection of the law."); *see also* Bridges v. Wixon, 326 U.S. 135, 154 (1944); *Ex parte* Kurth, 28 F. Supp. 258, 263 (S.D. Cal. 1939).

[178] *Thuraissigiam II*, 140 S. Ct. 1959, 2012 (2020) (Sotomayor, J., dissenting).

[179] *See id.* at 1970.

[180] *See, e.g.*, Natasha Arnpriester, *Trumping Asylum: Criminal Prosecutions for Illegal Entry and Reentry Violate the Rights of Asylum Seekers*, 45 HASTINGS CONST. L.Q. 3, 6 (2017).

[181] *See* Evan J. Criddle, *The Case Against Prosecuting Refugees*, 115 NW. U. L. REV. 717, 717–19 (2020).

[182] 28 F. Supp. 258 (S.D. Cal. 1939).

[183] *Id.* at 259–60.

[184] *Id.* at 260.

[185] *Id.* at 260–61.

acts of the guardians of the law—those charged with its enforcement."[186] Even though the court acknowledged the men's procedural due process rights to have a full and fair hearing before deportation, it still construed such rights narrowly.[187] Moreover, the court rejected their attempt to use the Ninth Amendment to establish an international right to asylum.[188] Even when there was, per the two men, a risk of physical harm if they had to return to Germany,[189] the court was more concerned about punishing illegal entry than affording due process rights to the asylum seekers.[190]

In more recent years, through its policies cracking down on illegal entry and reentry, the Trump administration also gave undue weight to the legality of entry in the asylum process.[191] During the first fiscal year of the Trump administration, there was a large increase in the number of asylum seekers criminally prosecuted for illegal entry and reentry.[192] Moreover, defense attorneys and humanitarian organizations reported instances where ICE or CBP officers refused to refer asylum seekers for credible fear interviews after they served prison sentence for illegal entry and still returned them to persecution in their home countries.[193] According to a 2018 report by Human Rights First, a woman fled Mexico when a criminal organization attempted to murder her husband and the police failed to protect them.[194] "She and her husband crossed into the United States between ports of entry and immediately sought assistance from a border agent," who separated her from her husband and placed her in expedited removal proceedings.[195] The agent also did not follow the

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[186] *Id.* (quoting Olmstead v. U.S., 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting)).

[187] *Id.* at 260–61 (citing Branch v. Cahill, 88 F.2d 545, 546 (9th Cir. 1937)) ("Before being deported, and while he is held for deportation under a warrant of arrest, he is entitled to a fair hearing. That means just this: The right to be apprised of the nature of the charge against him, the reason for the challenge of his right to be here; to be confronted with witnesses, and to present testimony and to have counsel."); *see generally Ex parte* Nunez, 93 F.2d 41 (9th Cir. 1937); Hays v. Zahariades, 90 F.2d 3 (8th Cir. 1937).

[188] *Ex parte* Kurth, 28 F. Supp. 258, 263 (S.D. Cal 1939).

[189] *Id.* at 259.

[190] *See id.* at 261.

[191] *See generally A Timeline of the Trump Administration's Efforts to End Asylum*, NAT'L IMMIGR. JUST. CTR., https://immigrantjustice.org/timeline-trump-administrations-efforts-end-asylum (last updated Nov. 2020).

[192] *See* John Gramlich, *Far More Immigration Cases Are Being Prosecuted Criminally Under Trump Administration*, PEW RSCH. CTR. (Sept. 27, 2019), https://www.pewresearch.org/fact-tank/2019/09/27/far-more-immigration-cases-are-being-prosecuted-criminally-under-trump-administration/ [https://perma.cc/DSS8-NUZZ] ("The year-over-year growth in criminal arrests and prosecutions far outpaced the . . . increase in apprehensions at the southwest border during the same period.").

[193] HUM. RTS. FIRST, PUNISHING REFUGEES AND MIGRANTS: THE TRUMP ADMINISTRATION'S MISUSE OF CRIMINAL PROSECUTIONS 5 (Jan. 2018) [hereinafter PUNISHING REFUGEES AND MIGRANTS], https://www.humanrightsfirst.org/resource/punishing-refugees-and-migrants-trump-administrations-misuse-criminal-prosecutions [https://perma.cc/SCN8-LH83].

[194] *See id.* at 16–17.

[195] *Id.* at 116.

proper procedure by asking her if she feared returning to Mexico.[196] Rather, the agent referred her to criminal prosecution, and a U.S. Attorney later charged her with illegal entry.[197] Upon finishing her sentence, she expressed her fear of persecution and requested an interview with an asylum officer, but the immigration officers ignored her written and oral requests and still removed her to Mexico where she feared for her life.[198]

In another case, a torture survivor in need of protection entered the U.S. via the southern border and presented himself to border patrol agents, explaining his traumatic experiences in Eritrea, his fear of torture if returned, and his desire to seek asylum.[199] Border agents also referred him to criminal prosecution for illegal entry, and he was later convicted.[200] But he was luckier than the Mexican national because, after serving his sentence in a federal prison, the Eritrean national had the chance to appear before an IJ, who determined that his eligibility for asylum was so clear that it was granted mid-hearing.[201] Imagine if an immigration officer had ignored the Eritrean national's request to appear before the IJ, he would have had to return to his home country and face persecution or death.[202]

These examples demonstrate the high stakes involved in asylum cases, particularly in expedited removal proceedings. For asylum seekers who crossed the border without inspection or valid entry documents, illegal entry often leads to particularly limited procedural due process.[203] Those asylum seekers rely on CBP officers to refer them to an IJ to establish their claim, only to find that immigration law enforcement prioritizes prosecution for illegal entry and in some cases ignores asylum requests.[204] From a law enforcement and policy standpoint, illegal entry results in criminal liability, and prosecutions deter future law-breaking.[205] But still, foreign nationals should be able to assert a necessity defense for illegal entry, when they break the entry rules to flee persecution from abroad.[206] The argument is not that illegal entry should not result in sanctions. Rather, the point is that if immigration law enforcement or the courts give undue weight to the legality of entry and try to enforce the requirement in every case, it would result in violation of due process and arbitrary prosecution of those who otherwise have legitimate asylum claims.[207]

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196 *Id.*
197 *Id.*
198 *Id.* at 116–17.
199 *See* Arnpriester, *supra* note 180, at 6.
200 *Id.*
201 *Id.*
202 *See id.*
203 *See, e.g.*, PUNISHING REFUGEES AND MIGRANTS, *supra* note 193, at 9, 17.
204 *See, e.g.*, *id.* at 4.
205 Gramlich, *supra* note 192.
206 *See* Criddle, *supra* note 181, at 790.
207 *Id.* at 719; *see also* U.S. CONST. amend. V.

In line with this Note's argument, the BIA also found that "there may be reasons, fully consistent with the claim of asylum, that will cause a person to possess false documents, such as the creation and use of a false document to escape persecution by facilitating travel."[208] Some federal circuit courts also agreed and have held that the use of false documentation to flee persecution is fully consistent with an asylum claim and should not be used as a basis to deny asylum.[209]

Among these decisions is *Mamouzian v. Ashcroft*, where the Ninth Circuit found that an asylum applicant from Armenia established well-founded fear of persecution based on her political opinion.[210] In *Mamouzian*, the applicant was jailed and beaten in retaliation for participating in an anti-government rally and for the applicant's political expression.[211] One of the beatings also caused her to lose consciousness for some time.[212] The government authorities threatened the applicant's life because she wrote articles to voice opposition to corruption in the ruling party and her protests were also directed towards policies and practices of that governing party.[213] Notably in that case, the asylum seeker worked with a smuggler and allegedly used false documents to enter the United States.[214] However, the Ninth Circuit ruled that "the way in which Mamouzian entered this country is worth little if any weight in the balancing of positive and negative factors."[215] The court also went so far as to say that "[w]hen a petitioner who fears deportation to his country of origin uses false documentation or makes false statements in order to gain entry to a safe haven, that deception 'does not detract from but supports his claim of fear of persecution.'"[216] According to the Ninth Circuit, "it would be anomalous for an asylum seeker's [legality] of entry to render her ineligible for a favorable exercise of discretion."[217]

Similarly, in *Turcios v. I.N.S.*, the Ninth Circuit also focused on the merits of the asylum claim, rather than giving undue weight to the fact that the asylum seeker entered the United States without inspection.[218] The court found that the El Salvadoran

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[208] *See In re* O-D-, 21 I. & N. Dec. 1079, 1083, 1998 WL 24904 (B.I.A. 1998).

[209] *See* Huang v. I.N.S., 436 F.3d 89, 99 (2d Cir. 2006) ("The BIA has explicitly cautioned that manner of entry cannot, as a matter of law, suffice as a basis for discretionary denial of asylum in the absence of other adverse factors."); Lin v. Gonzales, 445 F.3d 127, 134 (2d Cir. 2006) (holding that the use of false documents to escape persecution is consistent with a claim for asylum and cannot form the sole basis for adverse credibility determination); Kaur v. Ashcroft, 379 F.3d 876, 889 (9th Cir. 2004) ("[T]he fact that an asylum seeker has lied to immigration officers or used false passports to enter this or another country, without more, is not a proper basis for finding her not credible.").

[210] *See* Mamouzian v. Ashcroft, 390 F.3d 1129, 1134–35 (9th Cir. 2004).

[211] *Id.* at 1134.

[212] *Id.* at 1132.

[213] *Id.* at 1134.

[214] *Id.* at 1132.

[215] *Id.* at 1138.

[216] *Id.* (quoting Turcios v. I.N.S., 821 F.2d 1396, 1400–01 (9th Cir. 1987)).

[217] *Id.*

[218] *See Turcios*, 821 F.2d at 1398, 1400–01.

had established clear probability that his arrest, torture, and confinement were based on political persecution, and that the harms he suffered rose to the level of persecution.[219] The court acknowledged that the applicant entered the United States without inspection yet still reversed the BIA's finding of his deportability.[220] In making that decision, the court prioritized the individual's right to life and liberty over concerns about his illegal entry.[221]

However, these cases are the exception rather than the rule, and the courts generally take illegal entry into account in asylum determinations, as illustrated in recent cases such as *Thuraissigiam*.[222] In *Thuraissigiam*, the majority concluded that deportable asylum seekers who broke the law at the border would not be entitled to the full scope of constitutional due process protection.[223] Going forward, illegal entry will likely still negatively impact asylum determinations.[224]

C. Defining the Scope of Due Process Under Mathews v. Eldridge

After explaining how overemphasizing the legality of entry in the asylum process can lead to errors and dire consequences for asylum seekers who face persecution abroad, this section applies the *Mathews v. Eldridge* test[225] and argues that defining the proper scope of due process rights involves balancing different interests. Although courts have applied the *Eldridge* due process test less consistently and less rigorously in the asylum context,[226] this section argues that the balancing test should apply because asylum seekers in expedited removals are systematically deprived of due process.

Under *Mathews v. Eldridge*, to determine whether government procedures afford constitutionally sufficient due process, a court must consider (1) the private interest, (2) the government interest, and (3) the probable value of additional procedural safeguards.[227] In the context of expedited removal proceedings, the private interest

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[219] *Id.* at 1400–01.

[220] *Id.* at 1400, 1402–03.

[221] *Id.* at 1398, 1400, 1402–03.

[222] *See Thuraissigiam II*, 140 S. Ct. 1959, 1983 (2020).

[223] *See id.* at 1982–83.

[224] *See, e.g.*, Huang v. I.N.S., 436 F.3d 89, 99 (2d Cir. 2006) ("The manner of entry into the United States . . . is indeed one of the factors that can be weighed adversely in the exercise of agency discretion.").

[225] Mathews v. Eldridge, 424 U.S. 319, 334–35 (1976) ("[O]ur prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the . . . probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional . . . requirement would entail.").

[226] *See* Nimrod Pitsker, *Due Process for All: Applying* Eldridge *to Require Appointed Counsel for Asylum Seekers*, 95 CALIF. L. REV. 169, 174 (2007).

[227] *See id.*

involved is the right to seek asylum and the right to life and liberty.[228] For the asylum seekers with meritorious claims, the stakes are high, because they must either convince the immigration officers that their they have a well-founded fear or face persecution abroad.[229]

On the other hand, the government has an interest in protecting the integrity of the U.S. border, controlling the flow of immigration, and prosecuting illegal entry and reentry.[230] The government's interest in managing border flow is the strongest when CBP finds inadmissible asylum seekers at or near the border.[231] For the government, expedited removal can serve as a tool for border control, weeding out frivolous asylum claims and quickly sending migrants home without burdening the immigration system.[232] However, when border crossers reach beyond 100 miles from the border and are already in the interior of the country, for the purpose of controlling immigrant inflow, removing them becomes less exigent for the government than investing more resources to patrol the border.[233] Under the Trump administration, these immigrants were subject to DHS's expanded expedited removal plan,[234] but in that circumstance, immigrant's due process rights and the right to life and liberty, outweighs the government interest. Therefore, at least for these immigrants, an additional, independent review by an IJ could be valuable in order to prevent arbitrary administrative adjudications. The Biden administration has suspended its use of the expanded expedited removal policy that applied nationwide,[235] but still more work needs to be done to ensure that immigrants are not deprived of due process in removal proceedings.

D. Separation of Powers Concerns

In *Thuraissigiam*, Sotomayor wrote in her dissent: "Today's decision handcuffs the Judiciary's ability to perform its constitutional duty to safeguard individual

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[228] *See, e.g.*, Ramey, *supra* note 52.

[229] *Supra* Section III.B.

[230] *See* Trump v. Hawaii, 138 S. Ct. 2392, 2400 (2018).

[231] *See Thuraissigiam II*, 140 S. Ct. 1959, 1964–65 (2020).

[232] *See id.* at 1966–67; *see also* Kif Augustine-Adams & D. Carolina Núñez, *Sites of (Mis)translation: The Credible Fear Process in the United Sates Immigration Detentions*, 35 GEO. IMMIGR. L.J. 399, 405 (2021) ("Under expedited removal, IIRAIRA provided immigration officers with nearly unfettered power to order certain non-citizens removed 'without further hearing or review.'").

[233] *See generally The Constitution in the 100-Mile Border Zone*, ACLU, https://www.aclu.org/other/constitution-100-mile-border-zone [https://perma.cc/YWY3-CEZF] (last visited Apr. 26, 2022).

[234] *See* Louis Nelson, *Trump Amplifies Push to End Due Process for Illegal Immigrants*, POLITICO (June 25, 2019, 9:44 AM), https://www.politico.com/story/2018/06/25/trump-due-process-immigrants-669334 [https://perma.cc/NZ3C-3B29].

[235] *See* Stephenson, *supra* note 133.

liberty and dismantles a critical component of the separation of powers."[236] Under the plenary power doctrine, the legislative and the executive branches of the government have almost unrestricted power to regulate all aspects of immigration.[237] The Supreme Court's recent interpretation of immigrants' due process rights in expedited removal proceedings further diminished the judicial power to safeguard immigrants' constitutional rights (to the extent that they exist) in expedited removal proceedings, which has raised separation of powers concerns.[238]

While it is undisputable that as an attribute of sovereignty, the political branch should have the sole control over whom to admit or exclude,[239] the issue seems to become more complicated when such decisions directly impact the scope of immigrants' due process rights in removal proceedings. The expanded expedited removal framework that DHS previously implemented best illustrates the separation of powers concern.[240] It allowed the government to put *anyone* who was inadmissible under the INA into expedited removal proceedings,[241] therefore substantially limiting the procedural due process that normal removal proceedings would otherwise afford. Put another way, when the executive branch limits procedural due process, it likely performs a judicial act because the power to interpret the Constitution and the scope of protection it affords rests with the judiciary.[242] Because the actor and act do not align, there is a separation of powers problem.[243] The expanded expedited removal framework resulted in power aggrandizement of the political branch, since more

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[236] *Thuraissigiam II*, 140 S. Ct. at 1993 (Sotomayor, J., dissenting).

[237] *See* United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950) ("Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."); Chae Chan Ping v. United States, 130 U.S. 581, 609 (1889) (establishing the plenary power doctrine); *see also* Annika Mizel, *Clash of the Titans: Plenary Power and Habeas Corpus in* Castro, YALE L. J. FORUM 270, 270–71 (2017).

[238] *See, e.g.*, Philip S. Anderson, *A Challenge to the Bar: Assuring Justice and Due Process to America's Newcomers*, 37 JUDGES J. 41, 42 (1998).

[239] *See, e.g.*, Castro v. United States Dep't Homeland Sec., 835 F.3d 422, 439 (3d Cir. 2016); Fiallo v. Bell, 430 U.S. 787, 792 (1977) ("[T]he power to expel or exclude aliens [i]s a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control.").

[240] *See supra* Section II.D; *see also* Jaclyn Kelley-Widmer, *Unseen Policies: Trump's Little-Known Immigration Rules As Executive Power Grab*, 35. GEO. IMMIGR. L.J. 801, 832–33 (2021) (discussing the Trump-era expedited removal policy and the expansion of the government's enforcement power).

[241] *See* Kelley-Widmer, *supra* note 240, at 833.

[242] *See id.*; Jennifer Lee Koh, *Barricading the Immigration Courts*, 69 DUKE L.J. ONLINE 48, 71–73 (2020).

[243] *See* Lindsay Nash, *Deportation Arrest Warrants*, 73 STAN. L. REV. 433, 501–02 (2021) (noting separation of powers concerns about allowing the executive to perform judicial acts under the Alien Friends Act); *see generally* TOM CAMPBELL, SEPARATION OF POWERS IN PRACTICE (2004) (discussing the separation of powers doctrine and the functions of different branches of the government).

decisions made by immigration officers and IJs can go unchecked.[244] Even after the Biden administration suspended the Trump-era policy, as Justice Sotomayor argued, the majority opinion in *Thuraissigiam* still limits the judiciary's ability to hold the executive branch accountable.[245]

Additionally, Justice Kennedy's opinion in *Boumediene v. Bush* sheds light on the interplay of executive power and judicial prerogative: "Abstaining from questions involving formal sovereignty and territorial governance is one thing. To hold the political branches have the power to switch the Constitution on or off at will is quite another."[246] As Justice Kennedy argued, the latter would run afoul with our "tripartite system of government," giving "Congress and the President, not this Court, [the power to] say 'what the law is.'"[247] Applying Justice Kennedy's reasoning in the context of expedited removal proceedings, the executive branch should not have the power "to switch the Constitution on or off."[248] As Justice Sotomayor argued in her dissent, in expedited removal proceedings, the judiciary should be able to safeguard individual liberty and review executive decisions.[249]

IV. DESERVING OR UNDESERVING OF PROTECTION: ARBITRARY SOCIAL CONSTRUCTS AND TRUMP-ERA POLICIES

A. "Undeservingness" as an Arbitrary Social Construct

Since the beginning of Donald Trump's presidency, he promised to bring "law and order" back to what he described as a broken immigration system.[250] The Trump administration adopted an "invasion" rhetoric and sought to curb both legal and illegal immigration.[251] During Trump's presidential announcement speech, he stated that "[w]hen Mexico sends its people, they're not sending their best. They're bringing drugs. They're bringing crime. They're rapists. And some, I assume, are good people."[252] Statistical analysis has shown that politicians have unique power to move constituents' opinions in a particular direction and that such impact becomes stronger

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[244] *Thuraissigiam II*, 140 S. Ct. 1959, 1993 (2020) (Sotomayor, J., dissenting).

[245] *Id.*

[246] Boumediene v. Bush, 553 U.S. 723, 765 (2008) (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)); *see also* Mizel, *supra* note 237, at 275.

[247] *See Boumediene*, 553 U.S. at 765.

[248] *Id.*

[249] *Thuraissigiam II*, 140 S. Ct. at 1993 (Sotomayor, J., dissenting).

[250] *See* Arnpriester, *supra* note 180, at 3–4.

[251] *See* Peter Baker & Michael D. Shear, *El Paso Shooting Suspect's Manifesto Echoes Trump's Language*, N.Y. TIMES (Aug. 4, 2019), https://www.nytimes.com/2019/08/04/us/politics/trump-mass-shootings.html (quoting President Trump's campaign rallies "You look at what is marching up, that is an invasion!").

[252] *See Here's Donald Trump's Presidential Announcement Speech*, TIME (June 16, 2015), https://time.com/3923128/donald-trump-announcement-speech/ [https://perma.cc/8K5N-UCRU].

with the audience's additional exposure to political messages.[253] Anti-immigration rhetoric infiltrated fear in the public, and even mobilized hate toward immigrants.[254] For instance, some noted that the twenty-one-year-old who opened fire in Walmart in El Paso in 2019 echoed Trump's political rhetoric before killing twenty people and injuring dozens.[255] Before the shooting, the man wrote a manifesto announcing an attack as a response to "the Hispanic invasion of Texas."[256] Most importantly, anti-immigration rhetoric can also label certain groups of immigrants as undeserving.[257] When words such as "criminality," "resource-drain," and "freeloader"[258] are attached to those who crossed the border illegally, the result is the creation of a derogatory concept—undeserving immigrants.[259]

The concept of undeserving immigrants is a social construct that served the Trump administration's political need of curtailing immigration, yet the consequence is that immigrants, particularly those who had little choice other than crossing the border without valid documentation, faced increased penalties and limited scope of due process in asylum proceedings.[260] Besides the zero-tolerance policy for illegal border crossers, which separated children from parents, Trump also advocated for eliminating due process for border crossers: "Hiring . . . of judges, and going through a long and complicated legal process, is not the way to go . . . . People must simply be stopped at the Border . . . [c]hildren brought back to their country."[261] Then White House press secretary Sarah Huckabee also supported Trump's views, arguing that "it makes no sense that an illegal alien sets one foot on American soil and then they would go through a three- to five-year judicial process to be removed from the country."[262] Huckabee's argument is unconvincing, as it called for denying due process to asylum seekers simply because the U.S. asylum proceedings themselves were too time-consuming. The solution to immigration backlog is not to arbitrarily keep out asylum seekers with meritorious claims, but to improve the system itself to be more efficient.

B. Trump-Era Immigration Programs and Policies

Besides characterizing border crossers as undeserving of protection, the Trump administration also implemented a series of programs aimed at restricting immigrants'

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[253] *See* Tetsuya Matsubayashi, *Do Politicians Shape Public Opinion?*, 43 BRIT. J. POL. SCI. 451, 451 (2013).

[254] *See, e.g.*, Baker & Shear, *supra* note 251.

[255] *Id.*

[256] *See id.*

[257] *See* Lindsay Perez Huber, *Constructing "Deservingness": DREAMers and Central American Unaccompanied Children in the National Immigration Debate*, 9 ASS'N MEXICAN-AM. EDUCATORS 22, 22 (2015).

[258] *Id.* at 25.

[259] *See id.*

[260] *See* Arnpriester, *supra* note 180, at 12, 19, 45–46.

[261] Nelson, *supra* note 234.

[262] *Id.*

due process rights. One initiative was appointing immigration judges who supported Trump's hardline immigration policy.[263] Notably, eighty-eight percent of the IJs appointed in 2018 were former DHS employees or attorneys who represented DHS, and more than one third of the recent hires did not list any prior immigration law experience in their public biographies.[264] Perhaps the most controversial appointment was choosing Tracy Short, the former chief prosecutor for Immigration and Customs Enforcement, as the Chief Immigration Judge, who also lacked any bench experience.[265] Other appointments that received attention and criticism included selecting David Wetmore as the Chief Appellate Judge, who was a Trump advisor on immigration and a former prosecutor.[266] The Trump administration even appointed another IJ who worked for the Federation for American Immigration Reform, a known hate group against immigrants.[267]

Among other programs and policies that the Trump administration adopted were the "family unit" docket (FAMU) and the "last in, first out" principle.[268] In 2018, the Executive Office for Immigration Review (EOIR) began tracking and prioritizing the adjudication of parents with children deportation cases in immigration courts.[269] On the surface, the policy aimed at promoting efficiency, but in reality, it undermined due process. The government required that immigration courts must adjudicate any FAMU cases within 365 days of the commencement of removal proceedings, which is only one third of the time for deciding other cases.[270] This means that immigrant parents with children would have a much shorter time frame to find attorneys or prepare their cases in removal proceedings.[271] Similarly, the "last in, first out" doctrine also posed challenges for new immigrants.[272] Under the doctrine, USCIS

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[263] *See* Section III.B.

[264] *See* HUM. RTS. FIRST, IMMIGRATION COURT HIRING POLITICIZATION (Oct. 18, 2018), https://www.humanrightsfirst.org/sites/default/files/DOJ-FOIA-Immigration-Judges.pdf [https://perma.cc/WU8R-CU44].

[265] *See* Gregory Chen, *The Urgent Need to Restore Independence to America's Politicized Immigration Courts*, JUST SEC. (Nov. 12, 2020), https://www.justsecurity.org/73337/the-urgent-need-to-restore-independence-to-americas-politicized-immigration-courts/ [https://perma.cc/XD38-JPCD].

[266] *See id.*

[267] *See id.*

[268] *See* Memorandum from James R. McHenry III, Director, Exec. Off. for Immigr. Rev., on Tracking and Expedition of "Family Unit" Cases (Nov. 16, 2018), https://www.justice.gov/eoir/page/file/1112036/download [https://perma.cc/93S2-HYHF].

[269] *See generally id.*

[270] Jeffrey S. Chase, *EOIR Creates More Obstacles for Families*, JEFFREY S. CHASE.COM (Dec. 13, 2018), https://www.jeffreyschase.com/blog/2018/12/13/eoirs-creates-more-obstacles-for-families [https://perma.cc/D364-YE4H].

[271] *See id.*

[272] *See* Hawthorne Smith, *How the Asylum Backlog Affects Torture Survivors and What the Biden Administration Can Do to Fix It*, CTR. FOR MIGRATION STUD. (Feb. 25, 2021), http://doi.org/10.14240/cmsesy022521 [https://perma.cc/V5A9-2EXM].

would prioritize recent affirmative applications over the old ones, which shortened the amount of time new immigrants have for developing their cases and postponed the adjudication of cases filed prior to 2018.[273]

The Trump administration implemented different immigration policies that aimed to curb immigration, which also led to a much more limited scope of due process rights for immigrants. The politicization of the asylum process and the construction of the concept of undeservingness added another layer of arbitrariness in asylum determinations and often resulted in returning immigrants back to where they face harm or persecution.[274]

CONCLUSION

The recent Supreme Court's decision in *Thuraissigiam* will keep federal courthouse doors closed to asylum seekers in expedited removal processes who wish to challenge their asylum determinations. When placed in expedited removal proceedings due to illegal entry, immigrants will have a much more difficult path to asylum.[275] It is much harder to obtain meaningful review of their asylum claims, since they will be entitled to limited procedural due process rights, and abuse of discretion by immigration officials can go unchecked.[276]

Conditioning procedural due process rights upon the legality of entry carries a high risk of errors and often brings dire consequence to immigrants, including returning them to persecution. Furthermore, the political rhetoric that characterized border crossers as undeserving makes asylum seekers even more vulnerable.[277] It is when errors in the executive branch's decision-making can go unchecked that we realize conditioning due process upon the legality of entry runs afoul of the principles of fairness.

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[273] *See id.*
[274] *See supra* Section III.B.
[275] *See* Lee Koh, *Barricading the Immigration Courts*, *supra* note 242, at 50–51.
[276] *See Thuraissigiam II*, 140 S. Ct. 1959, 1993 (2020) (Sotomayor, J., dissenting).
[277] *See* Arnpriester, *supra* note 180, at 12, 19, 45–46.