

THE BOUNDARIES OF HABEAS: DUE PROCESS, THE SUSPENSION CLAUSE, AND JUDICIAL REVIEW OF EXPEDITED REMOVAL UNDER THE IMMIGRATION AND NATIONALITY ACT

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TABLE OF CONTENTS

INTRODUCTION	406
I. EXPEDITED REMOVAL AT THE BORDER AND BEYOND	413
A. <i>The Statutory Backdrop</i>	413
B. <i>The July 2019 DHS Expedited Removal Expansion Notice</i>	416
C. <i>Benefits and Risks of Expedited Removal: Impacts and Error Rates</i>	417
1. The INA and Error Rates	418
2. Nexus as a Check on False Positives	419
3. Fraud and Embellishment in Asylum Claims	419
D. <i>Expedited Removal as an Inquisitorial System</i>	420
1. Inquisitorial Models and American Law	420
2. Administrative Law, Immigration, and the Inquisitorial Paradigm	421
II. HABEAS CORPUS IN IMMIGRATION AND DETENTION	423
A. <i>Nonreviewability and Admission Cases</i>	424
B. <i>Error-Correction in Immigration Law</i>	427
C. <i>Inquisitorial Integrity</i>	431
1. Independence	432
2. The Overarching Premise of Good Faith	434
3. Plain Error and the Officer's Power	436
4. Procedural Rights for Subjects of Proceedings	437

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III. SELECTING THE HABEAS MODEL FOR ADMISSION AND EXPANDED EXPEDITED REMOVAL: THE ROLE OF DUE PROCESS BALANCING	439
A. <i>The Individual's Interest</i>	440
B. <i>State Interest</i>	441
C. <i>Risk of Error</i>	445
D. <i>Applying the Mathews v. Eldridge Factors</i>	446
1. Admission	446
2. Expanded Expedited Removal for Entrants in the United States for Less Than Two Years	449
CONCLUSION	449

INTRODUCTION

In immigration, habeas corpus has often been contested terrain.¹ One salient example is expedited removal under the Immigration and Nationality Act (INA), which provides for removal without a full hearing before an immigration judge (IJ) and severely limited judicial review.² Two recent developments have made the contours of habeas corpus in expedited removal even more acute. In *Thuraissigiam v. Dep't of Homeland Security*,³ the Ninth Circuit recently held that the expedited removal provision's limits on habeas corpus violated the Suspension Clause. Even more recently, the Acting Secretary of the Department of Homeland Security (DHS) issued a notice expanding the use of expedited removal to the statutory limit hitherto not reached, covering any foreign national whom DHS regards as inadmissible⁴ who cannot show that she has been in the United States for at least two years.⁵

1. See *INS v. St. Cyr*, 533 U.S. 289, 304–15 (2001) (holding that provisions of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) which purported to limit judicial review of removal decisions did not bar the access of a lawful permanent resident (LPR) to habeas corpus to challenge his removal); *Heikkila v. Barber*, 345 U.S. 229, 234–35 (1953) (reading an immigration statute as permitting habeas petitions by foreign nationals who had entered the United States, as the statute made agency determination on deportation final “except insofar as it was required by the Constitution”).

2. See 8 U.S.C. § 1225(b)(1)(B)(iii)(III) (2012) (providing for brief review by an IJ of an adverse determination by an asylum officer within 24 hours if practicable, and in all cases within 7 days); 8 U.S.C. § 1252(e)(2) (2012) (limiting habeas corpus to determinations of whether the petitioner is a U.S. citizen, lawful permanent resident (LPR), or person who has already been granted asylum or refugee status).

3. *Thuraissigiam v. Dep't of Homeland Security*, 917 F.3d 1097 (2019), *cert. granted*, No. 19-161, 2019 U.S. LEXIS 6487, 2019 WL 5281289 (Oct. 18, 2019).

4. The statute ties expedited removal to inadmissibility on the grounds that the foreign national whom the government seeks to remove either lacks a visa authorizing admission to the United States or has engaged in misrepresentation in the course of seeking to enter the country. See 8 U.S.C. § 1182(a)(7) (2012) (providing that a foreign national seeking to enter without a visa is inadmissible); 8 U.S.C. § 1182(a)(6)(C) (2012) (providing that a foreign national who engages in misrepresentation in the course of seeking admission is inadmissible).

5. Designating Aliens for Expedited Removal, 84 Fed. Reg. 35, 409 (July 23, 2019) [hereinafter DHS Expansion Notice]. The INA expressly provides this authority. See 8 U.S.C. § 1225(b)(1)(A)(iii)(II) (2012). However, the federal government has traditionally imposed tight limits on expedited removal that permitted its use only within 100 air miles of a border and when a foreign national cannot prove she has been in the country for at least 14 days. See *id.* Courts considering the legality of expedited removal under

In a setting where courts have traditionally accepted the absence of judicial review, the Ninth Circuit decision would apply a robust conception of the Suspension Clause. In contrast, where courts have assumed its validity, DHS's expansion of expedited review would *curtail* judicial review.

This Article argues that both the Ninth Circuit and the DHS expansion notice miss the mark. The Ninth Circuit uncoupled the Suspension Clause from due process,⁶ as well as the Supreme Court's procedural due process balancing test.⁷ That failure to consider habeas against the backdrop of rights and the balancing of government interests, private interests, and the risk of error lent an abstract tone to an inquiry that should be intensely practical.⁸ While the Ninth Circuit correctly concluded that restrictions on habeas in the INA's expedited removal provision violate the Suspension Clause, the *Thuraissigiam* court's vision of what the Suspension Clause requires was too broad and unduly discounted the government's legitimate interest in barring the admission of *prospective* entrants without prior ties to the United States.⁹ Any standard addressing the "practical necessities"¹⁰ of governance needs to be more attuned to government interests, even if that standard exceeds the cramped judicial review that Congress has provided for expedited removal.

The DHS expansion of expedited removal is a handy bookend for *Thuraissigiam*'s unduly broad vision, since DHS has wholly failed to address the long tradition of making habeas relief available to foreign nationals who have *already entered* the United States.¹¹ The breadth and scope of this tradition of judicial review do not turn on whether the foreign national entered the United States legally. Here, too, the Supreme Court has recognized a link between the availability of habeas and the possession of due process rights.¹²

the prior administrative limits upheld the statute. *See, e.g.,* *Shunaula v. Holder*, 732 F.3d 143, 144 (2d Cir. 2013); *Khan v. Holder*, 608 F.3d 325, 326 (7th Cir. 2010).

6. *See Thuraissigiam*, 917 F.3d at 1111.

7. *See id.* at 1110–12; *see also Mathews v. Eldridge*, 424 U.S. 319, 334–35 (1976).

8. *See Boumediene v. Bush*, 553 U.S. 723, 766 (2008) (finding that Guantanamo detainees have access to habeas corpus to test the legality of their detention, and noting that "practical obstacles" to deciding whether to grant the writ are a key concern); *see also id.* at 761 (discussing the importance of weighing "practical necessities" in determining scope of rights (citing *Reid v. Covert*, 354 U.S. 1, 75 (1957) (Harlan, J., concurring))). *Cf. id.* at 802 (Roberts, C.J., dissenting) (arguing that the *Boumediene* majority's analysis was incomplete because it did not resolve the question of detainees' constitutional right to due process, and arguing that "[h]abeas is most fundamentally a procedural right"); *id.* at 813 (Roberts, C.J., dissenting) (characterizing the *Boumediene* majority's statement that "common-law habeas corpus was, above all, an adaptable remedy . . . [whose] precise application and scope changed depending upon the circumstances" as an acknowledgment that habeas is "a flexible remedy rather than a substantive right").

9. *See Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1693 (2017) (citing *Fiallo v. Bell*, 430 U.S. 787, 792, 794 (1977)).

10. *See Boumediene*, 553 U.S. at 759.

11. *See, e.g., Hansen v. Haff*, 291 U.S. 559, 562–63 (1934); *Mahler v. Eby*, 264 U.S. 32, 44 (1924); *Yamataya v. Fisher* (The Japanese Immigrant Case), 189 U.S. 86, 101–02 (1903) (holding that the executive lacks the power to "to arbitrarily cause an alien who *has entered* the country, and has become subject in all respects to its jurisdiction, and a part of its population, although alleged to be illegally here, to be taken into custody and deported without giving him all opportunity to be heard upon the questions involving his right to be and remain in the United States," but then finding that the petitioner had in fact been granted this opportunity by the executive (emphasis added)).

12. *See Yamataya*, 189 U.S. at 101–02.

However, the rigor of the standard of review in habeas cases involving entrants to the United States varies according to the precise *content* of the process due.

Both the Ninth Circuit in *Thuraissigiam* and the DHS expansion notice limit habeas in immigration cases to one of two modes: either error-correction—the Ninth Circuit’s approach—or nonreviewability, which DHS champions. Error-correction in entrant immigration cases allows courts to address questions of law, including whether a provision in the INA is retroactive.¹³ There is also precedent for judicial review of mixed questions of law and fact, such as whether a particular ground for removal fits an entrant’s conduct.¹⁴ In immigration cases, judicial review of pure questions of fact is uncommon.¹⁵ In the somewhat different context of habeas for detainees confined by the United States at Guantanamo, the Supreme Court has extended error-correction to mere questions of fact, such as whether a detainee had engaged in certain conduct in Afghanistan.¹⁶ In contrast, nonreviewability allows virtually no judicial review for questions of law, mixed questions of law and fact, or mere questions of fact.¹⁷

This Article makes three key points about how the error-correction and nonreviewability typologies affect admission and entrant cases, respectively. First, ascertaining the scope of the Suspension Clause inevitably requires addressing the process that is due to each group. Second, parsing due process’s requirements, in admission cases neither the error

13. Congress, in an effort to confine judicial review of certain claims by entrants to the constitutional minimum after the Supreme Court’s decision to allow judicial review in *INS v. St. Cyr*, 533 U.S. 289 (2001), enacted a provision as part of the Real ID Act to expressly authorize “review of constitutional claims or questions of law” in cases outside the more truncated contours of expedited review. See 8 U.S.C. § 1252(a)(1)(D) (2012). This Article uses the term “error-correction” to contrast this mode of review under habeas with the nonreviewability that has traditionally governed admission cases. See *infra* notes 105–09 and accompanying text. Error-correction in this mode is not a remedy for every conceivable error in a decision. But it is a remedy for errors of law and, in some cases, errors of mixed law and fact and simple errors of fact.

14. See *Hansen*, 291 U.S. at 562–63 (holding that the petitioner had not entered the country “for the purpose of prostitution or for any other immoral purpose” under the INA and was therefore not deportable).

15. See *St. Cyr*, 533 U.S. at 306 (noting that in entrant immigration cases, apart from some cases reviewing the legal sufficiency of the evidence supporting removal, the courts “generally did not review factual determinations”). The Supreme Court has recently granted certiorari in a case concerning the judicial review of facts in applications for withholding of removal. See *Nasrallah v. U.S. Att’y Gen.*, 762 Fed. App’x. 638, 644 (11th Cir. 2019) (citing two prior Eleventh Circuit decisions, *Cole v. U.S. Att’y Gen.*, 712 F.3d 517, 533 (11th Cir. 2013), *cert. denied*, 571 U.S. 826 (2013) and *Keungne v. U.S. Att’y Gen.*, 561 F.3d 1281, 1283 (11th Cir. 2019), in holding that it had no jurisdiction to review questions of fact, only questions of law), *cert. granted sub nom.* *Nasrallah v. Barr*, No. 18-1432, 205 L. Ed. 2d 244 (2019).

16. See *Boumediene v. Bush*, 553 U.S. 723, 786 (holding that in Guantanamo cases, a court “must have the means to correct errors” that occurred in administrative proceedings, including the power to “consider exculpatory evidence” that the detainee had not introduced in administrative proceedings). *But see id.* at 814–16 (Roberts, C.J., dissenting) (suggesting that it is generally rare to review questions of fact in habeas cases, and that the majority read habeas requirements too broadly).

17. See *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 211 (1953) (asserting that in admission cases, “it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the government” (citing *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950))).

correction nor nonreviewability paradigms fit. Instead, the Article invokes a middle ground shaped by precedent on extradition and custody transfer, which provides review that ensures independence, absence of arbitrary decision-making, and fundamental fairness, but is more deferential than the error-correction approach. The Article calls this middle ground “inquisitorial integrity.” Third, the Article argues that error-correction is the appropriate standard in entrant cases, because of entrants’ domestic ties.

While both the Ninth Circuit in *Thuraissigiam* and the DHS expedited removal expansion notice seek in different ways to make due process irrelevant, habeas and due process are inherently conjoined. In assessing the availability of habeas and the relevant standard of review, the Supreme Court’s test for procedural due process in *Mathews v. Eldridge* should govern.¹⁸ Under *Mathews*, the Court considers the interest of the individual, the interest of the government, and the risk of error posed by current procedures.¹⁹ While the Supreme Court has asserted in multiple cases that an individual seeking admission to the United States is requesting a privilege, not enforcing a right,²⁰ that view underestimates the interests of persons who need a haven from persecution, which can include arrest, torture, or death. A person with a well-founded fear of persecution abroad has a strong interest in reducing that risk. That should make a difference for habeas.

Mathews also requires a court to consider the government’s interest in an efficient system for removing inadmissible foreign nationals, including those *without* meritorious asylum claims.²¹ As the Supreme Court reaffirmed recently, “the admission and exclusion of foreign nationals is a fundamental sovereign attribute exercised by the Government’s

18. See *Mathews v. Eldridge*, 424 U.S. 319, 334–35 (1976). Compare *Thuraissigiam v. Dep’t of Homeland Security*, 917 F.3d 1097, 1111 (9th Cir. 2019) (rejecting any necessary connection between habeas and due process), with *Castro v. U.S. Dep’t of Homeland Security*, 835 F.3d 422, 442–44 (3d Cir. 2016) (holding that the lack of due process protections in admission cases also meant that the Suspension Clause did not bar Congress from limiting judicial review in that context). See also Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 COLUM. L. REV. 961, 1052–57 (1998) (acknowledging a potential inconsistency between the author’s robust view of habeas in admission cases and the conventional view that due process does not apply, and urging revision of the conventional view; but, ultimately, reading the Suspension Clause as an *independent* source of access to judicial review of admission decisions). But see Richard H. Fallon, Jr., *Applying the Suspension Clause to Immigration Cases*, 98 COLUM. L. REV. 1068, 1078–79 (1998) (suggesting that the availability of habeas must be linked to other constitutional provisions, such as Article III and due process).

19. See *Mathews*, 424 U.S. at 334–35. Along with the risk of error, courts should also consider the value of additional safeguards in reducing the risk of error. *Id.* at 335.

20. See *Landon v. Placencia*, 459 U.S. 21, 32 (1982) (listing cases).

21. The legal standard for asylum is difficult to meet, because the claimant must not only show a “well-founded fear of persecution,” but must also show that such persecution has a demonstrable nexus to “race, religion, nationality, membership in a particular social group, or political opinion.” 8 U.S.C. § 1101(a)(42) (2012). Proving nexus can be challenging. See, e.g., *INS v. Elias-Zacarias*, 502 U.S. 478, 482 (1992) (holding that an asylum claimant had not established a nexus between the risk of harm and a political opinion in alleging that a guerilla group in Guatemala had threatened to retaliate against him and his family if he did not join the group).

political departments largely immune from judicial control.”²² Protracted stays in the United States by persons without colorable claims for asylum or other bases for admissibility would vitiate this aspect of sovereignty. Streamlined procedures can help the government manage sudden spikes in flows of inadmissible foreign nationals.²³ Those flows stem from both “push” and “pull” factors. In recent years, climate change, violence, and economic hardship have been major push factors, prompting a sharp increase in attempted border crossings.²⁴ In addition to the safety and economic opportunity available in the United States, U.S. immigration law and procedure constitute important pull factors. Informed by smuggling networks acting with entrepreneurial zeal,²⁵ prospective entrants look for openings that U.S. law provides. One such opportunity arises from long delays in U.S. asylum adjudication that enable asylum applicants to remain in the United States and work legally. Such delays raise incentives to enter the country and claim asylum.²⁶ The government can reasonably claim that it needs some latitude in tailoring procedural rules to prevent abuse of the asylum system.

The third *Mathews* factor—the risk of error—is harder to parse in this context. The haste and volume of expedited removal can produce errors, particularly when legal counsel for applicants is scarce.²⁷ Moreover, IJs may not always correct initial errors caused by the compressed time frame of expedited removal, in part because IJ quality varies widely. The varied quality of IJs has prompted criticism from appellate courts even in non-expedited

22. *Trump v. Hawaii*, 138 S. Ct. 2392, 2418 (2018).

23. See S. Rep. No. 104-249, at 7 (1996) (noting, in the course of passing the Illegal Immigration and Immigrant Responsibility Act of 1996 (IIRIRA), that foreign nationals “who violate U.S. immigration law should be removed from this country as soon as possible”); see also David A. Martin, *Two Cheers for Expedited Removal in the New Immigration Laws*, 40 VA. J. INT’L L. 673, 684–85 (2000) (suggesting that robust border enforcement that efficiently removes foreign nationals who lack a credible fear of persecution in their home country will ease the “revolving door” through which persons who are not admissible repeatedly seek to cross the border); Peter H. Schuck, *INS Detention and Removal: A White Paper*, 11 GEO. IMMIGR. L.J. 667, 669 (1997) (noting Congress’s view, manifested in legislation, that timely removal of inadmissible foreign nationals was an important national interest).

24. See Matthew Lorenzen, *The Mixed Motives of Unaccompanied Child Migrants from Central America’s Northern Triangle*, 5 J. MIGRATION & HUM. SEC. 744, 749–54 (2017) (discussing the range of reasons driving Central American migration); DORIS MEISSNER ET AL., *MIGRATION POL’Y INST., THE U.S. ASYLUM SYSTEM IN CRISIS: CHARTING A WAY FORWARD* 5 (2018), available at <https://www.migrationpolicy.org/research/us-asylum-system-crisis-charting-way-forward> (same).

25. VICTORIA A. GREENFIELD ET AL., *HOMELAND SECURITY OPERATIONAL ANALYSIS CENTER, HUMAN SMUGGLING AND ASSOCIATED REVENUES: WHAT DO OR CAN WE KNOW ABOUT ROUTES FROM CENTRAL AMERICA TO THE UNITED STATES* 10–14 (2019), available at https://www.rand.org/pubs/research_reports/RR2852.html (noting that smugglers work in a range of configurations, including individual guides for separate parts of the journey to the United States, loose networks, and—more rarely—highly organized groups; they often identify and recruit prospective border crossers).

26. See MEISSNER ET AL., *supra* note 24, at 4.

27. Stephen Manning & Kari Hong, *Getting It Righted: Access to Counsel in Rapid Removals*, 101 MARQUETTE L. REV. 673, 679 (2018).

removal cases with *full* IJ hearings.²⁸ In *Thuraissigiam*, the Ninth Circuit echoed this critique.²⁹ But the critique of IJs does not fully align with opposition to expedited removal. As part of the expedited removal process, border officials refer applicants to asylum officers for credible fear interviews. Asylum officers are not IJs, and credible fear interviews do not feature the procedural formality of immigration court. Nevertheless, in credible fear interviews, positive findings substantially outnumber adverse decisions.³⁰ Trained asylum officers' tendency to find credible fear shows that the informality of asylum interviews does not necessarily increase the risk of error.

Reconciling the *Mathews* factors, this Article argues that habeas should be available in admission cases involving an alleged risk of persecution, but in a more modest form than the Ninth Circuit envisioned in *Thuraissigiam*. The error-correction approach suggested by the Ninth Circuit failed to address the government's interest in easing the pull factors that drive unauthorized immigration. To accommodate that interest, this Article proposes a new standard—inquisitorial integrity—drawn from an early immigration opinion by Justice Holmes³¹ and cases on extradition and international custody transfers.³²

As in the extradition cases, expedited removal contemplates inquisitorial proceedings, in which the decisionmaker asks questions and solicits evidence.³³ Historically, many administrative immigration decisions, including those by line-level immigration inspectors or commissioners, have been inquisitorial.³⁴ In the extradition context, those conducting inquisitorial proceedings historically were magistrates appointed by the courts and thus independent of the executive branch.³⁵ In addition to independence, integrity—a

28. See Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 311 (2007); see also *Chavarria-Reyes v. Lynch*, 845 F.3d 278, 280 (7th Cir. 2016) (Posner, J., dissenting) (asserting that “the Immigration Court . . . is the least competent federal agency . . . it may well owe its dismal status to its severe underfunding by Congress, which has resulted in a shortage of immigration judges that has subjected them to crushing workloads”).

29. See *Thuraissigiam v. Dep't of Homeland Security*, 917 F.3d 1097, 1113 n.18 (2019) (discussing the shortcomings of the asylum interview process).

30. See ASYLUM DIV., U.S. CITIZENSHIP & IMMIGRATION SERVS. (USCIS), CREDIBLE FEAR WORKLOAD REPORT SUMMARY: FY 2018 TOTAL CASELOAD (2018) [hereinafter USCIS CREDIBLE FEAR WORKLOAD REPORT SUMMARY FY 2018: TOTAL CASELOAD], available at https://www.uscis.gov/sites/default/files/USCIS/Outreach/PED_CFandRFstats09302018.pdf (noting that asylum officers made positive credible fear findings in the overwhelming majority of cases in which they conducted interviews).

31. See *Gegiow v. Uhl*, 239 U.S. 3, 9 (1915); see also Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, *supra* note 18, at 105 (discussing *Gegiow v. Uhl*, 239 U.S. 3 (1915)); Gerald L. Neuman, *Jurisdiction and the Rule of Law After the 1996 Immigration Act*, 113 HARV. L. REV. 1963, 1967–68 (2000) (same).

32. See generally *Munaf v. Geren*, 553 U.S. 674 (2008); *Wilson v. Girard*, 354 U.S. 524 (1957); *Terlinden v. Ames*, 184 U.S. 270 (1902); *Ornelas v. Ruiz*, 161 U.S. 502 (1896); *In re Ross*, 140 U.S. 453 (1891); *In re Stupp*, 23 F. Cas. 296 (C.C.S.D.N.Y. 1875).

33. See Amalia D. Kessler, *Our Inquisitorial Tradition: Equity Procedure Due Process, and the Search for an Alternative to the Adversarial*, 90 CORNELL L. REV. 1181, 1194–95 (2005).

34. See Christen Chapman, *Developments in the Law: Immigration Reform: Relief From Deportation: An Unnecessary Battle*, 44 LOY. L.A. L. REV. 1529, 1538–39 (2011).

35. See *In re Kaine*, 14 F. Cas. 84, 88, 92 (C.C.S.D.N.Y. 1852) (discussing the manner of appointing commissioners who presided over extradition hearings), *writ dismissed on other grounds*, 55 U.S. 103 (1853).

good-faith effort to address the issue identified under the relevant statute—was a key element in such proceedings.³⁶

These core concepts of independence and integrity are also relevant to judicial review of credible fear findings. The reviewing court should vacate and remand removal orders in cases where the IJ reviewing the asylum officer's credible fear denial has failed to compile a summary and analysis of findings.³⁷ In addition, the reviewing court should ensure that the applicant had an interpreter, as the regulations require.³⁸ Moreover, the court should inquire whether the IJ blocked the claimant's ability to confer with counsel, assuming that the claimant could obtain counsel within the seven-day deadline provided for IJ review under expedited removal.³⁹ Finally, the reviewing court should assess the IJ's asylum decision under a plain error standard.⁴⁰

This standard is deferential. It consciously avoids inquiry into the weight of the evidence, which should be the province of decisionmakers below. However, the inquisitorial integrity standard does establish a baseline of independence, integrity, and fairness that checks arbitrary decisions and models a focused inquiry on the task at hand.

If inquisitorial integrity is the appropriate standard in admission cases, error-correction is the appropriate standard for the *entrants* affected by the DHS expansion notice. First, consider the individual's interest. As even the DHS expansion notice observed,⁴¹ foreign nationals who have resided in the United States may well have developed "substantial connections" to this country, including immediate relatives.⁴² Despite the diligence of most asylum officers, the haste that Congress hard-wired into expedited removal will impede entrants' efforts to seek relief.⁴³ The diligence of most asylum officers can compensate to some degree for the process's harsh deadlines, but some errors will evade notice.

By comparison, the government's interest is somewhat less weighty in this context. As in the case of admission, the government has a significant interest

36. Consistent with this value, the expedited review provision of the INA *already* requires that asylum officers considering whether a prospective entrant has a "credible fear" of persecution compile a "summary of . . . material facts" and an "analysis" of how the facts fit the credible fear standard. *See* 8 U.S.C. § 1225(b)(1)(B)(iii)(II) (2012).

37. Under 8 C.F.R. § 1003.42(b)–(d) (2018), the IJ must receive all "material and relevant evidence," provide an interpreter and make a *de novo* determination of whether there is a "significant possibility" that the applicant may qualify for asylum. However, the regulations do not specifically require written findings from the IJ. *See id.*

38. *See id.* § 1003.42(c).

39. *See* 8 U.S.C. § 1225(b)(1)(B)(iii)(III) (2012).

40. *See Ornelas v. Ruiz*, 161 U.S. 502, 509 (1896).

41. *See* DHS Expansion Notice, *supra* note 5, at 12.

42. *See Yamataya v. Fisher* (The Japanese Immigrant Case), 189 U.S. 86, 101–02 (1903) (holding that due process protects a foreign entrant to a country who has "become . . . a part of its population"); *see also* T. Alexander Aleinikoff, *Aliens, Due Process, and "Community Ties": A Response to Martin*, 44 U. PITT. L. REV. 237, 242 (1983) (describing the argument that certain entrants have—along with U.S. citizens—"mutual obligations" that "arise because of physical proximity and a sense of sharing in a common enterprise").

43. Under the INA, a foreign national must apply for asylum within one year of entering the United States. 8 U.S.C. § 1158(a)(2)(B) (2012).

in the timely removal of foreign nationals who were inadmissible at the time of their entry into the United States and who at the time of their apprehension still lack a legal basis for remaining here. But the removal of foreign nationals from the interior lacks the exigent element of managing a border surge. Moreover, the government's interest is discounted by the collateral effects of enforcement on U.S. citizen relatives of the entrant. This factor does not negate legal arguments for removal in specific cases. However, the need for deliberation in mitigating impacts like the separation of children from parents dilutes the need for speed in interior enforcement. For all of these reasons, an error-correction standard is most appropriate for the review of expanded expedited removal. As applied to this expanded setting, the limitations on judicial review of expedited removal violate the Suspension Clause, requiring federal courts to fill the gap with habeas.

This Article proceeds in three Parts. Part I discusses expedited removal, both in the admissions context and in the expansion just implemented by DHS. Part II discusses the visions of judicial review relevant to expedited removal, including nonreviewability, error-correction, and inquisitorial integrity. This Part argues that an account of habeas' availability and scope of review also requires a vision of substantive constitutional rights, including the due process balancing approach of *Mathews v. Eldridge*. Part III explains why the application of the *Mathews* factors favors the inquisitorial integrity approach for admission cases and the error-correction model for expanded expedited removal. That differential approach best fits the values that due process balancing seeks to vindicate. It therefore also provides the most practical and persuasive account of the habeas remedy in expedited removal cases.

I. EXPEDITED REMOVAL AT THE BORDER AND BEYOND

To understand both the Ninth Circuit's decision in *Thuraissigiam* and DHS's expansion of expedited removal, it is useful to know more about the expedited review process. This Part aims to provide an outline of the statutory framework for this streamlined procedure, which relies on inquisitorial procedures in place of the adversarial approach that characterizes the United States common law tradition. As we shall see, in general and with respect to immigration law, an inquisitorial approach has both risks and benefits. DHS's expansion of expedited removal compounds the risks of the inquisitorial approach.

A. *The Statutory Backdrop*

Congress enacted the expedited removal provisions of the INA in 1996 as part of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA).⁴⁴ Efforts to craft an expedited removal policy took shape because

44. See 8 U.S.C. § 1225(b) (2012); see also Martin, *Two Cheers for Expedited Removal*, *supra* note 23, at 675–78 (discussing the development and passage of the legislation).

of discontent in Congress and the Clinton Administration with the prior policy for handling foreign nationals arriving at the southern border, by sea, and at other points of entry such as airports.⁴⁵ Under the statutory framework then in place, foreign nationals arriving at these points without visas entitling them to admission to the United States would be arrested by immigration officers and then released if they sought asylum based on a fear of persecution.⁴⁶ After the individual alleged fear of persecution, immigration officials would typically release that person, pending a deportation proceeding at some future date in the Department of Justice's administrative immigration court, where the foreign national respondent could assert her asylum claim as a defense to deportation.⁴⁷ Both Congress and the Clinton Administration believed that this practice led to protracted stays in the United States by many individuals without a legal basis for permanently remaining in the country.⁴⁸ Moreover, both legislators and administration officials believed that these protracted stays undermined the INA's framework.⁴⁹ In enacting expedited removal in 1996, Congress substituted a more compressed and inquisitorial procedure to deal with inadmissible foreign nationals who could not prove to immigration officers that they had entered the United States at least two years prior to their arrest.⁵⁰

Under the statutory expedited removal provision, immigration officers anywhere in the country can summarily remove a foreign national who, (1) is inadmissible for lack of a valid visa, and, (2) cannot show at least two years of continuous physical presence in the United States, *unless* that foreign national indicates an intent to seek asylum or expresses a fear of persecution in her country of origin.⁵¹ At that point, the entrant receives a "credible fear" interview with a trained asylum officer from U.S. Citizenship and

45. Martin, *Two Cheers for Expedited Removal*, *supra* note 23, at 676–77.

46. Under longstanding immigration doctrine, courts will not view a foreign national stopped at the border or a port of entry as having "entered" the United States, even if the government subsequently detains that person within the country or provisionally releases the foreign national pending a subsequent removal hearing. *See, e.g., Kaplan v. Tod*, 267 U.S. 228, 230–31 (1925) (Holmes, J.) (finding that a foreign national apprehended at the border, who was charged with being inadmissible due to mental infirmity and then consigned to the care of an immigrants' aid society in the interior of the country, was "still in theory of law at the boundary line and had gained no foothold in the United States" (emphasis added)). The person apprehended in this fashion remains in the eyes of the law as merely being on the *threshold* of entry. *See Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 213 (1953) (noting that a foreign national arrested upon attempted entry in New York and detained there by immigration authorities has not effected an "entry" into the United States within the meaning of immigration law). Immigration scholars refer to this doctrine as the "entry fiction." *See* Charles D. Weisselberg, *The Exclusion and Detention of Aliens: Lessons from the Lives of Ellen Knauff and Ignatz Mezei*, 143 U. PA. L. REV. 933, 951–52 (1995). In ordinary discourse, being physically present in a country would indicate that one has entered. *Cf. id.* (noting the "strained" character of entry fiction). But perhaps even more than other areas of law, immigration law has a doctrinal valence that, on occasion, departs from the ordinary discourse. *See id.*

47. *See* 8 U.S.C. § 1229(a) (2012) (discussing the procedure for what are now called removal hearings before IJs).

48. Martin, *Two Cheers for Expedited Removal*, *supra* note 23, at 676–77.

49. *Id.*

50. *Id.*; 8 U.S.C. § 1225(b)(1)(A)(iii)(II) (2012).

51. Martin, *Two Cheers for Expedited Removal*, *supra* note 23, at 676–77; 8 U.S.C. § 1225(b)(1)(A)(i) (2012).

Immigration Services (USCIS), a component of DHS.⁵² That interview usually occurs at a port of entry or another location designated by immigration officials within days or a few weeks of the foreign nationals' arrest.⁵³ If the asylum officer decides that the claimant has a "credible fear of persecution," the claimant will receive a full immigration court hearing on a future date.⁵⁴

If the asylum officer decides that the claimant lacks a credible fear of persecution, the statute empowers the officer to enter an order of removal and prepare a written "summary of . . . material facts" and an analysis of how the facts fit the credible fear standard.⁵⁵ The statute further provides that, upon the claimant's request, an IJ will review the asylum officer's determination, where practicable within twenty-four hours and no later than seven days after the decision was rendered.⁵⁶ In the course of that IJ review, the IJ allows the claimant to be heard and allows the lawyer for the claimant to pose questions.⁵⁷ If the IJ determines that the claimant has a credible fear, a full merits hearing will be scheduled in due course in immigration court, much as when the asylum officer made a favorable decision. If the IJ determines that the claimant does not have a credible fear, no further administrative review is available.⁵⁸

Congress also restricted judicial review of expedited removal orders.⁵⁹ The INA provides that a constitutional challenge to the expedited review framework must be brought in the U.S. District Court for the District of Columbia within sixty days of the effective date of the legislation.⁶⁰ In addition, plaintiffs must follow the same narrow procedure for a statutory or constitutional challenge to any agency policy implementing the expedited review provision.⁶¹ Under the statute, judicial review of individual decisions is only

52. Martin, *Two Cheers for Expedited Removal*, *supra* note 23, at 676–77; 8 U.S.C. § 1225(b)(1)(A)(ii) (2012).

53. Martin, *Two Cheers for Expedited Removal*, *supra* note 23, at 676–77; 8 U.S.C. § 1225(b)(1)(B)(i) (2012).

54. Martin, *Two Cheers for Expedited Removal*, *supra* note 23, at 676–77; 8 U.S.C. § 1225(b)(1)(B)(ii) (2012). Before the hearing, immigration officials may grant the claimant parole or bond and release her. Martin, *Two Cheers for Expedited Removal*, *supra* note 23, at 676–77; 8 U.S.C. § 1182(d)(5)(A) (2012). Because of the current backlog of cases in immigration court, if the claimant is released, her merits hearing will probably occur at least three years after her arrest. *See* MEISSNER ET AL., *supra* note 24, at 15 (citing the Transactional Records Access Clearinghouse (TRAC) "Immigration Court Backlog Tool"). Absent the granting of parole or bond, officials will detain the claimant pending her hearing. *Id.*; 8 U.S.C. § 1225(b)(1)(B)(ii) (2012).

55. MEISSNER ET AL., *supra* note 24; 8 U.S.C. § 1225(b)(1)(B)(iii)(I)–(II) (2012).

56. MEISSNER ET AL., *supra* note 24; 8 U.S.C. § 1225(b)(1)(B)(i)(III) (2012).

57. *See* MEISSNER ET AL., *supra* note 24. The IJ must create a "record" of the proceedings, conduct a de novo review of the credible fear issue, and furnish an interpreter for the claimant if one is necessary, but is not required to provide reasons for her decision. 8 C.F.R. § 1003.42(b), (c) (2018); *see also* 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. 338, 361–62 (2018) (discussing the expedited removal process); Shoba Sivaprasad Wadhia, *The Rise of Speed Deportation and the Role of Discretion*, 5 COLUM. J. RACE & L. 1, 9–10 (2014) (same).

58. 8 U.S.C. § 1225(b)(1)(C) (2012).

59. *See* 8 U.S.C. §§ 1225(b)(1)(C), 1252(e)(2) (2012).

60. *See* 8 U.S.C. §§ 1225(b)(1)(C), 1252(e)(3)(A)(i), (B) (2012).

61. *See* 8 U.S.C. §§ 1225(b)(1)(C), 1252(e)(3)(A)(ii), (B) (2012).

available under habeas corpus and may include only limited issues: (1) whether the petitioner is a U.S. citizen, lawful permanent resident (LPR), or the recipient of a previous asylum grant that the government has not yet terminated, and, (2) failing that, whether the petitioner was, in fact, ordered removed.⁶² In all but a tiny minority of cases, the facts will clearly satisfy prong (2) and the factors included in prong (1) will not apply, placing the petitioner on a direct path to removal with no further federal judicial check on executive determinations.

B. *The July 2019 DHS Expedited Removal Expansion Notice*

The recent DHS expansion notice marks a material change in the government's implementation of the INA's expedited removal provision. Until July 2019, the government imposed tight limits on expedited removal that focused on arrests at or near a border or port of entry. Under these limits, DHS applied expedited removal procedures only, (1) within 100 air miles of a border, and, (2) when a foreign national could not prove she had been in the country for a short period: *fourteen* days.⁶³ Any foreign national in the country for fourteen days or more was not subject to expedited removal. The July 2019 DHS notice expanded expedited removal up to the limits of the statute. As a result, an arrest by immigration officers will trigger expedited removal, at the discretion of DHS, anywhere in the country, not just within 100 miles of a border. In addition, expedited removal will apply at DHS's discretion to any apparently inadmissible foreign national who cannot show "to the satisfaction of an immigration officer" that she has maintained a continuous physical presence in the United States for two or more years prior to her arrest.⁶⁴ At that point, the compressed procedures of expedited removal, including restrictions on judicial review, would apply.⁶⁵

As a practical matter, the pre-expansion policy meant that Customs and Border Patrol (CBP) and Immigration and Customs Enforcement (ICE) would use expedited removal only for people caught crossing the border or very close to it.⁶⁶ In contrast, expanded removal will by its terms apply to a substantially larger group, given its nationwide scope and extended temporal criterion. Under the expansion, this much larger group—which could number in the hundreds of thousands—will often be deprived of a full hearing before an IJ and the time and legal assistance helpful to prepare and support an

62. See 8 U.S.C. §§ 1225(b)(1)(C), 1252(e)(2)(A)–(C) (2012). Congress expressly precluded "review of whether the alien is actually inadmissible or entitled to any relief from removal." See 8 U.S.C. §§ 1225(b)(1)(C), 1252(e)(1)–(5) (2012).

63. DHS Expansion Notice, *supra* note 5, at 5–6.

64. 8 U.S.C. § 1225(b)(1)(A)(iii)(II) (2012).

65. Concerns about curbs on judicial review in immigration are not new. Almost seventy years ago, Professor Henry Hart cautioned about the problems with eliminating habeas corpus for entrants. See Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1392 (1953) (noting that cutbacks in federal court immigration jurisdiction had "largely been confined to admission cases").

66. See *Castro v. U.S. Dep't of Homeland Security*, 835 F.3d 422, 448 (3d Cir. 2016).

asylum claim. Under the pre-expansion policy, individuals arrested within the interior of the United States and those who entered the country at least fourteen days prior to arrest would receive a full removal hearing in immigration court. In some cases, known as “affirmative” asylum cases, noncitizens would apply for asylum to the office of USCIS within DHS, receive an interview with an asylum officer, and then subsequently receive a full immigration court hearing if the asylum officer denied the noncitizen’s claim.⁶⁷ In other cases, known as defensive asylum cases, a foreign national arrested by DHS within the country’s interior would be able to assert an asylum claim before an IJ and receive a full hearing on the claim at some point after the individual’s arrest, along with a reasonable time to seek legal counsel and prepare an asylum application.⁶⁸ Moreover, most relevant to this Article, these individuals would be able to seek administrative review of a negative IJ decision in the Justice Department’s Board of Immigration Appeals (BIA) and then seek judicial review in a U.S. circuit court of appeals on questions of law.⁶⁹ Under the DHS expansion, those safeguards will not be in place for the large group covered by the new policy.

C. *Benefits and Risks of Expedited Removal: Impacts and Error Rates*

Parsing the risks and virtues of expedited removal requires a careful look. In individual cases, the compressed procedures of expedited removal may prompt substantial costs and reduce the accuracy of decisions. That decrease in accuracy may be an even greater concern with DHS’s new expansion of the expedited removal process. A full assessment of expedited removal’s risks and benefits addresses both the types of errors in asylum proceedings and the relative virtues of inquisitorial and adversarial procedures in adjudicating asylum cases.

As with any other inquiry, errors come in two varieties: false positives and false negatives. For purposes of this Article, a false positive is a grant of asylum to a claimant who actually does *not* meet the statutory standard.⁷⁰ A false negative is a claimant who receives a denial but in fact *does* meet the statutory standard. The government frames expedited removal as a means for minimizing both false positives *and* the time it takes to accurately separate the

67. See Ramji-Nogales et al., *supra* note 28, at 305–06.

68. In both the affirmative and defensive asylum contexts, a claimant must apply within one year of entry, absent a showing of changed or extraordinary circumstances that justify filing later. 8 U.S.C. § 1158(a)(2)(B), (D) (2012).

69. See 8 U.S.C. §§ 1158(a)(2)(B), (D), 1252(a)(1)(D) (2012).

70. One can apply the same terms in assessing stays of removal in non-expedited removal cases subject to judicial review under the INA. In the stay context, a false positive would be a case in which the circuit court grants a stay to facilitate further consideration of the case, but ultimately denies the appeal on the merits. A false negative would be a case in which the court declines to grant a stay, but the petitioner ultimately *prevails* on the merits. See Fatma Marouf et al., *Justice on the Fly: The Danger of Errant Deportations*, 75 OHIO ST. L.J. 337, 386–87 (2014).

wheat from the chaff in asylum claims.⁷¹ In contrast, for claimants and their advocates, expedited removal heightens the risk of false negatives, without winnowing out false positives.⁷² While the government views reduction in the time spent adjudicating cases as an independent good, claimants generally view additional time as positively correlated with accuracy and reduction in errors.⁷³ Debates about errors play out against the backdrop of the INA. The INA reflects Congress's concern about both false positives and false negatives. The statute seeks to reduce false positives by requiring that applicants show a nexus between possible harm and one of the five bases for asylum: race, religion, nationality, membership in a particular social group, or political opinion.⁷⁴ Yet, in establishing "credible fear" of persecution as the threshold for initial asylum screening, the INA sets the prevention of false negatives as the top priority.

1. *The INA and Error Rates*

The *INA itself* weighs false positives and false negatives in asylum asymmetrically. In both initial screening and ultimate adjudication on the merits, Congress established standards that prioritize preventing false negatives.⁷⁵ In other words, the INA's provisions stress saving individuals from possible harm—including arrest, torture, or death—at the hands of their home country's government or those whom the government is unwilling or unable to control. To protect these individuals, the INA's provisions also tolerate initial and ultimate outcomes that entail false positives. The general theory includes consideration of the nature of the underlying harm at issue. As the Supreme Court has explained in *INS v. Cardoza-Fonseca*, the law endeavors to protect an individual from irreversible harm such as being "shot, tortured, or otherwise persecuted."⁷⁶ To that end, a claimant can meet the INA's "well-founded fear" of persecution standard merely by showing a *ten percent* chance of harm befalling her "on account of" one of the asylum provision's five grounds: race, religion, nationality, membership in a particular social group, or political opinion.⁷⁷

The INA's screening criteria used by asylum officers at initial interviews reinforce this prioritization of protection from harm. The "credible fear of persecution" standard used in initial screenings, including those for expedited removal, is designed to filter out manifestly unfounded claims. A more demanding test would filter out too many colorable claims for asylum and

71. See DHS Expansion Notice, *supra* note 5, at 9–10; Martin, *Two Cheers for Expedited Removal*, *supra* note 23, at 684–85.

72. See Manning & Hong, *supra* note 27, at 679, 683.

73. See Peter W. Billings, *A Comparative Analysis of Administrative and Adjudicative Systems for Determining Asylum Claims*, 52 ADMIN. L. REV. 253, 255 (2000).

74. See *INS v. Elias-Zacarias*, 502 U.S. 478, 482 (1992).

75. See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 440 (1987).

76. *Id.* at 440.

77. See *id.*

raise to unacceptable levels the risk of returning claimants to a country in which they could be “shot, tortured, or otherwise persecuted”—the very outcomes that the Supreme Court in *INS v. Cardoza-Fonseca* said Congress wished to prevent. To reduce that risk, the INA provides that asylum officers find that a claimant has shown a credible fear of persecution if there is a “significant possibility” that the claimant will subsequently be able to establish a well-founded fear.⁷⁸

2. *Nexus as a Check on False Positives*

One aspect of asylum law acts as a brake on grants at the final adjudication stage and hence, to some degree, on credible fear findings during preliminary screening: the requirement that a claimant must show a *nexus* between the persecution alleged and one of the five INA grounds. The likelihood of persecution—whether the risk rises to the ten percent threshold that the Supreme Court cited in *Cardoza-Fonseca*—is irrelevant, *unless* the claimant can demonstrate a nexus. As the Supreme Court indicated in *INS v. Elias-Zacarias*,⁷⁹ it can be difficult to show such a link.

For example, suppose a guerilla group threatens a farmer in Guatemala with retaliation if that individual does not join the group. According to the Court, an individual’s reluctance to join the group could be based on a range of factors, including fear of government forces who target the guerilla group or a desire to stay close to home and tend to the farm.⁸⁰ Justice Scalia, writing for the Court in *Elias-Zacarias*, found that an asylum claim was legally insufficient where the claimant could not demonstrate that the guerilla group would retaliate against him because of one of the five asylum grounds—here, political opinion—rather than one of the other factors noted above, which are not cognizable under the INA.⁸¹ The INA only requires the time and process reasonably necessary to determine that a future claimant is alleging facts similar to those in *Elias-Zacarias*, which are legally insufficient for a grant of asylum.

3. *Fraud and Embellishment in Asylum Claims*

Another important fact should temper asylum grants even when facts alleged are legally sufficient. Information about conditions abroad can be difficult to obtain. That factor helps account for the ten percent standard of proof for asylum cases: a claimant may encounter challenges in finding information to document her claim, which often concerns events in a distant country with a despotic government. At the same time, the lack of access to accurate information hampers adjudicators, who often find it difficult to verify the

78. 8 U.S.C. § 1225(b)(1)(B)(v) (2012).

79. See *Elias-Zacarias*, 502 U.S. at 482.

80. *Id.*

81. *Id.* at 482–84.

applicant's claims.⁸² In a significant number of cases, applicants either embellish their claims or invent them outright.⁸³ A system that cannot select out these invented claims invites an excessive number of false positives. These errors ultimately injure bona fide asylum seekers by fueling a backlash against even meritorious claims.

D. *Expedited Removal as an Inquisitorial System*

Expedited removal's supporters and critics divide on whether it is fair and accurate to rely on a largely inquisitorial system, as expedited removal does. Critics favor a hybrid system which couples inquisitorial and adversarial phases with judicial review. That system covered interior immigration enforcement prior to DHS's expansion of expedited removal. Addressing the propriety of a largely inquisitorial framework entails consideration of the inquisitorial and adversarial traditions, particularly with respect to immigration law.

1. *Inquisitorial Models and American Law*

Inquisitorial proceedings have a bad reputation in the common law world, but they are not necessarily unfair or inaccurate.⁸⁴ An inquisitorial proceeding, for purposes of this Article, is a relatively informal proceeding—at least compared with an adversarial judicial hearing—in which the decisionmaker examines witnesses, including the claimant or defendant. While a lawyer may be present, the lawyer will typically have a more modest role—one limited to preparing the party or witness for the examination, submitting appropriate evidence in writing either before the hearing or after if the examining officer so requests, and consulting with the claimant or clarifying facts for the record. This type of proceeding contrasts with the adversarial model, in

82. See *Maslenjak v. United States*, 137 S. Ct. 1918, 1923 (2017) (setting the standard for criminal prosecutions of false statements in naturalization, and describing an egregious misrepresentation in which an asylum applicant claimed her husband had been a victim of persecution when in fact he was a significant player in wartime atrocities); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-16-50, *ASYLUM: ADDITIONAL ACTIONS NEEDED TO ASSESS AND ADDRESS FRAUD RISKS 3-4* (2015), available at <https://www.gao.gov/assets/680/673941.pdf>; see also Martin, *Two Cheers for Expedited Removal*, *supra* note 23, at 184 (describing challenges of verifying information and incentives for claimants to embellish or misrepresent the facts).

83. See Martin, *Two Cheers for Expedited Removal*, *supra* note 23, at 184.

84. See Kessler, *supra* note 33, at 1258-60; John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 827-29 (1985); Russell G. Pearce, *Redressing Inequality in the Market for Justice: Why Access to Lawyers Will Never Solve the Problem and Why Rethinking the Role of Judges Will Help*, 73 *FORDHAM L. REV.* 969, 971 (2004) (noting that an inquisitorial system uses decisionmakers to "manage and guide a process where the parties assist them in their search for justice . . . [i]nquisitorial judges conduct investigations, initiate cases, determine the issues, and control the presentation of evidence"); Chapman, *supra* note 34, at 1536. Cf. David Alan Sklansky, *Anti-Inquisitorialism*, 122 *HARV. L. REV.* 1634, 1680-81 (2009) (discussing the imprecision of the Supreme Court's view of the inquisitorial approach in criminal procedure, but agreeing that the participation of the decisionmaker in the questioning of witnesses is a hallmark of the inquisitorial paradigm). A new breed of problem-solving courts addressing chemical dependency, housing, teen-against-teen violence, and other social issues also relies on inquisitorial techniques. See Jessica K. Steinberg, *Informal, Inquisitorial, and Accurate: An Empirical Look at a Problem-Solving Housing Court*, 42 *L. & SOC. INQUIRY* 1058, 1063-68 (2017).

which each party has primary responsibility for questioning witnesses and the attorney's role is more expansive.

Although U.S. courts owe much to the common law tradition, our judicial system leaves room for many inquisitorial elements. Courts have interpreted Article III of the U.S. Constitution to permit proceedings involving so-called “public rights” in agency settings run with inquisitorial procedures.⁸⁵ In addition, federal courts at one point conducted certain immigration-related inquisitorial proceedings, such as naturalization for legal residents who wished to become U.S. citizens.⁸⁶ Moreover, courts of equity have always had a strong inquisitorial bent.⁸⁷ In the development of courts of equity in England, chancellors who issued decisions frequently relied on masters who interviewed witnesses and prepared accounts of the witnesses' testimony.⁸⁸

The inquisitorial turn may provide a more conducive setting than the fraught arena of adversarial litigation for “calm recollection.”⁸⁹ An interview—even one under oath—takes place in an informal environment, without the pressures of the courtroom. In an interview setting, a party or other witness recalling past events—particularly those that involve difficult or traumatic experiences—may feel more comfortable than in the charged atmosphere of an adversarial proceeding.⁹⁰

2. *Administrative Law, Immigration, and the Inquisitorial Paradigm*

In administrative law, inquisitorial proceedings are legion. For example, in social security disability proceedings, an administrative law judge may ask questions about the claimant's alleged disability and its impact on the claimant's activities.⁹¹ While a lawyer may represent the claimant and conduct an

85. Public rights are a somewhat misleading term. These rights do not necessarily involve public law but instead concern rights, such as prompt receipt of officials' collection of tax revenue, that *belong* to the government on the public's behalf. *See Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 277 (1856) (upholding a summary administrative remedy to recover, on behalf of the government, revenues received by tax collectors); *see also Fong Yue Ting v. United States*, 149 U.S. 698, 713 (1893) (citing the public rights doctrine in observing that in admission “Congress might entrust the *final* determination of those facts to an executive officer” (emphasis added)). *Cf. Fallon, supra* note 18, at 1080–81 (discussing the relationship between admission cases and the public rights doctrine).

86. *See James E. Pfander & Daniel D. Birk, Article III Judicial Power, the Adverse-Party Requirement, and Non-Contentious Jurisdiction*, 124 *YALE L.J.* 1346, 1353–57, 1362, 1375, 1384, 1386 (2015) (explaining that federal courts historically exercised jurisdiction over matters lacking a concrete dispute, including naturalization, warrant requests, and remedies such as receivership for business organizations).

87. *See Kessler, supra* note 33, at 1201.

88. *Id.* at 1201–02.

89. *See id.* at 1216.

90. *See id.*

91. *See, e.g., Sims v. Apfel*, 530 U.S. 103, 110–11 (2000) (noting that, because Social Security proceedings are “inquisitorial rather than adversarial . . . [i]t is the ALJ's duty to investigate the facts and develop the arguments both for and against granting benefits”). *Cf. Henry J. Friendly, Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1290 (1975) (noting that in many modern administrative proceedings adversarial procedure is supplanted by the “investigatory model” and also noting that in this setting, informality is an “advantage,” allowing the “decisionmaker, in a conference-type setting . . . [to] hear the evidence and discuss the dispute with the parties”).

examination to elicit the claimant's testimony, the hearing officer will frequently follow up with questions of her own.⁹²

In immigration, the inquisitorial tradition is strong. For decades, many decisions in immigration cases were made either by inspectors at a port of entry, who questioned applicants for admission to the United States to determine those applicants' compliance with immigration law, or by examiners who also asked questions and decided whether a foreign national had violated immigration laws and hence should be deported from the United States.⁹³ Since the early 1990s, trained officers have interviewed applicants in the affirmative asylum process.⁹⁴ Asylum officers are trained in country conditions and the persecution that refugees have suffered.⁹⁵

That perspective differs markedly from the culture in immigration court. In some cases, immigration judges insulted applicants or asked questions that were manifestly irrelevant or prejudicial.⁹⁶ In addition, DHS trial lawyers, who represent the government in immigration court, may be gratuitously adversarial in cases involving meritorious claims.⁹⁷ Of course, many IJs and DHS trial counsel do solid, professional work in a challenging environment.⁹⁸ However, in specific cases, the negative examples affect the immigration court's ability to neutrally adjudicate claims, underscoring the gap created by restrictions on judicial review of expedited removal orders.

92. The inquisitorial model is also integral to the functioning of the federal criminal justice system. The vast majority of cases are resolved through plea bargaining, in which defendants make a proffer to federal prosecutors, who follow up with questions in a meeting or conference room remote from the official trappings of a court. *See generally* Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 *FORDHAM L. REV.* 2117 (1998).

93. *See* Bill Ong Hing, *No Place for Angels: In Reaction to Kevin Johnson*, 2000 *U. ILL. L. REV.* 559, 581–82 (2000) (describing the rigors of official interrogations in the early 1920's of Chinese nationals seeking admission, including those like the author's close relatives who sought admission based on family ties to U.S. citizens); Chapman, *supra* note 34, at 1538–39 (noting that, in the first half of the twentieth century, "a single immigration officer would play the role of investigator, government representative, and adjudicator").

94. Gregg A. Beyer, *Establishing the United States Asylum Officer Corps: A First Report*, 4 *INT'L J. REFUGEE L.* 455, 467–72 (1992).

95. *See* Amit Jain, *Bureaucrats in Robes: Immigration "Judges" and the Trappings of "Courts,"* 33 *GEO. IMMIGR. L.J.* 261, 317 (2019) (critiquing the fairness of *adversarial* procedures in immigration court, and acknowledging the view that asylum officers are more receptive and empathetic); Chapman, *supra* note 34, at 1536.

96. *See, e.g.,* *De Oliveira v. Holder*, 564 F.3d 892, 896–900 (7th Cir. 2009) (finding that an IJ made unsupported inferences about the applicant's credibility, ignored material evidence, and asked personal questions unrelated to the issues, such as whether the claimant's half-sister had been born out of wedlock and whether the applicant was infertile). *Cf.* Stephen H. Legomsky, *Restructuring Immigration Adjudication*, 59 *DUKE L.J.* 1635, 1645–47 (2010) (discussing an increasing incidence of federal court remands to the agency because of IJ mistakes).

97. *See* Jason A. Cade, *The Challenge of Seeing Justice Done in Removal Proceedings*, 89 *TULANE L. REV.* 1, 39–50 (2014); Mary Holper, *The Unreasonable Seizures of Shadow Deportations*, 86 *U. CIN. L. REV.* 923, 958–60 (2018); Jain, *supra* note 95, at 287–89; Won Kidane, *The Inquisitorial Advantage in Removal Proceedings*, 45 *AKRON L. REV.* 647, 687–97 (2011–12).

98. *See* Jain, *supra* note 95, at 297 (quoting a senior immigration court official as expressing admiration for the job done by IJs); Legomsky, *Restructuring Immigration Adjudication*, *supra* note 96, at 1639 (acknowledging external factors such as budget shortfalls that challenge IJs, while suggesting that only a small number of IJs are actually unsuited to the task of deciding immigration cases).

II. HABEAS CORPUS IN IMMIGRATION AND DETENTION

Historically, habeas in immigration cases has concerned two distinct models: nonreviewability and error-correction.⁹⁹ Until the Ninth Circuit's decision in *Thuraissigiam*, these approaches generally tracked the division between admission and entrant cases, with nonreviewability as the dominant approach in the former and error-correction in the latter. Under the approach taken in this Article, assessing the merits of each also implicates the procedural due process test in *Mathews v. Eldridge*.¹⁰⁰

To resolve whether habeas is available and what standard of review applies in both admission cases and expanded expedited review, we should consider models of habeas in immigration, along with related areas—such as extradition, custody transfer, and U.S. detention of foreign nationals at Guantanamo. Detention at Guantanamo is important to consider because the Ninth Circuit in *Thuraissigiam* relied heavily on the Supreme Court's holding in *Boumediene v. Bush*¹⁰¹ that detainees there had access to habeas and that error-correction was the appropriate standard.¹⁰² Transfer and extradition cases are important because each involves conveying custody of an individual from the U.S. government to a foreign power. That shift in custody entails some risk of the harms, including torture and death, that can follow from the denial of asylum in an expedited review.¹⁰³ Judicial review in such cases has been deferential, but not entirely toothless.¹⁰⁴ This Part frames the transfer and extradition cases as exemplifying a judicial inquiry into the inquisitorial integrity of such determinations. The next Part will suggest that the inquisitorial model is a better model than either nonreviewability or error-correction for immigration cases involving foreign nationals seeking admission to the United States.

99. This Article does not explore habeas corpus's long history. See *Boumediene v. Bush*, 553 U.S. 723, 740–41 (2008); Stephen I. Vladeck, *The New Habeas Revisionism*, 124 HARV. L. REV. 941, 946–49 (2011) (reviewing HABEAS CORPUS: FROM ENGLAND TO EMPIRE, by Paul D. Halliday); see also AMANDA L. TYLER, HABEAS CORPUS IN WARTIME: FROM THE TOWER OF LONDON TO GUANTANAMO BAY 272 (2017) (discussing the evolving nature of habeas corpus).

100. See *Mathews v. Eldridge*, 424 U.S. 319, 334–35 (1976). That approach tracks the view expressed by professors Fallon and Kovarsky. See Fallon, *supra* note 18, at 1078–79; Lee Kovarsky, *Citizenship, National Security, and the Habeas Remedy*, 107 CALIF. L. REV. 867, 895–900 (2019). In contrast, Professor Neuman has argued that habeas has force independent of other constitutional guarantees. See Neuman, *Habeas Corpus and Executive Detention*, *supra* note 18, at 1052–57.

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

102. See *Thuraissigiam v. Dep't of Homeland Security*, 917 F.3d 1097, 1106 (citing *Boumediene*, 553 U.S. at 766).

103. See *Munaf v. Geren*, 553 U.S. 674, 702 (2008) (acknowledging that the transfer of custody to a regime with rule of law institutions less developed than our own could entail a risk of torture for the transferee).

104. See *id.* at 689 (noting that transfer in the case involved “ongoing military operations conducted by American Forces overseas” and that “courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs”).

A. *Nonreviewability and Admission Cases*

The Supreme Court has repeatedly noted the exceptional deference owed to the political branches on the admission of foreign nationals.¹⁰⁵ In keeping with that deference, the Court has, in some cases, *entertained* habeas petitions challenging admission decisions, but then upheld those decisions with minimal or no scrutiny.¹⁰⁶ However, even in its deferential decision in *Trump v. Hawaii*¹⁰⁷ upholding President Trump's executive order barring the admission of nationals of several Muslim-majority countries,¹⁰⁸ the Court noted that it has engaged in a "circumscribed judicial inquiry" where an admission decision also allegedly affects a *U.S. citizen's* constitutional rights.¹⁰⁹

The cases addressing the harm to U.S. citizens' constitutional rights suggest that applying a carefully "circumscribed judicial inquiry" to admission cases involving asylum claims would not pose an unreasonable risk of court intervention. The Supreme Court's decisions in this area also employ a deferential standard, upholding government action that is "facially legitimate and

105. See, e.g., *Trump v. Hawaii*, 138 S. Ct. 2392, 2418 (2018) (describing the admission and exclusion of foreign nationals as a "fundamental sovereign attribute . . . largely immune from judicial control" (citation omitted)); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 211 (1953) (explaining that in admission cases, absent express legal authorization, no court should review the "determination of the political branch of the government" (citing *Knauff v. Shaughnessy*, 338 U.S. 537 (1950))). The familiar view that Congress has "plenary power"—virtually unchecked authority—over admission criteria owes much to this judicial tendency to link admission with sovereignty. See *Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581, 603–04 (1889); see also *Kerry v. Din*, 135 S. Ct. 2128, 2141 (2015) (Kennedy, J., concurring) (citing "political branches' broad power over the creation and administration of the immigration system"); *Harisiades v. Shaughnessy*, 342 U.S. 580, 589 (1952) (asserting that with respect to criteria for both admission and removal, decisions of political branches are "largely immune from judicial inquiry or interference"); David A. Martin, *Why Immigration's Plenary Power Doctrine Endures*, 68 OKLA. L. REV. 29, 44 (2015) (advancing the most compelling reasons for judicial deference). But see Kevin R. Johnson, *Immigration in the Supreme Court, 2009–13: A New Era of Immigration Law Unexceptionalism?*, 68 OKLA. L. REV. 57, 61–62 (2015) (arguing that deference is more variable than conventional account has depicted and that recent Supreme Court decisions may indicate the beginnings of more probing judicial review); Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 262 (criticizing the premises of the doctrine); see generally Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 549–50 (1990) (asserting that courts have turned to statutory interpretation to temper the harshness of the plenary power doctrine).

106. See *Mezei*, 345 U.S. at 209–10 (explaining that habeas corpus was the vehicle for *Mezei's* challenge to his detention by immigration authorities after his attempt to enter the United States); *id.* at 210–13 (denying *Mezei's* petition based on the longstanding tradition of deference to the political branches in admission cases). The Third Circuit recently invoked this tradition in finding that expedited removal of unauthorized immigrants close to the border did not violate the Suspension Clause. See *Castro v. U.S. Dep't of Homeland Security*, 835 F.3d 422, 442–44 (3d Cir. 2016).

107. *Trump v. Hawaii*, 138 S. Ct. 2392, 2418 (2018).

108. The executive order also included North Korea and certain nationals of Venezuela. See *id.* at 2405.

109. *Id.* at 2419 (citing *Kleindienst v. Mandel*, 408 U.S. 753, 756–57 (1972)). In *Mandel*, the Court upheld a government decision to deny a visa to a foreign national journalist whom a U.S. group had invited to speak at an academic conference. *Mandel*, 408 U.S. at 756–57. The group argued that the visa denial affected its First Amendment right to *hear* a range of views on political issues. *Id.* Cf. *Kerry v. Din*, 135 S. Ct. 2128, 2141 (2015) (Kennedy, J., concurring) (assuming that due process safeguards applied in the case of a U.S. citizen whose visa application for a foreign national spouse had been denied on national security grounds, but then finding that the denial met due process standards).

bona fide.”¹¹⁰ The Court upheld a visa denial to a leftist speaker where the government had argued that the applicant’s conduct while in the United States under a previous visa had exceeded the visa’s terms.¹¹¹ The Supreme Court found that this rationale met the “facially legitimate and bona fide” standard.¹¹² Applying a similarly deferential standard to asylum admission cases would leave most government decisions intact, but would at least produce a modest check on officials.

At least one early Supreme Court decision, *Gegiow v. Uhl*,¹¹³ suggests that some measure of review was considered possible in admission cases. In *Gegiow*, Justice Holmes found that an immigration inspector was “exceeding his power” by denying admission to a Russian national on the grounds that the petitioner was likely to become a “public charge”—a statutory term for an individual whom the government would be obliged to support because the person in question was wholly incapable of supporting herself.¹¹⁴ According to Holmes, the inspector had forsaken the inquiry into “permanent personal” factors, such as individual assets or severe disabilities that should inform the public charge determination, and had instead engaged in a free-floating inquiry regarding whether the local labor market was already saturated.¹¹⁵ Holmes suggested an alternative to nonreviewability that would largely defer to official decisions based on the statute but would intervene if the inspector had introduced factors such as local labor conditions that Congress had not included within the inspector’s ambit of authority.¹¹⁶

There is also substantial reason to question the post-*Gegiow* cases cementing blanket nonreviewability of admission decisions. For example, in *Shaughnessy v. United States ex rel. Mezei*,¹¹⁷ the Supreme Court upheld the denial of admission to a returning LPR against a due process challenge, even though efforts to find another country to take the petitioner had been

110. See, e.g., *Trump v. Hawaii*, 138 S. Ct. 2392, 2419 (2018); *Kleindienst v. Mandel*, 408 U.S. 753, 756–57 (1972).

111. See *Mandel*, 408 U.S. at 759 (reporting the government’s position that the applicant’s conduct during a previous visit included fundraising, which went “far beyond the stated purposes of his trip” that U.S. officials had relied on in the earlier visa grant); see also *id.* at 759 n.5 (discussing the circumstances of the event at which the applicant spoke during his earlier visit, which included fundraising for student demonstrators in Europe; that fundraising took place after the applicant’s talk).

112. *Id.* at 756–57.

113. *Gegiow v. Uhl*, 239 U.S. 3 (1915).

114. See *id.* at 9.

115. See *id.* at 10.

116. See Neuman, *Habeas Corpus, Executive Detention*, *supra* note 18, at 1015 (discussing *Gegiow v. Uhl*, 239 U.S. 3 (1915)). The Trump Administration has just issued a new rule that substantially expands the criteria for determining that a foreign national is a public charge under the INA. See *Inadmissibility on Public Charge Grounds*, 84 Fed. Reg. 41292 (Aug. 14, 2019) (to be codified at 8 C.F.R. pts. 103, 212–14, 245, 248). Compare *City & Cty. of San Francisco v. U.S. Citizenship & Immigration Servs.*, 944 F.3d 773, 790–98 (9th Cir. 2019) (holding that the public charge rule should receive Chevron deference), with *New York v. U.S. Dep’t of Homeland Security*, 408 F. Supp. 3d 334, 351 (S.D.N.Y. 2019) (granting a preliminary injunction against the DHS’ rule redefining “public charge,” on the grounds that the rule is inconsistent with longtime administrative practice and logic of the INA). See also *Dep’t of Homeland Sec. v. New York*, 140 S. Ct. 599 (2020) (issuing a stay of the district court’s preliminary injunction). Analysis of the new rule is beyond the scope of this Article.

117. *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953).

unsuccessful, and his indefinite detention in the United States was a likely outcome of the decision. In contrast, this Article's analysis suggests that the foreign national's interest in avoiding indefinite detention should elicit judicial review in admission cases where other countries have refused to accept the petitioner.

The facts surrounding *Mezei* and a case on which *Mezei* relied, *United States ex rel. Knauff v. Shaughnessy*,¹¹⁸ should also counsel revisiting their precedential force. In *Mezei*, the government declined to show the Supreme Court its evidence that the petitioner was a security risk, eliciting the ire of dissenters Justice Jackson and Justice Black.¹¹⁹ Evidence in subsequent administrative proceedings undertaken at the initiative of the Attorney General revealed that during his long legal residence in the United States, prior to the trip abroad that triggered the denial of admission, Mezei had belonged to a leftist political group with some links to the Communist Party. But testimony linking Mezei to the Communist Party came from an individual whom the government had used repeatedly as a witness in loyalty cases and paid a substantial sum for this work. Furthermore, the government never disclosed the witness's prior extensive work on its behalf to the petitioner and, after the case concluded, the government investigated the witness on perjury charges.¹²⁰

The tribunal in these proceedings ordered Mezei removed. However, it informally recommended that the government offer Mezei parole and release on conditions in the United States, where Mezei remained without incident for the rest of his life.¹²¹ These palliative measures would have been unthinkable had Mezei posed a genuine threat.¹²² Given this troubled history and the ease of adopting a reasonable alternative that would provide a measure of judicial review, the case for revisiting nonreviewability is strong, at least in cases where the stakes for the applicant for admission involve indefinite detention or the risk of persecution abroad.

118. *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950).

119. *See Shaughnessy v. United States ex rel. Mezei*, 345 U.S. at 219–22, 226 (Jackson, J., dissenting) (explaining that the petitioner had gone to Hungary to his visit elderly mother, and had then been unable to make a timely return to the United States due to the “disturbed conditions of Eastern Europe;” reporting on petitioner’s “nearly two years” in detention upon his attempted return to the United States and refusal of other countries to accept him after the United States branded him a security risk; and highlighting the risk that detention “without disclosure . . . of charges, evidence, informers or reasons” will “drift into oppression of the disadvantaged in this country as surely as it has elsewhere”); *id.* at 216–17 (Black, J., dissenting) (noting that the petitioner had been a longtime LPR whose case the Court treated as one of admission, as the petitioner had traveled to Hungary and remained there for well over a year; and asserting that the petitioner had then been denied admission because of evidence from “secret informers” that government declined to disclose even to the Supreme Court).

120. Weisselberg, *supra* note 46, at 979–81 (noting that the witness had repeatedly given false testimony in other cases, and even conceded under oath that he would lie if the government requested that he do so).

121. *Id.* at 983–84.

122. Faulty information also played a central role in the case of war bride Ellen Knauff, whose exclusion was upheld by the Supreme Court, but in subsequent agency proceedings was revealed as the product of rumors and lies. *See id.* at 961–64 (discussing the aforementioned proceedings and noting that the tribunal ultimately ordered Knauff’s admission as a LPR).

B. *Error-Correction in Immigration Law*

If nonreviewability has been a dominant strand in admission cases, cases involving entrants have often applied an error-correction approach. That approach to entrant cases includes review of errors of law, but only a very narrow review of mixed questions of law and fact or strictly factual determinations.¹²³ The Ninth Circuit's decision in *Thuraissigiam* sought to import the error-correction mode into judicial review of expedited removal, despite Congressionally-imposed limitations on review in that setting.¹²⁴ *Thuraissigiam*'s rationale relied heavily on two Supreme Court decisions: (1) *INS v. St. Cyr*,¹²⁵ in which the Court construed the INA as permitting access to habeas for already-entered LPRs who were removable due to U.S. criminal convictions; and, (2) *Boumediene v. Bush*,¹²⁶ in which the Court held that Guantanamo detainees had access to habeas.¹²⁷ However, the Ninth Circuit's reliance on *St. Cyr* and *Boumediene* ignored crucial differences between admission cases and those involving either entrants or Guantanamo detainees. Moreover, the Ninth Circuit in *Thuraissigiam* glossed over anomalies on the link between habeas and due process in Justice Kennedy's opinion for the Court in *Boumediene*—anomalies that are dissected in Chief Justice Roberts' dissent in that case.¹²⁸

Courts have regularly applied the writ's error-correction mode to review of immigration matters involving LPRs or those who have entered the United States. In *INS v. St. Cyr*,¹²⁹ the Supreme Court read a recent INA provision purporting to limit access to the courts to permit a habeas petition by an LPR.¹³⁰ The LPR's habeas petition argued on statutory grounds against retroactive application of another recent provision that eliminated relief from

123. See *Acharya v. Holder*, 761 F.3d 289, 299 (2d Cir. 2014) (remanding the decision to deny the petitioner's application for asylum, as the IJ applied an "overly stringent" legal standard for the nexus between the petitioner's persecution and his political opinion); see also *id.* at 295–96 (describing the review of an agency's factual findings as "exceedingly narrow").

124. See *Thuraissigiam v. Dep't of Homeland Sec.*, 917 F.3d 1097, 1118 (9th Cir. 2019) (noting that expedited removal contains no provision for "rigorous adversarial proceedings" and strongly suggesting that this was the fatal flaw with process in *Thuraissigiam*'s case, while remanding it to the district court to make the initial decision on precisely what process was required to bring expedited removal into compliance with the Suspension Clause).

125. *INS v. St. Cyr*, 533 U.S. 289 (2001).

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

127. *Id.* at 766. The scholarly literature on *Boumediene* is vast. See, e.g., Joshua A. Geltzer, *Of Suspension, Due Process, and Guantanamo: The Reach of the Fifth Amendment After Boumediene and the Relationship Between Habeas Corpus and Due Process*, 14 U. PA. J. CONST. L. 719, 738–41, 747–65 (2012) (discussing possible models of interaction of habeas and due process); Jared A. Goldstein, *Habeas Without Rights*, 2007 WIS. L. REV. 1165 (arguing that due process and habeas are distinct checks on the political branches); Stephen I. Vladeck, *Boumediene's Quiet Theory: Access to Courts and the Separation of Powers*, 84 NOTRE DAME L. REV. 2107, 2111–12, 2112 nn. 30–32 (2009) (suggesting that Justice Kennedy's opinion for the Court was shaped by concern about both harm to the separation of powers wrought by congressional curbing of judicial review and the risk of arbitrary and unreasonably protracted detention in the absence of a robust judicial check).

128. See *Boumediene*, 553 U.S. at 813–14.

129. *St. Cyr*, 533 U.S. at 305.

130. *Id.*

removal for certain criminal convictions.¹³¹ While the Court held on statutory grounds that Congress had not been sufficiently *precise* in curbing the Great Writ, Justice Stevens' majority opinion strongly suggested that Congress lacked *power* under the Constitution to categorically preclude judicial review of legal questions in cases involving LPRs.¹³² However, Justice Stevens limited his opinion to cases involving LPRs and entrants, notably avoiding any indication that access to judicial review in *admission* cases was similarly robust.¹³³

In *Thuraissigiam*, the Ninth Circuit read *St. Cyr* too broadly, ignoring the distinction between admission and entrant cases that was part of the essential backdrop for the Supreme Court's decision. Indeed, the Ninth Circuit at one point characterized an entrant case in a fashion that obscured this distinction, elaborating on the unlawful manner of the petitioner's entry instead of noting that at the time of the decision he had resided in the United States for over *twenty years*.¹³⁴ Although there may be room for debate about the precise temporal threshold after entry into the United States that triggers robust judicial review of administrative removal decisions, a full *generation* of residence meets any reasonable test.¹³⁵ Despite the Ninth Circuit's assertion, that element of longtime U.S. domicile makes such cases far less germane to the admission context.

Boumediene v. Bush also fails to support the Ninth Circuit's analysis. Justice Kennedy's opinion for the Court did not address cases in which officials denied admission to a foreign national. Instead, *Boumediene* dealt with an issue far closer to habeas's heartland—the U.S. government's power to confine individuals indefinitely.¹³⁶ Justice Kennedy wrote that a Guantanamo detainee confined in the United States' armed conflict with Al Qaeda could resort to habeas for “a meaningful opportunity to demonstrate that he is being

131. See *id.* at 315–22 (conceding that Congress *could* have made this elimination from relief retroactive, but—in the absence of clear evidence that Congress intended such a result—applying the presumption against retroactive application to preserve relief for convictions that had become final before the effective date of the provision).

132. See *id.* at 305 (asserting that a “serious Suspension Clause issue” would have arisen if the Court had read the jurisdiction limiting provision as having abrogated the federal courts' power to address “pure questions of law,” be they statutory or constitutional).

133. See *id.* at 304 (citing *Heikkila v. Barber*, 345 U.S. 229, 234–35 (1953) (construing the statute to preserve habeas for *entrants* based on statutory language that made agency action regarding deportation final “except insofar as it was required by the Constitution”)).

134. See *Thuraissigiam v. Dep't of Homeland Security*, 917 F.3d 1097, 1115 (9th Cir. 2019) (citing *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 262 (1954)). The Ninth Circuit reported that *Accardi* had entered the United States “from Canada ‘without immigration inspection and without an immigration visa.’” *Id.* (citing *Accardi*, 347 U.S. at 262). However, the Ninth Circuit failed to mention the facts that the Supreme Court in *Accardi* had deemed to be “relevant,” including the petitioner's residence in the United States—albeit without legal status—since 1932, more than twenty years before the Supreme Court rendered its decision. See *Accardi*, 347 U.S. at 262.

135. A twenty-year period of residence—at least when also assuming unbroken physical presence in the country—would exceed by a factor of ten the outer boundary of two years that Congress has set for expedited removal. See 8 U.S.C. § 1225(b)(1)(A)(iii)(II) (2012). That outer temporal boundary is the threshold that expanded expedited removal will enforce. See DHS Expansion Notice, *supra* note 5.

136. See *Boumediene*, 553 U.S. at 766.

held pursuant to ‘the erroneous application or interpretation’ of relevant law.”¹³⁷ In crafting an approach to judicial review of long-term confinement at Guantanamo, Justice Kennedy invoked *Johnson v. Eisentrager*,¹³⁸ in which the Supreme Court had denied a habeas corpus petition brought by a German prisoner who had been convicted by a U.S. military tribunal abroad of capital war crimes arising out of World War II.¹³⁹

An approach forged in the crucible of wartime detention, prosecution, and punishment is not an obvious fit for an immigration admission case. In habeas, the central remedy is typically release from confinement.¹⁴⁰ After *Boumediene*, a court considering a habeas petition by a Guantanamo detainee determines whether the detainee was part of Al Qaeda or the Taliban at the time of his capture; if the court answered that question in the negative, it may order that individual’s release.¹⁴¹ In contrast, in admission cases, the United States detains an individual only incidentally, to ensure her removal.¹⁴² Because the candidate for admission has by definition not resided

137. *Id.* at 779 (citing *INS v. St. Cyr*, 533 U.S. 289, 302 (2001)).

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

139. *See generally id.*; *see also Boumediene*, 553 U.S. at 766 (noting that the *Boumediene* test was based in part on “language from *Eisentrager*”). Justice Kennedy was concerned that without access to habeas, detention at Guantanamo could be inordinately protracted. *See id.* at 772 (noting that the petitioners “have been denied meaningful access to a judicial forum for a period of years” and expressing concern about “harms petitioners may endure from additional delay”); *see also Al-Alwi v. Trump*, 139 S. Ct. 1893, 1894 (2019) (Breyer, J., concurring) (observing that the petitioner “faces the real prospect that he will spend the rest of his life in detention based on his status as an enemy combatant a generation ago, even though today’s conflict may differ substantially from the one Congress anticipated” when it authorized the U.S. intervention in Afghanistan in 2001, shortly after the September 11th attacks). In his opinion for the Court in *Boumediene*, Justice Kennedy distilled the following factors from his reading of *Eisentrager*: (1) the “citizenship and status of the detainee and the adequacy of the process through which the status determination was made”—the term “status” referring to whether the petitioner was part of Al Qaeda or the Taliban and hence subject to detention under the law of armed conflict; (2) the “nature of the sites where apprehension and then detention took place”; and, (3) the “practical obstacles inherent in resolving the prisoner’s entitlement to the writ.” *Boumediene*, 553 U.S. at 766. The first and second factors spoke specifically to Guantanamo detention and have little relevance to immigration admission cases. *See id.* Indeed, the Ninth Circuit in *Thuraissigiam* conceded this. *See Thuraissigiam*, 917 F.3d at 1108 (agreeing with both parties to the case that the factors outlined by Justice Kennedy in *Boumediene* “do not map precisely onto this case”).

140. *See Munaf v. Geren*, 553 U.S. 674, 693 (2008) (noting that the “traditional function of the writ is to secure release from illegal custody” (citation omitted)). In admission cases, foreign nationals do not seek release per se; they want release along with permission to *enter the United States* and remain in this country. That goal separates admission cases from the “traditional function of the writ” that Chief Justice Roberts discussed in *Munaf*.

141. *See Hussain v. Obama*, 718 F.3d 964, 968–71 (D.C. Cir. 2013) (articulating a circumstantial test for status as part of Al Qaeda or the Taliban, based on a convergence of several factors—including training with Al Qaeda—which together make it unlikely that a neutral explanation would account for the detainee’s pattern of activity); *id.* at 968 (referring to this test colloquially as the “duck-test”). *But see id.* at 971–73 (Edwards, J., concurring) (suggesting that the court’s test, while dictated by D.C. Circuit precedent, was insufficiently rigorous to justify long-term detention). *See generally* Stephen I. Vladeck, *The Passive-Aggressive Virtues*, 111 COLUM. L. REV. SIDEBAR 122, 137–39 (2011) (suggesting that courts have often been too cautious or wary of confrontation with the political branches after 9/11, and that such caution has either impeded or distorted the development of legal doctrine).

142. *See Jennings v. Rodriguez*, 138 S. Ct. 830, 836 (2018); *see also Nielsen v. Preap*, 139 S. Ct. 954, 959 (2019) (describing the INA’s framework for “detention pending a decision on removal”).

in the United States or formed ties here, in most cases she is no worse off than when she applied for admission in the first place.¹⁴³ Compared with the rigors of indefinite wartime detention, the death penalty, or incarceration as punishment for a crime, denial of admission is not as compelling a deprivation for remedy through the Great Writ.

Further, the Ninth Circuit in *Thuraissigiam* relied excessively on Justice Kennedy's reservation in *Boumediene* of the question of Guantanamo detainees' due process rights.¹⁴⁴ While there are certainly contexts in which a petitioner uses habeas to vindicate *other* rights,¹⁴⁵ Justice Kennedy's decision in *Boumediene* borrowed liberally from the case law and concepts of due process.¹⁴⁶ A central prong in procedural due process analysis—the risk of error in the challenged procedural framework—was essential to Justice Kennedy's opinion finding the need for habeas as a corrective.¹⁴⁷ Any context in which habeas is available assumes that the process that has harmed the petitioner

143. Courts have long distinguished entrants to the United States on this basis. *See, e.g., Yamataya v. Fisher* (The Japanese Immigrant Case), 189 U.S. 86, 101–02 (1903) (holding that due process applies to a foreign national who “has entered the country, and has become . . . a part of its population” (emphasis added)). In the next section, I argue that asylum seekers have a larger stake in proceedings because they allege that denial of admission will typically entail removal to their home country where they will face persecution, including the risk of arrest, torture, or death. *See infra* notes 199–205 and accompanying text.

144. *See Boumediene v. Bush*, 553 U.S. 723, 785 (2008) (observing that the Court would “make no judgment whether . . . [administrative remedies for Guantanamo detainees] satisfy due process standards”); *see also Thuraissigiam v. Dep’t of Homeland Security*, 917 F.3d 1097, 1112 (9th Cir. 2019) (noting the *Boumediene* majority’s decision to leave for another day the question of whether the Due Process Clause protected Guantanamo detainees); *id.* at 1111 (asserting that “the rights protected by the Suspension Clause are not identical to those under the Fifth Amendment’s guarantee of due process”).

145. *See Padilla v. Kentucky*, 559 U.S. 356 (2010) (granting the post-conviction habeas petition made by an immigrant who had pleaded guilty to an offense that made him removable, on the ground that his defense lawyer had provided ineffective assistance of counsel under the Sixth Amendment’s fair trial guarantee by failing to provide him with information about the immigration consequences of his conviction). In the ordinary criminal justice system, defendants who have exhausted their direct appeals sometimes collaterally attack their convictions through habeas corpus, citing the Sixth Amendment or other provisions of the Bill of Rights. The Supreme Court has held that if Congress or a state legislature restricts access to habeas as a collateral remedy for criminal defendants, the statute limiting habeas must also furnish an acceptable substitute. *See Swain v. Pressley*, 430 U.S. 372, 381 (1977). In *Boumediene*, Justice Kennedy noted this as a building block in his argument that Congress could violate the Suspension Clause by limiting habeas for criminal defendants collaterally attacking their convictions and failing to provide an adequate substitute, even if the underlying criminal trial was consistent with due process. *Boumediene*, 553 U.S. at 785 (arguing that even though a “full criminal trial” presumably comports with due process, legislative limits on habeas must *still* include an adequate substitute, suggesting as a result that habeas and due process are not co-extensive). However, as Chief Justice Roberts observed in his dissent in *Boumediene*, habeas is vital as a collateral remedy for wrongful criminal convictions precisely because habeas helps bring to the surface *underlying flaws* in the initial trial, including ineffective assistance of counsel or the presentation of evidence that a defendant has showed on collateral view was inaccurate and should give way to evidence of the defendant’s actual innocence. *See id.* at 813–14 (Roberts, C.J., dissenting) (discussing the range of purposes of habeas, with each having a different scope of habeas review).

146. *See Boumediene*, 553 U.S. at 781 (noting that the scope of review for habeas hinges on whether “the rigor of any earlier proceedings accords with our test for procedural adequacy in the due process context” (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976))); *see also* Gerald Neuman, *The Habeas Corpus Suspension Clause After Boumediene v. Bush*, 110 COLUM. L. REV. 537, 553–56 (2010) (discussing *Boumediene*’s nod to due process balancing).

147. *See Boumediene*, 553 U.S. at 783–84 (noting what Justice Kennedy viewed as substantial flaws in the administrative process for the release of Guantanamo detainees).

has *some* underlying error or lack of fairness that habeas will remedy.¹⁴⁸ The issue of habeas corpus's availability for Guantanamo detainees fits this template; if habeas or an adequate substitute must be available, it is because the absence of habeas will countenance a state of affairs—such as protracted, arbitrary, and wrongful detention—that violates the petitioner's rights.¹⁴⁹ An account like Justice Kennedy's in *Boumediene* veers into incoherence if it purports to find a violation of the Suspension Clause without identifying "what rights either habeas [or an administrative substitute]. . . is supposed to protect."¹⁵⁰ The Ninth Circuit's decision in *Thuraissigiam* flirts with incoherence in much the same way.¹⁵¹

C. *Inquisitorial Integrity*

The error-correction and nonreviewability approaches do not exhaust the options available for habeas review. This Subsection discusses an alternative approach that the Supreme Court has used most often in cases of extradition or other transfers of individuals from U.S. custody to other nations.¹⁵² While the case law on what I refer to as inquisitorial integrity in the extradition/transfer process typically deals with actual or claimed U.S. citizens,

148. See *id.* at 813–14 (Roberts, C.J., dissenting); see also *id.* at 813 (citing *Reid v. Covert*, 354 U.S. 1, 75 (1957) (Harlan, J., concurring) (explaining that “the question of which specific safeguards of the Constitution are to be applied in a particular context . . . can be reduced to the issue of what process is ‘due’ a defendant in the particular circumstances of a particular case”). Cf. Kovarsky, *supra* note 100, at 895–900 (arguing—based on historical practice—that habeas is a vehicle for remedying violations of other substantive constitutional rights).

149. At least one modern scholar has argued that habeas should not be available for enemy fighters, even those who have entered the United States. See generally Andrew Kent, *Judicial Review for Enemy Fighters: The Court's Fateful Turn in Ex Parte Quirin*, 66 VAND. L. REV. 153 (2013). In contrast, this Article's approach assumes that habeas *would* be available in that situation. However, a full discussion of that point is beyond this Article's scope.

150. *Boumediene*, 553 U.S. at 813 (Roberts, C.J., dissenting).

151. In addition to its substantive anomalies, the Ninth Circuit's broad reading of Justice Kennedy's opinion in *Boumediene* also clashes with the most plausible prediction of the current Supreme Court's reading. Justice Kennedy has retired, and on most issues relevant to habeas corpus Kennedy's replacement, Justice Gorsuch, is more conservative. Little in Justice Gorsuch's track record suggests that he views habeas as an expansive remedy unmoored from distinct constitutional rights. See *Wilson v. Sellers*, 138 S. Ct. 1188, 1198 (2018) (Gorsuch, J., dissenting) (quoting an earlier Supreme Court decision asserting that habeas is “a guard against *extreme malfunctions* in the state criminal justice systems” (citation omitted)). In most cases in which the Court is closely divided, as it was in *Boumediene*, Chief Justice Roberts is now the swing vote. See, e.g., *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2573–76 (2019) (finding that the Department of Commerce's rationale for adding a citizenship question to the census was pretextual). Given Chief Justice Roberts' skepticism about Justice Kennedy's approach in *Boumediene*, the Court's current configuration does not augur well for an expansive reading of that decision.

152. See *Munaf v. Geren*, 553 U.S. 674, 694–95 (2008); *Wilson v. Girard*, 354 U.S. 524, 529–30 (1957); *Ornelas v. Ruiz*, 161 U.S. 502, 509 (1896) (denying a habeas petition brought by an individual subject to extradition and noting that the “judgment of the magistrate rendered in good faith on legal evidence . . . is final . . . unless palpably erroneous in law”); *In re Stupp*, 23 F. Cas. 296, 303 (C.C.S.D.N.Y. 1875). Professor Gerald Neuman discussed the relevance of extradition as a possible “analogue” to cases involving denial of admission in his important article on immigration and habeas. See Neuman, *Habeas Corpus and Executive Detention*, *supra* note 18, at 990–1005. One Supreme Court immigration admission decision is also consistent with the model of inquisitorial integrity outlined here. See *Gegiow v. Uhl*, 239 U.S. 3, 9 (1915) (holding that an immigration inspector who applied the wrong test to determine whether a candidate for admission was likely to become a “public charge” was thus “exceeding his power”).

petitioners in such cases face a risk of harm from prosecution and punishment in the state seeking custody. Versions of asylum dating back to the Founding Era have been salient in the evolution of precedent in this domain.¹⁵³ As the next Part suggests, the interest of the petitioner in avoiding a bad-faith prosecution in such cases parallels the interest of the asylum claimant in avoiding persecution based on one of the INA's protected grounds.¹⁵⁴

This body of law reviews inquisitorial proceedings, in which an official investigates, asks questions, and then makes a determination on a party's request. Generally, the cases require some measure of independence by the examining officer, who must also act in good faith,¹⁵⁵ avoid plain legal error,¹⁵⁶ and provide basic procedural protections such as an opportunity to be heard.¹⁵⁷ Meeting these relatively relaxed requirements ensures that the outcome of the proceedings has integrity. That relaxed approach imposes some check on executive decisions, although it consciously avoids the more rigorous strictures of the error-correction model, which would impinge on the efficiency needed in contexts such as extradition and transfers of custody.

1. Independence

A measure of independence is crucial to the integrity of the inquisitorial process. In the extradition or transfer process, the inquisitor cannot be completely beholden to the requesting state. That would make the requesting state the "judge of its own case." Insulating the inquisitor from that influence is necessary for integrity.

A prominent Founding Era controversy—the Jonathan Robbins affair—catalyzed this concern for independence.¹⁵⁸ The Robbins case arose because in 1799, Britain requested the extradition of one Thomas Nash on charges of mutiny.¹⁵⁹ In response, Nash claimed that he was actually a U.S. citizen, Jonathan Robbins, whom the British had impressed into their navy. The matter quickly became a political controversy in the United States, since Britain

153. See *United States v. Robins*, 27 F. Cas. 825, 832 (D.S.C. 1799).

154. See *infra* Section III, and accompanying footnotes nn. 196–202.

155. See *United States v. Rauscher*, 119 U.S. 407, 422 (1886) (noting that the doctrine of "specialty," which bars material variation between charges that formed the basis of an extradition request and those actually brought upon a suspect's return, guards against "fraud" and "bad faith" by the requesting country).

156. See *In re Stupp*, 23 F. Cas. 296, 303 (C.C.S.D.N.Y. 1875).

157. See *infra* notes 187–95 and accompanying text.

158. *United States v. Robins*, 27 F. Cas. 825, 832 (D.S.C. 1799). The case name appears in the official reporter without the second "b" in Robbins' name. Significant scholarly literature has developed around this episode. See generally Ruth Wedgwood, *The Revolutionary Martyrdom of Jonathan Robbins*, 100 *YALE L.J.* 229 (1990); see also Peter Margulies, *Taking Care of Immigration Law: Presidential Stewardship, Prosecutorial Discretion, and the Separation of Powers*, 94 *B.U. L. REV.* 105, 134–38 (2014); Neuman, *Habeas Corpus and Executive Detention*, *supra* note 18, at 995–96; John T. Parry, *International Extradition, the Rule of Non-Inquiry, and the Problem of Sovereignty*, 90 *B.U. L. REV.* 1973, 1975 n.10 (2010) (terming this incident a "cautionary tale of executive power for decades to come").

159. Wedgwood, *supra* note 158, at 286.

made the request under the Jay Treaty, which had been negotiated by the Federalist John Jay but had drawn the indignation of Jeffersonian Republicans as elevating British interests at American expense.¹⁶⁰ The Jeffersonian Republicans also expressed sympathy for mutineers, whom they took to be engaging in political action, using self-help as the only recourse against the notoriously harsh discipline practiced by British naval commanders on their crews, which often included impressed U.S. seamen.¹⁶¹

With no legislation implementing the Jay Treaty's extradition provision, Federalist President Adams had to act without congressional guidance. Adams informed the federal judge presiding over Britain's extradition request of Adams' "advice and request" that the judge order Nash's return.¹⁶² The judge conducted an inquiry that resulted in Nash's return to the British and eventual trial, conviction, and execution. The Jeffersonian Republicans' anger at what they perceived as Adams acting without congressional authorization and impinging on judicial independence resulted in a close vote against Adams' impeachment, Republican electoral ascendancy in the election of 1800, and the absence of any U.S. extradition for almost fifty years.¹⁶³ Extradition only resumed in the middle of the 19th century, after then-Secretary of State Daniel Webster concluded the Webster-Ashburton Treaty with Britain.¹⁶⁴ Viewed as a reflection of Founding Era constitutionalism, the Robbins episode highlighted the need for independence in extradition as central to maintaining consensus on the primacy of the rule of law.

Courts conducting habeas proceedings under the Webster-Ashburton Treaty noted the independence that the agreement built into the extradition process and the relevance of that process to alleviating concerns about political persecution by the requesting country. Although neither the treaty nor a statute expressly authorized habeas jurisdiction for the appeal of grants of a country's request for extradition, federal courts immediately began consideration of habeas requests by the subjects of extradition requests.¹⁶⁵ The habeas court reviewed a decision that *already* included safeguards for independence: the commissioner who examined the requesting country's charges was an

160. *Id.* at 289–92.

161. Margulies, *supra* note 158, at 134–35; Wedgwood, *supra* note 158, at 284–85.

162. Margulies, *Taking Care of Immigration Law*, *supra* note 158, at 136–37; Wedgwood, *supra* note 158, at 292. This request was conveyed through Adams' Secretary of State, Timothy Pickering. See Margulies, *supra* note 158, at 137.

163. Margulies, *Taking Care of Immigration Law*, *supra* note 158, at 138. The Robbins affair was the occasion for John Marshall's famous speech to Congress, in which Marshall argued that the President is the "sole organ" for U.S. positions on foreign affairs, but also appeared to suggest that Congress had a role in the execution of treaty obligations. See 10 *Annals of Cong.* 613 (1800).

164. See Treaty to Settle and Define the Boundaries Between the Territories of the United States and the Possessions of Her Britannic Majesty in North America, for the Final Suppression of the African Slave-Trade, and For the Giving Up of Criminals Fugitive from Justice, in Certain Cases (Webster-Ashburton Treaty), Aug. 9, 1842, *entered into force* Oct. 13, 1842, 8 Stat. 572, 12 Bevans 82.

165. See *In re Kaine*, 14 F. Cas. 84, 87 (C.C.S.D.N.Y. 1852) (asserting that the court had the authority to consider the subject's challenge to his extradition and that the Suspension Clause precluded the use of the treaty power to curb access to habeas, at least in a "time of peace"), *writ dismissed on other grounds*, 55 U.S. 103 (1852).

independent officer appointed by the Federal Circuit Court in New York.¹⁶⁶ That independence quelled the concern, manifested first in the Robbins matter and then by popular sentiment in *Kaine*, that the requesting country—Britain—and the United States were colluding in extradition to assist the requesting country’s political designs.¹⁶⁷ Subsequent cases have also stressed independence.¹⁶⁸

2. *The Overarching Premise of Good Faith*

Good faith is part of the backdrop for extradition, which occurs under bilateral treaties entered into by the United States and other states. In extradition, the doctrine of specialty is a crucial safeguard that reduces the chance for “bad faith” and subterfuge by the state requesting extradition.¹⁶⁹ Extradition agreements ensure that individuals who commit crimes that affect the “life, liberty, and person” of others cannot evade legal accountability through flight to another country.¹⁷⁰ Extradition treaties typically enumerate serious offenses—such as murder, robbery, or forgery—which would trigger return to a requesting state.¹⁷¹ However, the benefits of extradition for enforcing accountability came with a crucial caveat that ensured that extradition would not become a tool for political oppression.

In *United States v. Rauscher*, the Supreme Court noted “the policy of all governments” to “grant. . . asylum to persons who have fled from their homes

166. *See id.* at 88, 92.

167. *See id.* at 87 (expressing concern, based on prior developments in the case, that the subject of the request—a national of Ireland—might be “rescued from the custody of the law by a mob” intent on preventing his extradition to Britain); *see also* Neuman, *Habeas Corpus and Executive Detention*, *supra* note 18, at 998 (discussing the case).

168. For example, *Wilson v. Girard*, 354 U.S. 524 (1957) involved the U.S.’ agreement to waive its right under a bilateral agreement to try a service member accused of misconduct. Pursuant to the waiver, the U.S. permitted Japan to try the service member. In *Girard*, the post-World War II relationship between the U.S. and Japan furnished sufficient assurance that the decision to defer to Japan was not the product of Japan’s undue influence. Japan had unconditionally surrendered at the war’s conclusion, and war crimes trials addressing Japanese atrocities during the conflict had occurred shortly thereafter. *See Hirota v. MacArthur*, 338 U.S. 197, 199 (1948) (Douglas, J., concurring); Stephen I. Vladeck, *Deconstructing Hirota: Habeas Corpus, Citizenship, and Article III*, 95 GEO. L.J. 1497, 1499–1500 (2007). Japan was in no position to intimidate the United States into surrendering a U.S. service member. Under the circumstances, the nature of the U.S.-Japan relationship guaranteed that the United States’ waiver of its rights under the agreement constituted an independent decision.

Similarly, in *Munaf v. Geren*, 553 U.S. 674 (2008), the Court upheld the transfer of two U.S. citizens—who had allegedly joined the insurgency that followed the toppling of Saddam Hussein—to Iraqi authorities by a U.N.-authorized multinational force run by the United States. *Id.* at 681–84. The context of *Munaf* framed the issue of independence differently: it concerned whether a post-Saddam Hussein regime manifestly beholden to the United States could keep a neutral posture about an individual whom the United States clearly believed to be an insurgent who threatened U.S. interests as well as Iraqi security. While the question is closer than in *Girard*, the *Munaf* Court could cite evidence of Iraqi tribunals’ independence. In one of the two cases that the Court had heard together in *Munaf*, an Iraqi tribunal had displayed independence by vacating the petitioner’s conviction and requiring more investigation. *See id.* at 684. While this fact did not figure heavily in Chief Justice Roberts’ opinion for the Court, it provided at least a baseline indication that the Iraqi tribunal would not be a mere rubber stamp for the U.S. executive branch’s expedient calculus.

169. *See United States v. Rauscher*, 119 U.S. 407, 422 (1886).

170. *See id.* at 420.

171. *See id.* at 421.

on account of political disturbances.”¹⁷² Extradition treaties exclude “political offenses,” since allowing returns in such cases could cement a requesting state’s power over its domestic opponents and undermine the purpose of asylum.¹⁷³ Under the doctrine of specialty, a requesting state must allege that an individual committed a “specific offense” covered by the extradition treaty.¹⁷⁴ Once the requesting state cites that specific charge as the basis for an extradition request, it cannot substitute *another* offense after it obtains custody of the individual.¹⁷⁵

This requirement of consistency between the basis for the extradition request and the subsequent prosecution in the requesting state guards against “fraud” and “bad faith” in the extradition process. It thus ensures the integrity of the process and mandates adherence to the “solemn” purposes of extradition agreements.¹⁷⁶ The duty to comply with the doctrine of specialty binds both the requesting state and the state honoring the extradition request; a state must reject a request if that nation reasonably believes that the requesting state intends to breach the specialty principle.¹⁷⁷ Good faith has also played a role in more recent cases addressing this issue.¹⁷⁸

172. *Id.* at 420.

173. *See id.* At the time of *Rauscher*, asylum was often the tacit result of an individual emigrating to another country, since many countries, including the United States, lacked immigration laws to keep out foreign nationals. *See generally* Matthew J. Lindsay, *Immigration as Invasion: Sovereignty, Security, and the Origins of the Federal Immigration Power*, 45 HARV. CIV. RTS.-CIV. LIB. L. REV. 1 (2010); Gerald L. Neuman, *The Lost Century of American Immigration Law (1776–1875)*, 93 COLUM. L. REV. 1833 (1993); James E. Pfander & Theresa R. Wardon, *Reclaiming the Immigration Constitution of the Early Republic: Prospectivity, Uniformity, and Transparency*, 96 VA. L. REV. 359 (2010).

174. *Rauscher*, 119 U.S. at 419.

175. *Id.* at 419–20.

176. *Id.* at 422.

177. *Id.*

178. In *Munaf v. Geren*, 553 U.S. 674 (2008), a unanimous Court upheld the transfer to Iraqi authorities by a U.N.-authorized multinational force run by the United States of two U.S. citizens who had traveled voluntarily to Iraq and then allegedly committed crimes in the ongoing insurgency against the post-Saddam Hussein regime. *See id.* at 681–84. The Court stated that it would not review the transfer on the merits, referring to the longstanding principle of territorial jurisdiction, which allows a state to prosecute alleged criminal conduct on its own territory. *Id.* at 694–95; *see also* *Wilson v. Girard*, 354 U.S. 524, 529 (1957). However, in *Girard*, which *Munaf* cited, the Court assured itself that the transfer of a U.S. service member to Japan was done in good faith. *See id.* at 532–36 (including an appendix consisting of an affidavit by Department of Defense General Counsel Robert Dechert, who described in detail the service member’s apparent culpability in the homicide; according to Dechert’s affidavit the service member had willfully fired a shell casing from a grenade launcher at close range in the direction of a Japanese female civilian scavenging for copper casings after luring in the victim by throwing casings on the ground). Moreover, all of the Justices in *Munaf* agreed that the transfer in that case met the threshold criterion of good faith. Both opinions in the case observed that the petitioners had not submitted evidence that the United States had transferred the petitioners to facilitate their interrogation by Iraqi authorities under conditions that would be illegal in the United States. *See Munaf*, 553 U.S. at 702 (noting that the petitioners had “allege[d] only the possibility of mistreatment” by Iraqis, and that U.S.-Iraqi diplomatic exchanges on the issue of prisoner abuse helped persuade the Court that this was *not* a case “in which the Executive has determined that a detainee is likely to be tortured but decides to transfer him anyway”); *id.* at 706–07 (Souter, J., concurring) (suggesting that habeas or another remedy would be available if the U.S. government planned to transfer a detainee to a country where the risk of torture was clear, but implying that this was not such a case). In addition, the rationale for deference regarding transfers to a state exercising territorial jurisdiction may not be as compelling for transfers to other states that lack this venerable foundation for adjudication. *See generally* *Doe v. Mattis*, 889 F.3d 745 (D.C. Cir. 2018) (upholding

3. *Plain Error and the Officer's Power*

In a leading case, the court also asked whether the determination to extradite “exceeded the jurisdiction” of the official presiding over the inquisitorial process.¹⁷⁹ During the nineteenth-century, when extradition doctrine developed, courts often cited this element, which also in practice covered plain legal error.¹⁸⁰ The modest review contemplated by this requirement ensures that extradition and transfer stay within the parameters of the legal system rather than becoming creatures of executive whim or caprice.

In *Gegiow v. Uhl*,¹⁸¹ Justice Holmes wrote for the Court in the single admission case that relied on this standard, granting the writ because the “commissioner of immigration. . . [was] exceeding his power.”¹⁸² The inspector misconstrued the statutory requirement that the candidate for admission not be “likely to become a public charge”; he defined “public charge” as including consideration of specific local labor market conditions instead of the “permanent personal” attributes of the noncitizen, such as a history of dependence on others or risk of future dependence due to severe physical or mental disabilities.¹⁸³

In reinforcing that the inspector’s misreading of the legal standard had resulted in a decision beyond the inspector’s scope of power, Justice Holmes

an injunction against the transfer of a U.S. citizen to a state without a territorial link, absent a further showing by the government).

Establishing threshold good faith has also played a role in immigration decisions featuring a “circumscribed judicial inquiry” into admission decisions that may affect the rights of U.S. citizens. *See, e.g.*, *Trump v. Hawaii*, 138 S. Ct. 2392, 2419 (2018) (upholding President Trump’s travel ban on the admission of persons from several countries, most of which were Muslim-majority, and indicating that even when an admissions decision implicates the First Amendment interests of U.S. nationals in free speech or no established church, courts should defer to executive decisions about admission that are “facially legitimate and bona fide”); *Kerry v. Din*, 135 S. Ct. 2128, 2141 (2015) (Kennedy, J., concurring) (applying a standard based on the assumption that due process applied in the case of a U.S. citizen seeking review of an Afghan spouse’s visa denial); *Kleindienst v. Mandel*, 408 U.S. 753, 756–57 (1972). Each of these decisions is quite deferential; however, a deferential standard is better than no standard at all. *Cf.* Peter Margulies, *The Travel Ban Decision, Administrative Law, and Judicial Method: Taking Statutory Context Seriously*, 33 GEO. IMMIGR. L.J. 159 (2019) (critiquing *Trump v. Hawaii* as unduly deferential to the executive branch). Even more recently, in a decision upholding an injunction against the Department of Commerce asking a citizenship question on the U.S. Census, the Supreme Court—in an opinion by Chief Justice Roberts—cited the “contrived” and pretextual nature of the government’s rationale as the basis for its holding. *See Dep’t of Commerce v. New York*, 139 S. Ct. 2551, 2573–76 (2019).

179. *See In re Stupp*, 23 F. Cas. 296, 303 (C.C.S.D.N.Y. 1875).

180. *See id.* (restating the law on review of findings by a commissioner presiding over an extradition request and noting that the commissioner cannot “arbitrarily commit the accused for surrender, without any legal evidence”); *see also* Fallon, *Applying the Suspension Clause to Immigration Cases*, *supra* note 18, at 1098 n.168. The requirement in older entrant cases that deportation be supported by “some evidence” also touches on similar concerns, as a finding unsupported by “some evidence” therefore lacks a basis in any evidence. *Cf.* Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, *supra* note 18, at 1014–15, 1020 (discussing the “some evidence” standard). However, the inquisitorial integrity approach outlined here does not rely on the “some evidence” standard because that standard blurs the difference between the deferential approach in admission cases and the somewhat more probing approach appropriate in the entrant context.

181. *Gegiow v. Uhl*, 239 U.S. 3 (1915).

182. *Id.* at 9.

183. *Id.* at 9–10 (contrasting such durable personal features with the “local conditions” relied on by the inspector, which might vary with time and place).

also cited to another provision of the statute that expressly gave the President authority to consider “detriment. . . [to] labor conditions.”¹⁸⁴ Under that provision, the President may categorically deny admission to nationals of any country that willfully issues passports to nationals without family ties to the United States or skills needed in the labor market and facilitates foreign passport-holders’ passage from a U.S. territory such as Hawaii to the “continental territory of the United States.”¹⁸⁵ For Holmes, an express grant of power to the President of this type suggested that Congress could not have intended to grant similar authority to a line-level immigration inspector.

In extradition cases, the conception of the examining magistrate’s power was rooted in the avoidance of plain legal error. A habeas court could review the legal issue of whether the conduct alleged in the extradition request constituted an “extraditable crime.”¹⁸⁶ Review of this determination ensured that the requesting state was not seeking to undermine the integrity of the extradition process by seeking the return of those who had committed political offenses. Insisting that a request describe an extraditable crime also reinforced the specialty doctrine, as the state receiving the request could not monitor the actual crime charged after the return of the prisoner to ensure that it was identical to the crime cited in the request. To ensure vigilance on this score, a court could grant the writ if the commissioner’s decision was “palpably erroneous” as a legal matter.¹⁸⁷ Such occasions were rare because the plain error standard was appropriately deferential and magistrates had the independence necessary to do their jobs. But having the standard in place was a useful check as well as a symbol of independent review.

4. *Procedural Rights for Subjects of Proceedings*

Courts have also stressed that in the extradition and transfer contexts, the subjects of other states’ requests must offer an array of procedural rights. Although review of these requests will not inquire on a granular level about every possible procedural error that has or might occur, courts generally seek assurance at a systemic level that a fair process is in place.

184. *Id.*

185. See Act of Feb. 20, 1907 (An Act to Regulate the Immigration of Aliens into the United States), ch. 1134, 34 Stat. 898. This statute codifies the so-called “Gentlemen’s Agreement,” in which then-president Theodore Roosevelt agreed with Japan to limit the immigration of low-skilled laborers from Japan who had disembarked in Hawaii—then a U.S. territory—and then traveled to California; in exchange, Roosevelt committed the U.S. government to ensure that U.S. states such as California did not violate the Equal Protection Clause by discriminating in public education against lawful U.S. residents from Japan. See Elishu Root, *The Real Questions under the Japanese Treaty and the San Francisco School Board Resolution*, 1 AM. J. INT’L L. 273, 277 (1907) (explaining the agreement; the Secretary of State asserted that state segregation of Japanese schoolchildren was unlawful because the state is “forbidden . . . to discriminate”); see also Margulies, *Taking Care of Immigration Law*, *supra* note 158, at 156–58 (describing the background and the context of the agreement, including San Francisco’s attempt to bar Japanese children from public schools).

186. See *Ornelas v. Ruiz*, 161 U.S. 502, 509 (1896).

187. See *id.*

In an early extradition case, Judge Blatchford, who subsequently served on the Supreme Court, vacated the order of a commissioner who refused to permit the accused to testify.¹⁸⁸ For then-Judge Blatchford, the ability of the accused to testify was an important safeguard against arbitrary decisions.¹⁸⁹ Not every procedural request of a petitioner would elicit such a reaction. Indeed, Judge Blatchford rejected another argument by the petitioner that the commissioner should have adjourned the hearing to allow the petitioner to obtain evidence from Switzerland, which had requested the petitioner's extradition to stand trial on forgery charges. Judge Blatchford noted that the petitioner had not submitted a specific proffer regarding the evidence sought and thus had not shown that the evidence existed or was "accessible or . . . likely to be obtained."¹⁹⁰ Here, too, the habeas court focused on procedural safeguards, although it did not allow the hypothetical availability of exculpatory evidence to interfere with the court's efficient processing of the extradition request.

In subsequent cases involving extradition and transfer, courts have expressly noted the accused's right to question witnesses and gain access to evidence. For example, in *Wilson v. Girard*, the Court upheld the transfer of a U.S. service member to Japanese authorities for trial following allegations of criminal conduct occurring on Japanese territory.¹⁹¹ In an appendix, the Court cited to a Department of Defense affidavit by its General Counsel guaranteeing that in the Japanese criminal prosecution, the defendant would have a lawyer of his choice paid for by the U.S. government, an interpreter, full information on the charges, the right to confront all witnesses, compulsory process for witnesses on his behalf, and attendance at the trial by a U.S. government representative, who would monitor the proceedings and report back to U.S. officials.¹⁹² While the Court's per curiam decision rested mainly on the age-old principle that a state maintains jurisdiction to try individuals for alleged criminal conduct occurring within that state's territory,¹⁹³ both the nature of the post-war U.S.-Japan relationship and the detail in the Defense Department General Counsel's affidavit suggested strongly that the accused would receive baseline procedural rights.¹⁹⁴

188. See *In re Farez*, 8 F. Cas. 1007, 1011–12 (C.C.S.D.N.Y. 1870) (asserting that "the prisoner must have an opportunity, if he desires, of making his own statement under oath").

189. In a subsequent decision, Judge Blatchford questioned whether a habeas court could even require a commissioner to permit the accused's testimony if other competent evidence supported the extradition request. See *In re Stupp*, 23 F. Cas. 296, 300–01 (C.C.S.D.N.Y. 1875). In any case, extradition requests always proceed on notice to the accused, who has an opportunity to respond in writing and in practice frequently appears before the commissioner. See *In re Farez*, 8 F. Cas. 1001, 1003 (C.C.S.D.N.Y. 1869) (recounting the extensive earlier proceedings in *Farez's* case).

190. *Farez*, 8 F. Cas. at 1013.

191. *Wilson v. Girard*, 354 U.S. 524, 529–30 (1957).

192. *Id.* at 547.

193. See *id.* at 529–30.

194. Language in *Munaf v. Geren*, 553 U.S. 674 (2008), indicates that a habeas court in a transfer case involving a requesting state's territorial jurisdiction should not review the requesting state's procedural rights. See *id.* at 696 (noting that in cases involving territorial jurisdiction, an otherwise lawful

In sum, inquisitorial integrity looks to the presence of an independent decisionmaker, a good-faith judgment, the absence of plain legal error, and fundamental fairness. Although this model lacks the rigor of the error-correction approach, it does serve the checking function that habeas performs in the constitutional design.

III. SELECTING THE HABEAS MODEL FOR ADMISSION AND EXPANDED EXPEDITED REMOVAL: THE ROLE OF DUE PROCESS BALANCING

This Part turns to the Supreme Court's procedural due process test in *Mathews v. Eldridge* to determine which approach—error-correction, nonreviewability, or inquisitorial integrity—is appropriate for expedited removal.¹⁹⁵ Addressing due process is vital because, as Chief Justice Roberts noted in his dissent in *Boumediene v. Bush*, crafting the contours of habeas must entail consideration of “what rights either habeas [or an administrative substitute]. . . is supposed to protect.”¹⁹⁶ Under *Mathews*, the Court considers the interest of the individual, the interest of the government, and the risk of error posed by current procedures.¹⁹⁷ Applying this test leads to disparate results for expedited removal in admission cases and expanded expedited removal, respectively. In the former case, the more deferential inquisitorial

transfer or extradition is not vitiated if the requesting state does not provide the same procedural rights contained in the U.S. Constitution). Nevertheless, the *Munaf* Court's recital of the facts in the case indicates both that compelling evidence supported at least one of the two prosecutions addressed in that case and that in the other case, an Iraqi tribunal had vacated the petitioner's conviction, providing him with a new trial. *See id.* at 681 (describing one petitioner's capture in a residence with “explosive devices and other weapons,” in the company of an Iraqi insurgent and fighters from Jordan); *id.* at 683–84 (discussing the course of earlier proceedings in Iraq regarding the other petitioner). Chief Justice Roberts, writing for the Court in *Munaf*, also cited an earlier case, *Neely v. Henkel*, 180 U.S. 109 (1901), in which the Court had declined to hold the procedures of a requesting state to the standards of the U.S. Constitution. *Munaf*, 553 U.S. at 695–96. However, in *Neely*, the Court noted that under the relevant statute the requesting state had to show probable cause that the accused had committed the crime charged and had to provide the accused with a “fair and impartial trial,” albeit one that did not necessarily comply in all particulars with U.S. constitutional norms. *Neely*, 180 U.S. at 123.

195. *Mathews v. Eldridge*, 424 U.S. 319, 334–35 (1976).

196. *See Boumediene v. Bush*, 553 U.S. 723, 813 (2008) (Roberts, C.J., dissenting); *see also* Fallon, *Applying the Suspension Clause to Immigration Cases*, *supra* note 18, at 1078–79 (arguing that habeas derives content from other constitutional provisions, such as Article III and due process). *But see* Neuman, *Habeas Corpus and Executive Detention*, *supra* note 18, at 1020–21 (suggesting that the Suspension Clause alone is sufficient to support the judicial review of removal decisions, including those in admission cases). Under the approach taken in this Article, Congress cannot curb judicial review required by the Due Process Clause, regardless of whether Article III of the Constitution, which governs federal judicial power, provides a separate check on Congress's ability to limit such review. *See generally* Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. 272 (1855) (holding that Congress can enact an administrative procedure to remedy federal tax collectors' refusal to hand over duly collected taxes to the government); *see also* Fong Yue Ting v. United States, 149 U.S. 698, 714–15 (1893) (suggesting that the denial of admission can be effected on the sole authority of political branches and that judicial review is not required). *Cf.* Fallon, *Applying the Suspension Clause to Immigration Cases*, *supra* note 18, at 1080–81 (discussing the “public rights” doctrine that allows Congress to limit judicial review of cases involving rights that accrue to the public generally, and the relevance of the doctrine to immigration law). In light of this focus on due process, the Article defers discussion of Article III's independent significance to another day.

197. *Mathews*, 424 U.S. at 334–35. Along with the risk of error, courts should also consider the value of additional safeguards in reducing the risk of error. *See id.* at 335.

integrity standard is appropriate; that standard enhances the recourse of asylum seekers, virtually all of whom have no avenue for review today.¹⁹⁸ In the latter, the application of *Mathews* requires the use of the more probing error-correction approach, in large part because of U.S. ties developed by foreign nationals who have entered the United States and resided here for any period under two years.

A. *The Individual's Interest*

The interest of the individual is a central driver in this Article's approach. With respect to cases involving persecution claims, the individual's interest in admission supports the rejection of the traditional nonreviewability paradigm and the adoption of an inquisitorial integrity standard.¹⁹⁹ These compelling interests also support this Article's prescription that courts adopt an error-correction standard for review of expanded expedited removal determinations.

In dealing with an asylum seeker, a false negative can result in arbitrary arrest, torture, or death.²⁰⁰ The avoidance of these harms to life, liberty, and personal safety equals or outweighs mere harm to income or property, which may trigger due process protections.²⁰¹ Nevertheless, the harms associated with denying asylum differ from those recognized in existing caselaw. For example, compared with the Guantanamo detainees who gained access to habeas in *Boumediene v. Bush* to secure their release from indefinite wartime detention, an asylum seeker denied admission does not necessarily face the *certainty* of harm. An asylum claimant need only show that return to the applicant's home country will engender a "reasonable possibility" of persecution based on one of the five statutory factors.²⁰² Moreover, since the United States is not *directly* causing the possible harm, an applicant denied

198. Their only chance under the statute is the severely limited remedy found in 8 U.S.C. § 1252(e)(2)(A)–(C) (2012), under which a petitioner must show that they are a U.S. citizen, who was in fact *not* ordered removed, or who was previously granted a currently valid LPR, refugee, or asylee status.

199. The inquisitorial integrity standard also dovetails with the "facially legitimate and bona fide" standard that the Court has used in immigration cases that affect a *U.S. citizen's* constitutional rights, such as the right to know under the First Amendment or the right of intimate association with close family members seeking admission from abroad. *See* *Trump v. Hawaii*, 138 S. Ct. 2392, 2419 (2018); *Kerry v. Din*, 135 S. Ct. 2128, 2141 (2015) (Kennedy, J., concurring); *Kleindienst v. Mandel*, 408 U.S. 753, 756–57 (1972).

200. *See* Neuman, *The Habeas Corpus Suspension Clause After Boumediene v. Bush*, *supra* note 146, at 576 n. 212 (implying that the interest of "an asylum seeker . . . wrongly denied referral to a credible fear review" may require heightened protection under *Mathews* balancing); *id.* at 577 n.B 213 (noting that such individuals may face "death or imprisonment" if the United States removes them to their country of origin).

201. *See generally Mathews*, 424 U.S. at 340–43 (assuming that the final termination of Social Security Disability benefits requires an evidentiary hearing, but that because these benefits are not tied to financial need, the preliminary agency termination of benefits does not require a formal pre-deprivation evidentiary hearing, although it does require notice to the recipient and a chance to respond).

202. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 440 (1987).

admission may be able to find safety in a third country.²⁰³ An admission candidate's attenuated or nonexistent ties to the United States further diminish her equities.²⁰⁴ Even appropriately discounted, however, denial of admission clearly increases the risk of serious harm. Under a due process balancing analysis that rejects the "privilege, not right" view of admission that drives the nonreviewability model, the applicant's interest is weighty enough to require *some* judicial review beyond the exceedingly narrow parameters that the INA sets for expedited removal.²⁰⁵

If interests of asylum claimants in admission cases have some weight, the scale tips further for foreign nationals who are subject to *expanded* expedited removal. As the DHS expansion notice conceded,²⁰⁶ foreign nationals who have resided in the United States just short of two years have forged "substantial connections."²⁰⁷ Those ties may include relationships with U.S. citizen friends and families, as well as ongoing duties to comply with U.S. law.²⁰⁸ If our legal system imposes the burden of compliance on entrants, it should also share the benefits of our signature legal protections, including due process. While DHS avowed that its implementation of expedited removal's expansion will take entrants' U.S. connections into account,²⁰⁹ an independent check would ensure that those connections receive an appropriate level of respect. The skeletal judicial review currently available under the expedited removal statute does not adequately protect these interests.

B. *State Interest*

The government's interest also depends on whether the foreign national in removal proceedings has entered the country and on the duration of the entrant's stay here. State interest is most weighty in expeditious removal of inadmissible foreign nationals apprehended at or near the border or a port of entry. In contrast, state interest in removal of entrants who have resided in the United States for up to two years is both less acute—because it does not directly involve management of border inflows—and tempered by countervailing factors, such as the welfare of the foreign national's U.S. citizen

203. See *In re A-G-G-*, 25 I & N Dec. 486, 494 (B.I.A. 2011) (discussing the possibility of resettlement in a third country in the context of an applicant's *prior* resettlement, which bars eligibility for asylum under 8 U.S.C. § 1158(b)(2)(A)(vi)).

204. See *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990) (holding that the Fourth Amendment did not protect a foreign national located abroad, with no previous ties to the United States, from seizure without warrant by U.S. officials who had brought the subject to this country for trial, and distinguishing cases that granted constitutional protections to foreign nationals who have "come within the territory of the United States and developed substantial connections with the country").

205. See 8 U.S.C. § 1252(e)(2)(A)–(C) (2012).

206. See DHS Expansion Notice, *supra* note 5, at 12.

207. *Id.*; see *Yamataya v. Fisher* (The Japanese Immigrant Case), 189 U.S. 86, 101–02 (1903) (holding that due process covers a foreign entrant who has "become . . . a part of . . . [the country's] population"); see also *Aleinikoff*, *supra* note 42, at 242 (asserting that certain entrants have accrued "mutual obligations" with U.S. citizens due to "a sense of sharing in a common enterprise").

208. See *Yamataya*, 189 U.S. at 101–02.

209. See DHS Expansion Notice, *supra* note 5, at 12.

dependents. In either category, the government's interest is *systemic*. With limited resources, the government must both apprehend persons who violate immigration laws and adjudicate immigration cases, including applications for asylum. Moreover, the government's interest is both *ex post*—responding to immigration flows that have already occurred—and *ex ante*: within legal constraints, deterring attempts at entry by inadmissible foreign nationals and those with manifestly unfounded asylum claims.²¹⁰ The government's systemic interest in deterrence requires examination of both “push” and “pull” factors shaping immigration flows.

From a systemic standpoint, an accurate inquisitorial system at the admission stage serves United States interests. As the Supreme Court reiterated in *Trump v. Hawaii*, “the admission and exclusion of foreign nationals is a fundamental sovereign attribute.”²¹¹ Opting for a full adversarial hearing in every case would present significant systemic, logistical and budgetary demands.²¹² Moreover, a turn away from inquisitorial methods would also have *ex ante* feedback effects, increasing the incidence of unauthorized immigration and unfounded asylum claims.

Asylum flows reflect the influence of both push and pull factors. Push factors include climate change, violence abroad, and economic hardship.²¹³ An

210. I use the term “manifestly unfounded” here because asylum seekers may not be able to assess their claims before receiving legal advice adequately, and an excessive focus on deterrence may impede individuals who turn out to have meritorious claims. Overdeterrence would produce an unacceptable increase in false negatives: persons excluded by U.S. immigration law and policy even when they have a well-founded fear of persecution based on one of the five statutory grounds.

211. *Trump v. Hawaii*, 138 S. Ct. 2392, 2418 (2018).

212. See Martin, *Two Cheers for Expedited Removal*, *supra* note 23, at 684–85; see also David A. Martin, *Reforming Asylum Adjudication: On Navigating the Coast of Bohemia*, 138 U. PA. L. REV. 1247, 1268–69 (1990) (suggesting that an unmanageable volume of asylum claims, including a substantial cohort of doubtful merit, “gravely threatens the overall structure of deliberate control over immigration—control that is highly valued by the public, and by politicians and judges”). A sharp upturn in admission asylum claims can overwhelm even the expedited removal process. To alleviate this problem, the Trump Administration has come to rely heavily on two practices used to a lesser degree under the Obama Administration: (1) “metering,” under which asylum applicants wait in Mexico for an interview with a U.S. asylum officer at a port of entry, with only limited slots available each day; and, (2) the “Remain in Mexico” policy, otherwise known as the Migrant Protection Protocols (MPP), which requires that asylum seekers wait in Mexico—sometimes for months or longer—for a full U.S. IJ adversarial hearing. Each of these policies entails exposure of applicants to unsafe conditions. As a result, each policy is problematic, although full discussion of each is beyond the scope of this Article. See generally Innovation Law Lab v. McAleenan, 924 F.3d 503 (9th Cir. 2019) (per curiam) (suggesting that the INA may permit MPP); *id.* at 510–11 (Watford, J., concurring) (warning that the MPP will endanger asylum seekers); Stephanie Leutert, *What “Metering” Really Looks Like in South Texas*, LAWFARE (July 17, 2019), <https://www.lawfareblog.com/what-metering-really-looks-south-texas> (describing the risks of the metering approach, including subjecting asylum seekers to attacks by gangs).

213. See Lorenzen, *supra* note 24, at 749–54; MEISSNER ET AL., *supra* note 24, at 5; Roger Cohen, *‘Here There is Nothing’: Guatemalans Deserve Better Than Jimmy Morales’s Lawlessness and Donald Trump’s Posturing*, N.Y. TIMES (May 10, 2019), <https://www.nytimes.com/2019/05/10/opinion/border-immigration-crisis-guatemala.html> (discussing the effects of climate change—including the greater difficulty in growing coffee beans, the resulting downturn in agriculture, and the growth in palm oil plantations—which have resulted in substantial deforestation, and thus curbed subsistence hunting that provided food for families); Stephanie Leutert, *How a Struggling Coffee Market Pushes Guatemalans North*, LAWFARE (Aug. 20, 2019), <https://www.lawfareblog.com/how-struggling-coffee-market-pushes-guatemalans-north>. In an ominous sign, these “push” factors have risen in importance over the last couple of years. See also Nick Miroff & Josh Dawsey, *Family Crossings Surge at the Border*, WASH. POST (Oct.

important pull factor is U.S. immigration law and procedure. As consumers of advice, rumor, and self-promotion from smuggling networks,²¹⁴ prospective entrants look for openings in U.S. law. More foreign nationals will attempt to gain admission to the United States with manifestly unfounded asylum claims if U.S. legal rules, along with overburdened immigration courts, result in claimants' release from detention and authorized employment during multi-year delays in adjudication.²¹⁵ This pull factor, in some cases, permits the sound preparation of meritorious asylum claims.²¹⁶ But it

18, 2018) (noting that, in the course of reporting on border crossings, throughout each day, "large groups of 100 or more Central American parents and children have been crossing [the border]"); Michael D. Shear & Zolan Kanno-Youngs, *Migrant Families Would Face Indefinite Detention Under New Trump Rule*, N.Y. TIMES (Aug. 21, 2019), <https://www.nytimes.com/2019/08/21/us/politics/flores-migrant-family-detention.html> (quoting Acting Secretary of Homeland Security Kevin McAleenan as asserting that, in the ten-month period ending on August 21, a total of 475,000 members of families crossed the southwestern border of the United States).

214. See GREENFIELD ET AL., *supra* note 25, at 10–14; see also Wayne A. Cornelius, *Death at the Border: Efficacy and Unintended Consequences of U.S. Immigration Control Policy*, 27 POPULATION & DEV. REV. 661, 667–68 (2001) (describing the expanded role of smugglers, sometimes called "coyotes"); see generally Peter Andreas, *Illicit Globalization: Myths, Misconceptions, and Historical Lessons*, 126 POL. SCI. Q. 403, 410–11 (2011) (discussing the history of human smuggling at or near the U.S.-Mexican border).

215. See MEISSNER ET AL., *supra* note 24, at 4 (noting that, "[b]ecause asylum seekers are permitted to remain in the United States while their claims are decided—and, if a decision is not reached within 180 days, are to be granted work authorization—long wait times can create incentives for individuals without qualifying claims to apply"; and further explaining that Congress required an asylum applicant seeking a work permit to wait 180 days from the date of filing the asylum claim "to prevent the asylum system from being used simply to gain employment authorization"); see also Miroff & Dawsey, *supra* note 213 (reporting that border crossers in the current ongoing spike in Central American migration "turn themselves in" to U.S. Customs and Border Patrol (CBP) officers, and after expressing a fear of return to their home country, "are typically assigned a court date and released from custody"); Nick Miroff, *The Border is Tougher to Cross Than Ever. But There's Still One Way Into America.*, WASH. POST (Oct. 24, 2018), <https://www.washingtonpost.com/graphics/2018/national/border-asylum-claims/> (noting that, based on interactions with families crossing the border, for a person seeking to enter the United States without a visa, the "quickest path [is] . . . administrative . . . through the front gates of the country's immigration bureaucracy" by turning oneself in to a CBP officer and claiming asylum).

216. The DHS's rule supplanting the settlement in *Flores v. Reno* by authorizing family detention beyond 20 days is also an effort to neutralize a "pull" factor driving unauthorized immigration. See U.S. DEP'T OF HOMELAND SEC., DHS AND HHS ANNOUNCE NEW RULE TO IMPLEMENT THE FLORES SETTLEMENT AGREEMENT; FINAL RULE PUBLISHED TO FULFILL OBLIGATIONS UNDER FLORES SETTLEMENT AGREEMENT (2019), available at <https://www.dhs.gov/news/2019/08/21/dhs-and-hhs-announce-new-rule-implement-flores-settlement-agreement> (classifying as a "pull" factor the judicial extension of a 20-day limit on detention from unaccompanied children to family units upheld by the Ninth Circuit in *Flores v. Lynch*, 828 F.3d 898 (9th Cir. 2016)); see also *Flores v. Barr*, 407 F. Supp. 3d 909, 929 (C.D. Cal. 2019) (granting an injunction against proposed regulations that would authorize the detention of families beyond 20 days). Whether loosening limits on family detention is sound law or policy also turns on the existence of workable constraints on the duration of detention and conditions in detention facilities. See Margaret H. Taylor & Kit Johnson, "Vast Hordes Crowding In Upon Us": *The Executive Branch's Response to Mass Migration and the Legacy of Chae Chan Ping*, 68 OKLA. L. REV. 185, 201–07 (2015) (criticizing the conditions in family detention). A complete discussion of the *Flores* settlement issue is beyond the scope of this Article.

Describing "pull" factors that help shape the interaction of prospective immigrants and smuggling networks is not an effort to demonize the former group. Individuals who seek to enter the United States are reacting rationally to the burgeoning "push" factors described above, including violence, climate change, and economic hardship. "Push" and "pull" factors interact in diverse ways within the overall population of individuals who consider unauthorized emigration to the United States. When "push" factors are strong enough, changes to "pull" factors alone may be ineffective. For example, for the cohort of Central Americans who have been victims of violence on repeated occasions in their home countries, emigration decisions may not be sensitive to changes in U.S. immigration law or procedure. See Jonathan Hiskey et

also drives up the incidence of inadmissible border crossers and compounds court backlogs with claims lacking merit.²¹⁷ The government has an interest in reducing these externalities.

However, the government's interest in interior removal of entrants is less compelling than its interest in limiting unlawful admissions. In admission cases, the government can rightly claim that its judgments will craft a first line of defense against foreign nationals' attempts at entry, which recently have spiked to unmanageable levels.²¹⁸ That rationale does not wholly dissipate for entrants who lack legal status. Many people who now reside in U.S. interior—and would thus be subjected to expanded expedited removal—came into the country in the same unauthorized way that foreign nationals arrested at the border try on a daily basis. If the government lacked effective means to remove foreign nationals in the interior without lawful status, that would be a powerful pull factor enticing more people to seek entry.²¹⁹ In that vein, an effective admission enforcement policy will limit the foreign nationals who actually enter the country and move to the nation's interior. But while interior entrants can strain the government's enforcement efforts, they cannot overwhelm them as massed candidates for admission do. Moreover, precisely because interior entrants are dispersed among myriad locations, they cannot be a rallying point for media, the U.S. public, and transnational players such as smuggling networks.²²⁰

Additionally, for interior entrants, countervailing factors curb the government's interests. Properly framed, the government's interest also includes the welfare of U.S. citizens with ties to interior entrants. For example, removal of entrants may permanently separate children from parents or cause significant

al., *Leaving the Devil You Know: Crime Victimization, US Deterrence Policy, and the Emigration Decision*, 53 *LATIN AM. RES. REV.* 429, 430, 441–42 (2018) (studying Hondurans and El Salvadorans, including those in urban areas most likely to be victimized by crime on multiple occasions, while acknowledging that Guatemalan emigration decisions may stem more from economic concerns). Even with strengthened U.S. enforcement, the need to escape future violence in this group may impel efforts to emigrate. *Id.* A rational response to current immigration trends requires a clear-eyed examination of causes and possible remedies. Aid to other countries, assistance with governance reform, and a renewed dedication to addressing climate change are three steps that would be effective in addressing “push” factors. See Jeh Charles Johnson, *Trump-era Politics Are Drowning Out Consensus on Immigration. It's Time for Some Straight Talk*, *WASH. POST* (July 6, 2019), <https://www.washingtonpost.com/opinions/2019/07/06/trump-era-politics-are-drowning-out-consensus-immigration-its-time-some-straight-talk/>. For a larger set of policy prescriptions, see MEISSNER ET AL., *supra* note 24, at 23–29.

217. See Martin, *Two Cheers for Expedited Removal*, *supra* note 23, at 684–85.

218. See Johnson, *supra* note 215 (noting “high volumes of immigration on our Southern border . . . and the tragic overcrowding at holding centers that follows”); Miroff & Dawsey, *supra* note 213 (discussing the nature and the consequences of current migration flows at the southern border).

219. See *supra* notes 214–217 (discussing “pull” factors in the admission context).

220. On occasion, interior entrants have mobilized effectively, as childhood arrivals did when they claimed the name, “Dreamers.” See *Regents of the Univ. of Cal. v. U.S. Dep’t of Homeland Sec.*, 908 F.3d 476, 505–10 (9th Cir. 2018) (holding that the Trump Administration’s attempted revocation of the Obama Administration’s program for Dreamers—Deferred Action for Childhood Arrivals (DACA)—violated the Administrative Procedure Act), *cert. granted*, 139 S. Ct. 2779 (2019). But mobilization of this kind requires great courage and dedication, in part because public mobilization exposes participants to removal efforts. The rarity of these attributes makes interior mobilization difficult and also curbs the political force of entrants’ presence and example.

disruptions in care and custody. Collateral impacts on U.S. citizens do not bar interior removals as a matter of law. However, the need to temper those disruptions calls for a more deliberative approach to enforcement that clashes with expedited removal's haste.

C. *Risk of Error*

The haste and volume of expedited removal cases creates a risk of false negatives, particularly given the severe limits on judicial review. Without judicial review, an asylum seeker can fall victim to the uneven quality of inquisitors among the ranks of asylum officers and IJs. More time to obtain legal representation would alleviate this problem.²²¹ Judicial review can help reduce error rates through court assessment of adverse credible fear findings. It can also enhance accuracy through lengthening the timeline of asylum adjudication, which thus creates more opportunities for legal assistance.²²²

Because the supply of skilled immigration lawyers is limited and lawyers need time to prepare, the tight timelines of expedited removal present a challenge for the provision of legal representation.²²³ Without legal assistance, an asylum applicant may only have the ability to articulate an inchoate fear of returning to her home country. A persuasive asylum claim requires more structure, expert judgment, and supporting detail than many applicants can muster on their own. Moreover, when a lawyer is present and judicial review is available, a claimant can create a record for prevailing on appeal, even if the adjudicator making an initial judgment is biased, indifferent, or incompetent. The combination of barriers to legal assistance and limits on judicial review spurs abiding concern about errors in expedited removal.

However, statistics on the expedited removal process indicate that *overall* error rates may not be as high as the above critique would suggest, whatever the impact of expedited removal in individual cases. The centerpiece of expedited removal—the asylum officer interview—results in a credible fear

221. See Manning & Hong, *supra* note 27, at 679.

222. The provision of legal assistance need not imperil efficiency. Immigration courts can control the timeline of their cases, declining unreasonable requests for continuances. Moreover, as a value, efficiency contemplates some acceptable level of accuracy. A rush to judgment that results in burgeoning false negatives clashes with efficiency, as that term is properly understood.

223. See Lindsay M. Harris, *Withholding Protection*, 50 COLUM. HUM. RTS. L. REV. 1, 25–27 (2019) (discussing barriers to the provision of effective legal representation in expedited removal); Daniel Kanstroom, *Expedited Removal and Due Process: "A Testing Crucible of Basic Principle" in the Time of Trump*, 75 WASH. & LEE L. REV. 1323, 1356 (2018) (same); Katherine Shattuck, Comment, *Expedited Removals: Immigration Judge Review and Requests for Reconsideration of Negative Credible Fear Determinations*, 93 WASH. L. REV. 459, 482–83 (2018) (same); see also Ingrid V. Eagly, *Remote Adjudication in Immigration*, 109 NW. U. L. REV. 933, 985–86 (2015) (discussing the negative impact on applicants' success of courtroom protocols such as televideo hearings that tend to impair applicants' inclination and ability to secure legal representation); Mazin Sidahmed, *'It's Like an Automatic Deportation if You Don't Have a Lawyer'*, N.Y. TIMES (Aug. 13, 2019), <https://www.nytimes.com/2019/08/13/opinion/facing-the-injustice-of-immigration-court.html> (describing virtues of programs providing counsel to respondents in immigration court).

finding in almost *ninety percent* of cases.²²⁴ The credible fear finding is a ticket *out* of expedited removal and into a full IJ hearing.²²⁵ That statistic suggests that asylum officers as a group are aware of their statutory responsibility to minimize false negatives and conduct their interviews accordingly. Indeed, when the statistics tell a story about possible false negatives, the culprit is immigration court. Substantially fewer than *half* of initial credible fear findings ultimately result in IJ grants of asylum.²²⁶ This statistic may mean that many IJs are overzealous gatekeepers.²²⁷ Or it may mean that many colorable asylum claims lack enough evidence to prevail at the end of the day.²²⁸ But this statistic demonstrates that asylum officers as a group are appropriately mindful of the need for refugee protection.

D. *Applying the Mathews v. Eldridge Factors*

It is time to apply the *Mathews* factors to the admissions and expanded expedited removal contexts. The institutional integrity approach might require a remand to the immigration court prior to issuance of a final removal order under facts like those in Thuraissigiam's case, particularly if the petitioner could show failures of fundamental fairness, such as specific and material errors in translation of the claimant's testimony. In the expanded removal setting, the compressed timelines that the statute mandates would trigger relief under the error-correction model, paving the way for more extensive review in federal court.

1. *Admission*

To analyze the standard of review appropriate in admission cases, it is necessary to consider all three *Mathews* factors. The government's interest in managing admissions is weighty, but the individual's interest in avoiding the risk of arrest, torture, or death abroad is also significant. The overall risk of

224. USCIS CREDIBLE FEAR WORKLOAD REPORT SUMMARY FY 2018: TOTAL CASELOAD, *supra* note 30, at 1 (noting that asylum officers found credible fear in 74,677 cases during a 12-month period, while finding that the applicant had not established credible fear in only 9,659 cases).

225. 8 U.S.C. § 1225(b)(1)(B)(ii) (2012).

226. U.S. DEP'T OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW (EOIR), CREDIBLE FEAR IN THE U.S. IMMIGRATION SYSTEM 9 (2018), available at https://cis.org/sites/default/files/2018-09/EOIR_Credibile%20Fear_USCIS%20Proceedings%20Table.pdf (indicating that in 2016, only 29% of initial credible fear findings resulted in IJ asylum grants; the numbers from 2013 to 2018 ranged from 46% to 26%).

227. See Jain, *supra* note 95, at 287–89.

228. In a not insignificant cohort of cases, applicants resort to fraud. See *Maslenjak v. United States*, 137 S. Ct. 1918, 1923 (2017) (holding that the trial judge had improperly instructed the jury in the defendant's trial on making false statements to obtain U.S. citizenship; the defendant lied in applying for asylum by claiming that her husband tried to avoid being drafted into the Bosnian Serb Army in the early 1990s and had endured persecution; when in fact the defendant's husband had been an *officer* in a unit responsible for wartime atrocities); see also Martin, *Due Process and Membership*, *supra* note 23, at 184 (noting risk of fraud inherent when “the decisionmaker must learn of events in a distant country, as to which few witnesses are likely to be available here, other than the applicant himself”); U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 82, at 3 (explaining that “asylum officers and immigration judges must make decisions, at times, with little or no documentation to support or refute an applicant's claim”).

error is not as high as some critics of expedited removal claim, but errors in individual cases are likely.²²⁹ An appropriate habeas standard would reject the categorical nonreviewability model that has long dominated admission cases, but would also steer clear of a particularized error-correction approach. The fundamental fairness required by the inquisitorial integrity standard is a reasonable middle ground.

Fundamental fairness would require a written explanation by IJs.²³⁰ A written explanation would guard against the possibility of plain legal error, since an IJ would have to justify her decision by reference to the applicable legal standard. However, the explanation would not have to be exhaustive or needlessly detailed. It would serve to demonstrate that the IJ had conducted her review with the good faith that inquisitorial integrity requires. The record would also have to show that the IJ had ensured adequate interpreter services for a claimant who required them. Interpretation is an art, not a science, and occasional errors are endemic. However, a pattern of material errors that distorted the claimant's testimony but failed to elicit corrective action by the IJ would be a basis for a remand. Moreover, if the claimant had retained a lawyer, the IJ would have to allow reasonable participation by the attorney. That would not require changing the inquisitorial character of the hearing by ceding all power of inquiry to the legal representative. However, it would require the IJ to provide the lawyer with an opportunity to present a brief closing statement and submit clarifications on the record.²³¹

229. Systemic error at the credible fear stage would be low in cases like *Thuraiissigiam*, in which U.S. Customs and Border Patrol officers have referred the petitioner for a credible fear interview. See Michele A. Pistone & John H. Hoeffner, *Rules Are Made to Be Broken: How the Process of Expedited Removal Fails Asylum Seekers*, 20 GEO. IMMIGR. L.J. 167, 175–93 (2006) (detailing problems with expedited removal, principally in pre-referral screening by Customs and Border Patrol officers). But a low systemic error rate leaves open the possibility of egregious errors in individual cases, because of the variability of asylum officers and IJs, the high volume of cases, and the haste of decisionmaking. See Manning & Hong, *supra* note 27, at 679, 683.

230. The statute expressly requires a written explanation from the asylum officer, but not from the IJ who has reviewed the asylum officer's decision. See 8 U.S.C. § 1225(b)(1)(B)(iii)(II) (2012). The IJ's explanation could be delivered orally in the course of the hearing, as long as that explanation was recorded and could be transcribed if the applicant sought habeas relief. *Id.*

231. In dicta, the Third Circuit has suggested that despite the language of the expedited removal statute limiting review, as-applied review might be available to address a removal decision that did not comply with statutory constraints. See *Castro v. U.S. Dep't of Homeland Sec.*, 835 F.3d 422, 433 n.13 (3d Cir. 2016) (suggesting that a challenge might be valid in the case of a foreign national who was subjected to expedited removal but had, in fact, lived continuously in the United States for at least two years, thus taking him outside of the provision's coverage). Especially in the wake of expanded expedited removal, similar challenges could arise in which petitioners claim that they submitted incontrovertible evidence of at least two years of continuous physical presence in the United States. I do not discuss this issue further, because this Article argues that applying expedited removal to *any* entrant who has established residence in the United States—even for fewer than two years—violates the Suspension Clause. But if this argument were rejected by the courts, the need for *some* judicial review of an immigrant's actual time in the United States would acquire greater salience.

In addition, after *Castro*, the Third Circuit ruled in favor of an as-applied challenge brought by children in the *Castro* case whom the government had subsequently approved for Special Immigrant Juvenile status (SIJS) under 8 U.S.C. § 1101(a)(27)(J). See *Osorio-Martinez v. U.S. Att'y Gen.*, 893 F.3d 153, 166–68 (3d Cir. 2018). Arguably, the Third Circuit could have resolved this case on statutory grounds, by finding that as SIJS recipients, the petitioners had been paroled into the United States and were thus not subject to expedited removal. See 8 U.S.C. § 1255(h)(1) (2012) (deeming SIJS recipients to be paroled); see

In *Thuraissigiam*, there is evidence that the IJ failed to meet this standard. Thuraissigiam alleged that he been severely beaten and abused by agents of the Sri Lankan government because he had assisted a politician who, like the petitioner, was a member of the Tamil minority in that country.²³² The government's account of the asylum officer interview differs. According to the government, the claimant recounted that a group of men had beaten him while he worked on his farm, but the claimant stated that he did not recognize the men or know why they had attacked him.²³³ Since the claimant could not state what had prompted the attack, the asylum officer found that the claimant had failed to show the requisite nexus between the alleged harm and one of the five statutory factors.²³⁴ As a result, the asylum officer found that the claimant did not have a credible fear of persecution based on a protected ground.²³⁵ The IJ affirmed that finding, in what the Ninth Circuit described as a "check-box decision."²³⁶ In his habeas petition, Thuraissigiam asserted that the asylum officer had failed to "elicit all relevant and useful information" regarding credible fear and failed to consider relevant evidence of harsh conditions in Sri Lanka.²³⁷ In addition, the habeas petition alleged that during the interview, there were "communication problems" between the officer, Thuraissigiam, and the interpreter. Thuraissigiam alleged that similar flaws were present during the IJ hearing.²³⁸

An inquisitorial integrity model would result in a remand of this case to the IJ for an explanation of the IJ's decision. If the government's account of the "nexus" issue with the petitioner's testimony were accurate, the IJ could rely on that ground to find a lack of credible fear.²³⁹ A habeas court would also request a transcript of the IJ hearing, to determine if the "communication problems" that the petitioner alleged were material and pervasive, or merely minor glitches that played no role in the case. A habeas court would not require that either the asylum officer or the IJ expressly consider country conditions, since information about country conditions is widely available and,

also 8 U.S.C. §§ 1225(b)(1)(A)(iii)(II), (B)(iii)(II) (2012) (noting that expedited removal only applies to foreign nationals who have not been "admitted or paroled into the United States"). The Third Circuit rejected this argument, suggesting that review under the statute only extended to whether a removal order had literally been issued. *See Osorio-Martinez*, 893 F.3d at 164–66. However, the court's reading of the statute may have been needlessly narrow. A statutory solution would have avoided the need for a holding based on the Suspension Clause.

232. *Thuraissigiam v. Dep't of Homeland Sec.*, 917 F.3d 1097, 1102 (9th Cir. 2019).

233. *Petition for Writ of Certiorari at 10*, *Thuraissigiam*, 917 F.3d 1097 (9th Cir. 2019) (No. 19-161).

234. *Id.* (noting that the asylum officer found that the claimant had not shown a connection between the attack and the claimant's race, religion, nationality, political opinion, or membership in a particular social group).

235. *Id.* at 11.

236. *Thuraissigiam*, 917 F.3d at 1101.

237. *Id.* at 1102.

238. *See id.*

239. This finding does not necessarily question the applicant's credibility as a witness; it merely indicates that the applicant's allegations are *legally* insufficient to meet the statutory standard. *See* 8 U.S.C. § 1225(b)(1)(B)(v) (2012).

in any event, an asylum decision hinges on the nexus between the INA's five recognized factors for asylum and a claimant's *specific* account of persecution.²⁴⁰

2. *Expanded Expedited Removal for Entrants in the United States for Less Than Two Years*

Because of the entrant's heightened interest in preserving her U.S. ties, the standard for "expanded" expedited removal must be more rigorous. Here, the error-correction model is the appropriate choice.²⁴¹ A predicate for the error-correction model would be a finding that the petitioner had completed entry into the United States—whether or not that entry was lawful—and had established residence. That finding would be sufficient to trigger full due process rights for the entrant.

The haste and inquisitorial cast of all administrative proceedings under expedited removal would be inappropriate for a person entitled to the due process owed to entrants.²⁴² A court would then hold that expedited removal violated the Suspension Clause as applied to this group. Given that finding, a habeas court—which could be a federal district court accustomed to hearing testimony and taking evidence—could stand in for the full adversarial process that the petitioner *would have* received in Immigration Court prior to expedited removal's expansion. At this evidentiary proceeding in federal court, the petitioner could seek any relief from removal permitted by the INA.²⁴³ Of course, Congress could restore the system that had been in place prior to expedited removal's expansion. However, if Congress failed to take this step, a federal judicial forum would be available to fill the gap.

CONCLUSION

Habeas corpus and immigration law have reached an inflection point. Under the status quo ante, expedited removal's truncation of judicial review in admission cases was acceptable, given the Supreme Court's view that admission was a privilege, not a right. Moreover, prior administrative limits on expedited removal ensured that the process's bounds remained shy of its

240. See *INS v. Elias-Zacarias*, 502 U.S. 478, 482 (1992).

241. In *Make the Rd. N.Y. v. McAleenan*, 405 F. Supp. 3d 1 (D.D.C. 2019), Judge Jackson found that expanded expedited removal violated the APA. See *id.* at 101–05. However, Judge Jackson did not fully address the extensive indications in the INA that the agency's expansion of expedited removal to the statutory limit was unreviewable. See, e.g., 8 U.S.C. § 1225(b)(1)(A)(iii)(I) (2012) (stating that the decision to expand expedited removal "shall be in the sole and unreviewable discretion" of immigration officials, and that the scope of expedited removal "may be modified at any time"). Because of these textual indications in the statute, the court should have found that the INA provided no basis for awarding plaintiffs the relief they sought. The court should then have analyzed plaintiffs' constitutional claims.

242. For example, the requirement that IJ review of an asylum officer's negative credible fear finding be held within 7 days would be inconsistent with a proper weighing of the entrant's interest under *Mathews*. See 8 U.S.C. § 1225(b)(1)(B)(iii)(III) (2012) (noting deadlines).

243. A petitioner who had entered the United States more than a year earlier would generally be ineligible for asylum. See 8 U.S.C. § 1158(a)(2)(B) (2012). However, the petitioner could seek withholding of removal or relief under the Convention Against Torture.

full statutory scope. That decision allowed the error-correction model of appellate review to operate in cases involving entrants. That operating consensus collapsed in response to two recent developments: (1) the Ninth Circuit's holding in *Thuraissigiam* that expedited removal violates the Suspension Clause and (2) the Trump Administration's expansion of expedited removal to include nationwide coverage of most foreign nationals who have been in the United States for less than two years.

This Article has argued that more judicial review is required in both admission and entrant cases. That argument first requires a discussion of the contradictions in current models of judicial review. While the *Thuraissigiam* court's reasoning embraced the error-correction model, the Ninth Circuit reached that result through an unduly broad reading of the Supreme Court's decision in *Boumediene v. Bush* on access to habeas for Guantanamo detainees. As Chief Justice Roberts noted in his *Boumediene* dissent, the decision's disaggregation of habeas from other constitutional rights lacks support both in the logic and history of habeas and in the reasoning of Justice Kennedy's majority opinion, which relied heavily on due process balancing under *Mathews v. Eldridge*. As the weakest link in Justice Kennedy's opinion, the disaggregation of habeas from due process cannot bear the weight that the Ninth Circuit placed on this move in *Thuraissigiam*.

The nonreviewability model has contradictions of its own. The Supreme Court has not applied it consistently, instead recognizing that at least a "circumscribed judicial inquiry" is appropriate in cases involving the admission of foreign nationals, where the case's outcome will also affect the constitutional rights of U.S. citizens. The Court's resolution of matters entailing this modest inquiry suggests that abandoning nonreviewability would not ensnare the courts in excessive intrusion upon the political branches. Moreover, the leading cases on nonreviewability—*Mezei* and *Knauff*—rest on the shaky foundation of rumor, concealment, and colorable perjury. Allowing precedent to seek firmer foundations would serve both the courts and the political branches.

The liabilities of these models—particularly in dealing with admission—highlight the virtues of a third model advanced in this Article: inquisitorial integrity. Inquisitorial integrity captures the Court's approach to extradition and transfer cases, which often deal with the risk of harm similar to harm threatened in asylum cases. Moreover, in one early decision, *Gegiow v. Uhl*, in which Justice Holmes wrote for the Court, inquisitorial integrity has already figured in the admission setting. The model foregoes the rigors of error-correction. Instead, it turns on the fundamental fairness of the proceeding, including its independence, good faith, avoidance of plain legal error, and preservation of fundamental fairness.

To determine which model works best in the admission and entrant contexts, this Article turned to the *Mathews* test. Because of the government's sovereign interest in regulating admission, error-correction is too cumbersome

a mode of review. Moreover, the overall risk of error in inquisitorial proceedings conducted by trained asylum officers is low enough to make the error-correction mode unnecessary, despite the applicant's interest in protection from persecution abroad in the event of her removal. An inquisitorial integrity model best reconciles the *Mathews* factors.

In contrast, an error-correction model is most appropriate for entrant cases, in light of the applicant's developing U.S. connections. The haste and impediments to legal representation that typify expedited removal do not fit the applicant's interest in sustaining those U.S. ties. The inquisitorial integrity model is insufficiently rigorous for entrants, including those who have been physically present in the United States for just under two years. As a result, courts should hold that the provision of the INA that authorizes expanded expedited removal violates the Suspension Clause as applied to this group. Absent congressional action to pick up the slack, courts should provide evidentiary hearings for entrants via the vehicle of habeas corpus itself.

The consensus that prevailed before *Thuraissigiam* and expanded expedited removal relied on flawed constitutional analysis. The Ninth Circuit and the Trump Administration have, in different ways, highlighted the need for a fresh perspective. This Article has sought to build on that opportunity with a balanced approach resting on history, practice, and principle.