DEPARTMENT OF HOMELAND SECURITY V. THURAISSIGIAM: THE SUSPENSION CLAUSE AND THE PRESERVATION OF THE SEPARATION OF POWERS

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INTRODUCTION

The Suspension Clause is a bedrock element of the structural separation of powers devised by the nation's founders, who sought systemic security of individual liberty.[1] The Writ of Habeas Corpus is a safeguard against arbitrary imprisonment, which Alexander Hamilton described as among "the favorite and most formidable instruments of tyranny."[2] The Clause ensures the judiciary will watch over the government's application of power to individuals and never turn a blind eye to those imprisoned by executive force, absent the requisite public necessity. Congress may limit the protections of the Writ in certain circumstances and has done so in the case of noncitizens subject to "expedited removal" under the immigration laws of the United States. Congress has placed limitations on judicial review of administrative determinations regarding credible fear of return for otherwise deportable individuals.[3] The constitutionality of those limitations is the question before the Court in *Department of Homeland Security v. Thuraissigiam*.[4]

This note will explain how *Thuraissigiam* presents an opportunity for the Court to reaffirm the principle that the Suspension Clause is essential to the separation of powers and that the Clause's protection must be replaced by adequate substitute safeguards absent a constitutional suspension of the Writ of Habeas Corpus. Part I of this note explains how the constitutional question came before the Court. Part II explains the Court's understanding of the Suspension Clause as essential to the separation of powers. Part III explains how immigration law has developed parallel to the fundamental protections of the Suspension Clause. Part IV explains how criticisms of the Court's Suspension Clause jurisprudence do not apply to asylum seekers. Finally, Part V discusses how the open and virulent hostility towards asylum seekers that is characteristic of the Trump administration reveals a pressing need for judicial participation in review of the credible-fear determinations of asylum officers at the border.

I. THE CONSTITUTIONAL QUESTION: THE CIRCUITS SPLIT

In early 2019, in *Thuraissigiam v. U.S. Department of Homeland Security*, the Ninth Circuit split with the Third Circuit over the applicability of the Suspension Clause to asylum seekers in expedited removal proceedings. The Ninth Circuit determined that the statutory limitation on habeas review of

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1. U.S. CONST. art. I, § 9, cl. 2. ("[T]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the Public safety may require it.").

2. THE FEDERALIST NO. 84 (Alexander Hamilton).

3. 8 U.S.C. §1252(e)(2) (2015).

4. Robert Barnes, *Supreme Court will Rule on Expedited Removal of Those Denied Asylum Requests*, WASH. POST (Oct. 18, 2019), https://www.washingtonpost.com/politics/courts_law/supreme-court-will-rule-on-expedited-removal-of-those-denied-asylum-requests/2019/10/18/916a4716-f1dd-11e9-89eb-ec56cd414732_story.html; Richard Wolf, *Trump Administration Effort's to Speed Removal of Migrants Seeking Asylum Headed to Supreme Court*, USA TODAY (Oct. 18, 2019), https://www.usatoday.com/story/news/politics/2019/10/18/supreme-court-consider-donald-trump-crackdown-asylum-seekers/4013142002/.

credible-fear determinations violates the Suspension Clause and that individuals may petition the judiciary for review of those administrative determinations. In August 2019, the Department of Homeland Security ("DHS") filed a petition for writ of certiorari in the Supreme Court,[5] which the Court granted.[6]

The question before the Court is whether 8 U.S.C. §1252(e)(2) is unconstitutional under the Suspension Clause.[7] The Suspension Clause, Article 1, section 9, clause 2, provides that "the Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the Public safety may require it."[8] §1252(e)(2) limits the availability of judicial review for asylum seekers placed in a process known as "expedited removal."[9]

Congress created the system of expedited removal in 1996 to apply to noncitizens arriving at the border without proper authorization.[10] These individuals could be removed to their country of origin by immigration authorities without a hearing before an immigration judge.[11] The 1996 law granted the Justice Department discretion to expand the program to apply to individuals apprehended inside the United States within two years of entry.[12] DHS has since expanded the program to include undocumented individuals apprehended within fourteen days of entry within 100 miles of the border.[13]

8 U.S.C. §1225(b) provides for "inspection of aliens arriving in the United States and certain other aliens who have not been admitted or paroled."[14] Section 1225(b)(1)(B)(iii) provides for asylum interviews of those individuals referred to asylum officers.[15] An asylum officer determines that a credible fear exists when there is a significant possibility that the individual can establish eligibility for asylum, withholding of removal, or protection under the Convention Against Torture.[16] An individual may be eligible for asylum if they are unable or unwilling to return to their home country because of

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5. *Department of Homeland Security v. Thuraissigiam*, SCOTUSBLOG.COM, https://www.scotusblog.com/case-files/cases/department-of-homeland-security-v-thuraissigiam/ (last visited Dec. 17, 2019).

6. Thuraissigiam v. Dep't of Homeland Sec., 917 F.3d 1097, 1101-03 (9th Cir. 2019), *cert. granted*, 140 S.Ct. 427 (U.S. Oct. 18, 2019) (No. 19-161).

7. Petition for a Writ of Certiorari at 3, Dep't of Homeland Sec. v. Thuraissigiam, No. 19-161 (U.S. argued Mar. 2, 2020) (No. 19-161), 2019 WL 3545866 at *1.

8. U.S. CONST. art. I, § 9, cl. 2.

9. 8 U.S.C. § 1252(e)(2) (2015).

10. U.S. COMM'N ON INT'L RELIGIOUS FREEDOM, BARRIERS TO PROTECTION, THE TREATMENT OF ASYLUM SEEKERS IN EXPEDITED REMOVAL 11 (2016), https://www.uscirf.gov/sites/default/files/Barriers%20To%20Protection.pdf.

11. *Id*.

12. *Id*. at 12.

13. *Id*. at 13.

14. 8 U.S.C. § 1225(b) (2009).

15. 8 U.S.C. § 1225(b)(1)(B)(iii) (2009).

16. 8 U.S.C. § 1225(b)(1)(B)(v) (2009).

"persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion."[17]

Section 1225(b)(1)(B)(iii)(III) provides for final review of the determination of asylum officers by an immigration judge, "in no case later than 7 days after the date of the determination . . . ."[18] Section 1225(b)(1)(B)(iii)(IV) requires detention of those individuals subject to removal after review of their determination.[19] 8 U.S.C. § 1252(a)(2)(A)(iii) provides that "notwithstanding any . . . habeas corpus provision . . . no court shall have jurisdiction to review . . . the application of [§ 1225(b)(1)] to individual aliens . . . ."[20] Section 1252 (e)(2) makes judicial review available for any determination made under § 1225(b)(1), but limits that review to determinations of whether the petitioner is an alien; whether the petitioner was ordered removed; and whether the petitioner can prove they are a lawful permanent resident or have been admitted as a refugee or asylum seeker.[21] There appears to be a conflict between the Suspension Clause and § 1252(e)(2): has Congress suspended the Writ with this limitation on judicial review of the arrest and removal of these individuals within the United States?

In 2016, the Third Circuit held that individuals subject to expedited removal are not entitled to the protections of the Suspension Clause.[22] When twenty-eight families filed habeas petitions in federal district court to challenge negative credible-fear determinations, the district court dismissed the petitions for lack of jurisdiction, holding that "Congress has determined that expedited removal decisions – particularly the evaluation of credible-fear claims – are best left to the Executive, not the courts."[23] The Third Circuit affirmed.[24] Because those individuals were apprehended "within hours of surreptitiously entering the United States," the Third Circuit treated them as "aliens seeking initial admission."[25] By treating those individuals as "aliens seeking initial admission," the Third Circuit was able to rely on *Landon v. Plasencia* to hold that "an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application."[26] From there, the Third Circuit was able to place the individuals outside of the protections of the Suspension Clause itself.[27] Judge Hardiman wrote separately to express his doubt that the plenary power doctrine, as expressed

17. 8 U.S.C. § 1101(a)(42)(A) (2014).
18. 8 U.S.C. § 1225(b)(1)(B)(iii)(III) (2009).
19. 8 U.S.C. § 1225(b)(1)(B)(iii)(IV) (2009).
20. 8 U.S.C. § 1252(a)(2)(A)(iii) (2015).
21. 8 U.S.C. § 1252(e)(2) (2015).
22. Castro v. U.S. Dep't of Homeland Sec., 835 F.3d 422, 425 (3d Cir. 2016).
23. Castro v. U.S. Dep't of Homeland Sec., 163 F.Supp.3d 157, 174–75 (E.D. Pa. 2016).
24. *Castro*, 853 F.3d at 450.
25. *Id*. at 445–46.
26. *Id*. at 445 (citing Landon v. Plasencia, 459 U.S. 21, 32 (1982)).
27. *Id*. at 445–46.

in *Landon*, completely resolves the Suspension Clause inquiry.[28] Judge Hardiman noted that the Court in *Landon* did not "purport to resolve a jurisdictional question raising the possibility of an unconstitutional suspension of the writ of habeas corpus."[29]

In 2019, the same question came before the Ninth Circuit. Vijayakumar Thuraissigiam, a citizen of Sri Lanka, is a member of an ethnic minority group known as the Tamils.[30] Thuraissigiam worked on behalf of a candidate for parliament with the Tamil National Alliance in 2004, two years after a cease fire ostensibly ended a brutal civil war between Sri Lankan government forces and a Tamil separatist group known as the Liberation Tigers of Tamil Eelam ("LTTE").[31] In 2007, Thuraissigiam was detained and beaten in a Sri Lankan army camp and eventually released.[32] In 2013, Thuraissigiam assisted the same candidate for a provincial election. In 2014, he was approached by men "who identified themselves as government intelligence officers and called [him] by name."[33] Thuraissigiam was "pushed into a van where he was bound, beaten, and interrogated about his political activities" and "endured additional torture before he woke up in a hospital where he spent several days recovering."[34]

Thuraissigiam fled Sri Lanka in 2016 and arrived in Mexico.[35] In February 2017, he was arrested twenty-five yards north of the U.S.-Mexico border by U.S. Customs and Border Patrol.[36] Thuraissigiam was placed in expedited removal proceedings but indicated a fear of persecution in Sri Lanka and was referred for an asylum officer interview.[37] The asylum officer determined that Thuraissigiam had not established a credible fear of persecution.[38] A supervisor approved the negative determination, an immigration judge affirmed, and Thuraissigiam was returned to DHS for removal to Sri Lanka.[39]

Thuraissigiam filed a habeas petition in federal district court in January 2018.[40] Thuraissigiam alleged that, during the asylum interview, there were communication errors with the translator and that the asylum officer failed to elicit all the relevant information bearing on his credible-fear determination.[41] Thuraissigiam further alleged that during the brief review hearing before the immigration judge – the one appellate protection afforded asylum seekers in expedited removal proceedings – the *same* troubling defects

28. *Id*. at 450–51.
29. *Id*. at 450–51.
30. *Thuraissigiam*, 917 F.3d at 1101–03.
31. Thuraissigiam v. Dep't of Homeland Sec., 287 F.Supp.3d 1077, 1078 (S.D. Cal. 2018).
32. *Thuraissigiam*, 287 F.Supp.3d at 1078.
33. *Id*.
34. *Id*.
35. *Thuraissigiam*, 917 F.3d at 1101.
36. *Id*.
37. *Id*.
38. *Id*.
39. *Id*.
40. *Id*.
41. *Thuraissigiam*, 917 F.3d at 1102.

occurred.[42] The district court found that 8 U.S.C. §1252(e) bars habeas review and dismissed that petition for lack of subject matter jurisdiction.[43] The Ninth Circuit agreed that 8 U.S.C. §1252(e) barred habeas review of the petition, but went on to hold that this limitation violates the Suspension Clause.[44] The Ninth Circuit disagreed with the approach taken by the Third Circuit. *Landon*, the Ninth Circuit explained, is a case about due process, and therefore "is not relevant to whether Thuraissigiam can invoke the Suspension Clause."[45] The Ninth Circuit rejected the notion that only those who have been "lawfully admitted" may invoke the Suspension Clause.[46] The Ninth Circuit relied on *Boumediene v. Bush* to hold that the political branches cannot free themselves from the Constitution's legal constraints by dictating when and where the Constitution's terms apply.[47] The Ninth Circuit followed *Boumediene* and declined to accept a statutory scheme that permits the political branches "to switch the Constitution on or off at will."[48] "Because the Writ is an indispensable separation-of-powers mechanism, '[t]he test for determining the scope of this provision must not be subject to manipulation by those whose power it is designed to restrain.'"[49]

The Ninth Circuit relied on *Boumediene*'s holding that "the privilege of habeas corpus entitles the prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to 'the erroneous application or interpretation' of relevant law."[50] That constitutional minimum, the Ninth Circuit reasoned, is not satisfied by the procedures set forth in §1252(e) because they do not allow for judicial review of the government's application of the relevant law to these individuals.[51]

According to the Court's recent holding in *Boumediene v. Bush*, there cannot be plenary executive power without some satisfactory substitute protections against arbitrary executive detention.[52] Moreover, the plenary power line of immigration cases never disclaimed the application of the Suspension Clause as a check on potential abuse. For those reasons, the Court must hold that the Suspension Clause applies to credible-fear determinations for asylum seekers in expedited removal procedures and must evaluate whether or not it represents a sufficient substitute in accordance with *Boumediene*.

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42. *Id*.
43. *Id*.
44. *Id*. at 1100.
45. *Id*. at 1112.
46. *Id*. at 1115 n.19.
47. *Thuraissigiam*, 917 F.3d at 1104–05; *see also* Boumediene v. Bush, 553 U.S. 723, 765 (2008).
48. *Boumediene*, 553 U.S. at 727.
49. *Thuraissigiam*, 917 F.3d at 1115 n.19 (quoting *Boumediene*, 553 U.S at 765–66).
50. *Boumediene*, 553 U.S. at 779 (citing I.N.S. v. St. Cyr, 533 U.S. 289, 302 (2001)).
51. *Thuraissigiam*, 917 F.3d at 1118–19.
52. *Boumediene*, at 794.

II. THE SUSPENSION CLAUSE PRESERVES THE SEPARATION OF POWERS

The Suspension Clause is essential to preserve the separation of powers and must be replaced by adequate substitute protections absent a constitutional suspension by Congress. Justice Kennedy's opinion for the Court in *Boumediene* laid out the historical importance of the Suspension Clause and explained how it is inextricably tied to a fundamental purpose of the separation of powers: to secure individual liberty.[53] "The Framers' inherent distrust of governmental power," Justice Kennedy noted, "was the driving force behind the constitutional plan that allocated powers among three independent branches."[54] The Clause is essential to the doctrine of separation of powers, and cannot be infringed without grave risk to that scheme's ability to preserve liberty. In *Boumediene*, the Court rejected the argument that the government could "switch the Constitution on or off at will."[55] That same argument, rejected in *Boumediene*, was embraced by the Third Circuit in *Castro*. Any argument that green lights such a power fails to satisfy the constitutional requirements set forth in *Boumediene*.

In *Boumediene*, the government argued that the Constitution did not apply in the Guantanamo Bay detention camp because the United States had disclaimed sovereignty.[56] Despite disclaiming sovereignty, the government still maintained complete control over the territory and persons within it.[57] This legal construction would create a situation where the government exercised plenary control but the Constitution did not apply. This would eliminate the Suspension Clause's design to shield individual liberty from "subjection to a single branch."[58] Switching the Constitution on and off by way of contract, Justice Kennedy reasoned, "would permit a striking anomaly in our tripartite system of government, leading to a regime in which Congress and the President, not this Court, say 'what the law is.'"[59]

Although the *Boumediene* Court dealt with an issue distinct from immigration, the ultimate implication on the separation-of-powers framework is the same: if it necessarily creates a legal environment where executive power can be exercised without the separation-of-powers safeguards rooted in the Suspension Clause, it is not constitutional. [60]

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53. *Boumediene*, 553 U.S. at 739–40.
54. *Id*. at 742.
55. *Id*. at 765.
56. *Id*. at 753.
57. *Id*. at 764.
58. Alison Holland, *Across the Border and Over the Line: Congress's Attack on Criminal Aliens and the Judiciary Under the Antiterrorism and Effective Death Penalty Act of 1996*, 27 AM. J. CRIM. L. 385, 410 (2000).
59. *Boumediene*, 553 U.S. at 765.
60. Justice Kennedy noted that, because the Constitution's separation-of-powers structure protects *persons*, a constitutional class known to encompass much more than just *citizens*, "foreign nationals who have the privilege of litigating in our courts can seek to enforce separation-of-powers principles." *See Boumediene*, 553 U.S. at 743.

That is the environment endorsed by the Third Circuit in *Castro* and rejected by the Ninth Circuit in *Thuraissigiam*. The Ninth Circuit was correct to read Justice Kennedy's opinion as a requirement that we consider the implications on the separation of powers (and what they are designed to protect) when we consider acts of Congress that deny access to judicial review.[61]

Justice Scalia took a very different view of the separation-of-powers issue at hand in *Boumediene*. Justice Scalia's reasoning began from the perspective that if habeas corpus exists to constrain the executive, there must necessarily be some complementary constraint on the judiciary.[62] According to this view, if the judiciary expands the scope of habeas corpus to cover Guantanamo, that is itself the unilateral expansion that threatens the separation of powers.[63] Justice Scalia believed that limit was jurisdictional – that the power to say what the law is, "is circumscribed by the limits of our statutorily and constitutionally conferred jurisdiction."[64] Justice Scalia went on to conclude, "the text and history of the Suspension Clause provide no basis for our jurisdiction."[65] Justice Scalia believed the Court's holding itself violated the separation of powers: it was an encroachment by the judiciary onto the political branches where it had no jurisdiction beyond sovereign territory.[66] For Justice Scalia's view on the separation-of-powers concerns to apply to questions regarding habeas corpus in the immigration context (that extending habeas corpus to the border actually encroaches upon political branches such that it violates the separation of powers), they would have to determine either that the government does not exercise sovereign control over the border,[67] or that there is no jurisdiction over immigration officials operating on the border.[68] Neither presumption is tenable.[69]

Chief Justice Roberts and Justices Thomas and Alito joined Justice Scalia's dissent. Chief Justice Roberts, joined in turn by Justices Thomas, Alito, and Scalia, wrote, in a separate dissent, that it was unnecessary to resolve the habeas question because it had not been shown that the statute at issue provided insufficient procedural protections.[70] According to this view, "[t]he critical threshold question . . . prior to any inquiry about the Writ's

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61. Stephen L. Vladeck, *Boumediene's Quiet Theory: Access to Courts and the Separation of Powers*, 84 NOTRE DAME L. REV. 2107, 2138–39 (2009).

62. *Boumediene*, 553 U.S. at 842–43 (Scalia, J., dissenting).

63. *Id.*

64. *Id.* at 842.

65. *Id.* at 849.

66. *Id.* at 842–43.

67. The United States does, of course, have sovereign control over the border. *See e.g.*, Zadvydas v. Davis, 533 U.S. 678, 711 (2001) (Kennedy, J., dissenting) ("Congress's power to detain aliens in connection with removal or exclusion, the Court has said, is part of the Legislature's considerable authority over immigration matters."); Wong Wing v. U.S., 163 U.S. 228, 231 (1896) (" . . . the right to exclude or to expel aliens . . . absolutely or upon certain conditions, in war or in peace, is an inherent and inalienable right of every sovereign and independent nation . . . .").

68. Article III courts do have jurisdiction over immigration officials operating at the border. *See e.g.*, Almeida-Sanchez v. United States, 413 U.S. 266, 278 (1973) (Powell, J., concurring).

69. *See e.g.*, *supra* notes 67 and 68.

70. *Boumediene*, 553 U.S. at 801.

scope, is whether the system the political branches designed protects whatever rights the detainees may possess."[71] "If so," Chief Justice Roberts argued, "there is no need for any additional process, whether called 'habeas' or something else."[72] In the Chief Justice's view, the *Boumediene* majority put the cart before the horse, and the statutory protections afforded by Congress to military detainees at Guantanamo were sufficient to protect against arbitrary detention by executive authorities.[73] The critical question for the Chief Justice may be: do the statutory protections afforded to asylum seekers at the border protect against arbitrary deprivation of liberty by executive authorities? Put that way, the Chief Justice would still require the first step of *Boumediene* to apply.

This still gives the Court an opportunity to reaffirm the principle that the Suspension Clause is essential to the separation of powers and must be replaced by adequate substitute protections absent a constitutional Congressional suspension of the Writ of Habeas Corpus. In *Thuraissigiam*, the Court should also explain that, throughout the long history that developed the plenary power of the political branches over immigration law, the Court never disclaimed the separation-of-powers role rooted in the Suspension Clause.

III. WHAT ABOUT *LANDON*? THE PRESERVATION OF THE SEPARATION OF POWERS THROUGHOUT THE DEVELOPMENT OF THE PLENARY POWER DOCTRINE

In *Castro*, the Third Circuit misread *Landon* to isolate asylum seekers in federal custody from the protections of the Suspension Clause. In *Landon*, the Court articulated the nature of the plenary power of the political branches over immigration law: "an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application."[74] However, the Third Circuit misapplied *Landon* to disclaim the judiciary's separation-of-powers function anchored in the Suspension Clause. The Third Circuit misconstrued the plenary power doctrine to grant power both to prescribe procedures in the immigration context and, extraordinarily, to suspend the Writ of Habeas Corpus.

Throughout the evolution of the plenary power doctrine in immigration law, the separation-of-powers concerns rooted in that doctrine were treated as distinct from those inherent to the Suspension Clause. Though it disclaimed the judiciary's power to second-guess political decisions regarding exclusion or immigration processes, the Court never eliminated its role as an instrument of the separation of powers anchored in the Suspension Clause. In

71. *Id*. at 802.
72. *Id*. at 802.
73. *Id*. at 825–26.
74. *Plasencia*, 459 U.S. at 32.

this way, the plenary power doctrine is consistent with the constitutional scheme of the separation of powers.

In the late nineteenth century, in *Chae Chan Ping*, the Court held that the federal government was within its right to revoke a previously valid certificate of entry.[75] While a Chinese laborer, lawfully present, had left the country with a valid certificate of entry, the United States passed the Chinese Exclusion Acts.[76] He was denied entry on the basis that the Act nullified his certificate of entry.[77] After the Ninth Circuit issued a writ of habeas corpus, the Supreme Court upheld the basis for his exclusion.[78] The Court reasoned that the power of exclusion of foreigners is an "incident of sovereignty."[79] In accordance with that sovereignty, any questions regarding "whether a proper consideration by our government" was granted, "are not questions for judicial determination."[80] Accordingly, the laborer's only recourse was through political channels.[81] In terms of the separation of powers, the power to exclude by law was considered inextricably tied to the nation's sovereignty. The Court's message in *Chae Chan Ping* was clear: the decision to statutorily bar the entry of non-citizens was vested in the political branches and was not a question for the judiciary.

A. *The Court creates a parallel relationship between plenary power and the Suspension Clause*

Chae Chan Ping, standing on its own, appeared to create the world imagined by the Third Circuit in *Castro*. However, *Chae Chan Ping* was not the end of the story. In *Yamataya v. Fisher*, just fourteen years later, the Court demonstrated the parallel relationship between the plenary power doctrine and the Suspension Clause.

In *Yamataya*, the Court reconciled the plenary power doctrine with other fundamental constitutional requirements. The Court upheld the constitutionality of the Immigration Act of 1891,[82] which created additional classes of excludable aliens.[83] Kaoru Yamataya entered the United States and was present for four days.[84] An immigration officer determined that she "came here in violation of law, in that she was a pauper and a person likely to become a public charge," and issued a warrant for her arrest and return to Japan.[85] The Court found no ground for habeas intervention.[86]

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75. Chae Chan Ping v. United States, 130 U.S. 581, 610–11 (1889).
76. *Id*. at 581–82.
77. *Id*.
78. *Id*.
79. *Id*. at 609.
80. *Id*.
81. *Chae Chan Ping*, 130 U.S. at 609.
82. Yamataya v. Fisher, 189 U.S. 86, 101–02 (1903).
83. Immigration Act of 1891, Pub. L. No. 51–551, 26 Stat. 1084 (1891).
84. *Yamataya*, 189 U.S. at 87.
85. *Id*. at 87.
86. *Id*. at 102.

Crucial to its holding, the Court explicitly declined to read the Immigration Act of 1891 in a way that would be at odds with other constitutional requirements.[87] The Court first affirmed that "the power to exclude or expel aliens belonged to the political department of the government,"[88] and that the order of an executive immigration officer "was due process of law, and no other tribunal, unless expressly authorized to do so, was at liberty to re-examine the evidence on which he acted, or to controvert its sufficiency."[89] However, the Court warned that it has not and would not hold, "that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in 'due process of law as understood at the time of the adoption of the Constitution.'"[90] Put another way, the Court was satisfied that the process afforded by the Act was the process due, but declined to endorse the power of executive officers to apply the law arbitrarily: "[n]o such arbitrary power can exist where the principles involved in due process of law are recognized."[91]

With this crucial clarification, the Court affirmed that the process afforded by Congress was the process due and that there is no basis to challenge those processes. However, the Court clarified that there is no place in our constitutional order for arbitrary executive detention. This reflects the notion that habeas review creates protections unavailable under the Due Process Clause.[92] Further, it explains how the Suspension Clause actually saves the plenary power doctrine: the Clause acts as a safeguard against the possibility of arbitrary executive detention. Put into context of the case at issue: Thuraissigiam cannot challenge the procedures that afford him a translator in his asylum interview, but he must be able to challenge an immigration officer's arbitrary denial of that statutory process.

Asylum seekers at the border are due whatever process is afforded them by Congress. That notion is consistent with the plenary power doctrine and therefore the separation of powers. But that process itself cannot deny the judiciary the ability to review arbitrary denial of that process. Further, one cannot guard against this arbitrariness without the availability of habeas review. That is the essence of the parallel relationship between the Suspension Clause and the plenary power doctrine that brings the plenary power doctrine into harmony with the constitutional principle of the separation of powers.

87. *Id*. at 101.
88. *Id*. at 100.
89. *Id*.
90. *Yamataya*, 189 U.S. at at 100–01.
91. *Id*.
92. Brandon L. Garrett, *Habeas Corpus and Due Process*, 98 CORNELL L. REV. 47, 111 (2012); Gerald L. Neuman, *The Habeas Corpus Suspension Clause After* Boumediene v. Bush, 110 COLUM. L. REV. 537, 571 (2010).

B. *The parallel relationship is reaffirmed*

Several other cases from the early twentieth century cemented the essential relationship between plenary power and the Suspension Clause articulated in *Yamataya*. In *Kwock Jan Fat v. White*, the government determined that Kwock Jan Fat was a Chinese national and denied his re-admission after a temporary visit to China.[93] Kwock Jan Fat alleged the inspecting officer arbitrarily omitted testimony supporting his claim to American citizenship.[94] The Court issued a writ of habeas corpus, and reiterated that "the decision by the Secretary of Labor . . . is final, and conclusive upon the courts, *unless it be shown* that the proceedings were 'manifestly unfair,' . . . or show 'manifest abuse' of the discretion committed to the executive officers by the statute."[95] "The acts of Congress give great power to the Secretary of Labor over Chinese immigrants and persons of Chinese descent." That power, the Court explained, "is a power to be administered, not arbitrarily and secretly, but fairly and openly, under the restraints of the tradition and principles of free government applicable where the fundamental rights of men are involved, regardless of their origin or race."[96] "It is the province of the courts, in proceedings for review . . . to prevent abuse of this extraordinary power."[97]

In *United States v. Ju Toy*, the Court found no grounds for habeas review of the exclusion of a person of Chinese descent whom the government had determined was not a U.S. citizen.[98] The Court reiterated that Congress may "exclude aliens of a particular race . . . establish regulations for sending out of the country such aliens as come here in violation of the law, and commit the enforcement of such provisions . . . to executive officers, without judicial intervention."[99] However, before the Court concluded that there could be no habeas review, it explained that the petition "disclosed neither abuse of authority nor the existence of evidence not laid before the Secretary."[100] When it clarified that the habeas question did not involve abuse of power or other arbitrariness, the Court implicitly reaffirmed the parallel relationship between plenary power over immigration and the judiciary's separation-of-powers protections against arbitrary or abusive executive action.

C. *The illusory change: the plenary power doctrine remains limited by the fundamental protections of the Suspension Clause*

In *United States ex rel. Knauff v. Shaughnessy*, the Court withheld habeas review after the Attorney General denied admission to the wife of a U.S.

93. Kwock Jan Fat v. White, 253 U.S. 454, 456–57 (1920).
94. *Id.* at 456–57.
95. *Id.* at 457–58 (quoting Tang Tun v. Edsell, 223 U.S. 673, 681 (1912) (emphasis mine)).
96. *Id.* at 464.
97. *Id.*
98. United States v. Ju Toy, 198 U.S. 253, 261 (1905).
99. *Ju Toy*, 198 U.S. at 261.
100. *Id.*

citizen who had served in the armed forces during the Second World War.[101] The petitioner in that case sought entry based on the War Brides Act, which provided procedures for admission of otherwise-admissible spouses and children of World War II veterans.[102] The petitioner was denied entry when the Attorney General determined, "upon the basis of confidential information," that the entry would be contrary to the public interest.[103] Further, the petitioner was denied a hearing, because, in the Attorney General's judgment, "the disclosure of the information on which he based that opinion would *itself* endanger the public security."[104]

The Court reiterated that the power to exclude is "a fundamental act of sovereignty," which may be properly placed in the executive branch and delegated to "a responsible executive officer of the sovereign."[105] The Court went on to describe the plenary power's relationship to the judicial branch: "[w]hatever the rule may be concerning deportation of person's who have gained entry into the United States, it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of Government to exclude a given alien."[106] To support this proposition, the Court cited *Nishimura Ekei, Fong Yue Ting*, and *Ludecke*. However, the Court included a comparison citation to *Yamataya* to fence in its own sweeping language regarding the limitations on judicial review. Crucially, that citation directed us to the very place where Justice Harlan explained that the constitutional principle of the separation of powers demands the plenary power doctrine does not sanction executive and arbitrary administration of executive powers.[107]

Importantly, the regulation at issue in *Knauff* flowed from an act of Congress that granted the President the power to "impose additional restrictions and prohibitions on the entry into and departure of persons . . . during the national emergency proclaimed May 27, 1941."[108] Because the national emergency had not been terminated, the Court considered that authority still in place, and disclaimed any power to "retry" the determination, citing *Ludecke v. Watkins*.[109]

The Court's reliance on *Ludecke* reveals an important limitation on this line of cases. In 1948, the Court denied habeas to a former member of the Nazi party who was ordered removed pursuant to a presidential proclamation to remove "alien enemies who shall be deemed by the Attorney General to be

101. United States *ex rel*. Knauff v. Shaughnessy, 338 U.S. 537, 546–67 (1950).
102. *Shaughnessy*, 338 U.S. at 539–40.
103. *Id*. at 544.
104. *Id*. (emphasis added).
105. *Id*. at 542–43.
106. *Id*. at 543.
107. *Id*.
108. *Shaughnessy*, 338 U.S. at 540.
109. *Id*. at 546.

dangerous to the public peace and safety."[110] The Court held that the power to remove "enemy aliens" was a political judgment inherent in the War Powers, and that "it is not for us to question a belief by the President that enemy aliens who were justifiably deemed fit subjects for internment during active hostilities do not lose their potency for mischief during the period when the guns are silent but the peace of Peace has not come."[111] The national security and war powers interests at issue in *Knauff* and *Ludecke* enhanced the ability of the political branches to restrict procedures, but the Court's reliance on Justice Harlan's explanation in *Yamataya* reaffirmed the judiciary's place to protect against arbitrariness and abuse. Understood this way, *Knauff* is not the blank check that the Third Circuit interprets it to be, at least not outside the realm of war powers. In peace-time civil administration, liberty demands the separation of powers guarded by the Court in the pre-war cases.

In *Shaughnessy v. United States ex rel. Mezei*, the Court upheld an immigrant's effectively permanent exclusion and isolation on Ellis Island when no other countries would accept him.[112] As in *Knauff*, the Attorney General determined he would be excluded without a hearing, based on confidential information.[113] The Court cited *Knauff* for the proposition that, at the "threshold of initial entry," whatever process was afforded by Congress was the process due.[114] Nevertheless, because his movements were restrained by authority of the United States, "he may by habeas corpus test the validity of his exclusion."[115] Thus, despite disclaiming any authority to second-guess a procedure which subjected an immigrant to indefinite detention on Ellis Island without a hearing, the Court expressly preserved the habeas review essential to the separation of powers.

Then came *Landon*. In *Landon*, a permanent resident traveled to Mexico and was apprehended at the border attempting to assist in the illegal entry of several Mexican and Salvadoran nationals.[116] Immigration authorities treated her as if she was entering the country and proceeded to an exclusion hearing, where she was ordered excludable and deported.[117] When she challenged this determination on habeas review, the Court upheld that determination.[118] The Court cited *Knauff* for the proposition that, "an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a

110. Ludecke v. Watkins, 335 U.S. 160, 163 (1948) (quoting Proclamation 2655, 10 Fed. Reg. 8947).
111. *Id.* at 170.
112. Shaughnessy v. United States. *ex rel.* Mezei, 345 U.S. 206, 215–16 (1953).
113. *Id.* at 208.
114. *Id.* at 212.
115. *Id.* at 213.
116. *Plasencia*, 459 U.S. at 23–24.
117. *Id.* at 25.
118. *Id.* at 37.

sovereign prerogative."[119] Nevertheless, the Court found that she was entitled to some degree of due process, because of her status as a lawful permanent resident.[120] The Court remanded the issue to the Ninth Circuit to determine whether she received the process due.[121]

The Court in *Landon* did not address the Suspension Clause question lurking behind previous plenary power decisions. If the Court in *Landon* read *Knauff* to disclaim the separation-of-powers role anchored in the Suspension Clause, contrary to *Yamataya*, it did not say so. In fact, the Court expressly declined to expand upon the *Mezei* line of cases, because the government had conceded that the petitioner in *Landon* had a right to due process.[122] Indeed, as discussed above, the Court's reasoning and the underlying facts at issue in *Knauff*, relied upon in *Landon*,[123] suggests something quite different. The Third Circuit, however, adopted this assumption and ran with it—hop-skipping effortlessly to the conclusion that since the asylum seekers were apprehended "within hours of surreptitiously entering the United States,"[124] and since the issues they challenged "all stem from the Executive's decision to remove them from the country," the Constitution simply did not apply, "including the Suspension Clause."[125] In its eagerness to deny asylum seekers judicial review, the Third Circuit accepted plenary executive power outside the reach of the Constitution: a power *Yamataya, Knauff*, and *Landon* did not sanction and *Boumediene* explicitly forbids.

Landon's articulation of the plenary power doctrine in immigration law does not create executive detention outside the reach of the Constitution, and the *Castro* panel was mistaken to interpret it this way. The Suspension Clause ensures that no such detention can exist, and the Court has been sure to preserve that protection throughout the history of the plenary power doctrine.

IV. THE "ONE-WAY RATCHET" AND HABEAS REVIEW FOR ASYLUM SEEKERS

The limitation on judicial review of credible fear determinations is distinct from the relationship between the Suspension Clause and immigration enforcement articulated by Justice Scalia in his dissent to the Court's decision in *I.N.S. v. St. Cyr*. In *St. Cyr*, the Court upheld habeas review of a challenge to the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).[126] The AEDPA reduced the class of persons eligible for discretionary relief

119. *Id.* at 32.
120. *Id.* at 37.
121. *Id.*
122. *Plasencia*, 459 U.S. at 34 ("We need not now decide the scope of *Mezei*; it does not govern this case, for Plasencia was absent from the country only a few days, and the United States has conceded that she has a right to due process[.]" (citation omitted)).
123. *Id.* at 32.
124. *Castro*, 835 F.3d at 445.
125. *Id.* at 446.
126. *St. Cyr*, 533 U.S. at 326.

from deportation to exclude those convicted of an aggravated felony.[127] The petitioner in that case had pleaded guilty before the law took effect, but his removal proceedings occurred after the law took effect; the INS determined that he could not be entitled to discretionary relief by law.[128] When the petitioner challenged whether his detention could rest upon that authority, the INS argued that the statute barred judicial review of the question.[129] The Court held that, at a minimum, the Suspension Clause means that courts can review pure questions of law, and that, absent a clear and unambiguous statement by Congress, a statute cannot be read to take away such review.[130] Because the statute was not clear and unambiguous, the Court upheld the habeas review.[131] Justice Scalia dissented to say that he does not believe courts have habeas power "unless given by written law."[132] Justice Scalia went on to argue that, even if there is some constitutionally required minimum (beyond what Congress grants), it did not apply.[133] Because the relief was discretionary, removing judicial review of that discretion cannot be considered a "suspension of the Writ."[134] To hold otherwise, Justice Scalia argued, would give effect to a "one-way ratchet."[135] In other words, taking away judicial review of discretionary relief from removal (when they would otherwise be subject to removal by effect of the law) is not a suspension.

Arguably, removal of judicial review of preliminary asylum adjudications (of people who are otherwise inadmissible) is not a suspension of the Writ, and to hold otherwise is to give effect to a "one-way ratchet."[136] That would imply that the decision to move an individual from expedited procedures to regular removal proceedings is discretionary relief from expedited removal. However, that decision is required by law, and is not discretionary. Discretionary does not appear in the statute (as it did in the AEDPA "discretionary relief"). Once an individual is moved into expedited removal, there is no available habeas review of their adverse credible-fear determination. This is not like someone who is otherwise legally subject to removal (as would be a deportable convicted felon in *St. Cyr*) being denied discretionary relief by the immigration authorities. It is someone who may very well not be deportable at all under the law, let alone subject to expedited removal proceedings, *but for* an arbitrary adverse determination. For that reason, Justice Scalia's

127. *Id.* at 295–97.
128. *Id.* at 293.
129. *Id.* at 298.
130. *Id.* at 314.
131. *Id.* at 326.
132. *St. Cyr*, 533 U.S. at 340 (Scalia, J., dissenting) (quoting *Ex parte* Bollman, 8 U.S. 75, 94 (1807)).
133. *Id.* at 341.
134. *Id.* at 346.
135. *Id.* at 341–42.
136. *Id. See also* Prost v. Anderson, 636 F.3d 578, 583 n.4 (10th Cir. 2011) (noting that Justice Gorsuch, while on the Tenth Circuit, hinted that he may be receptive to the one-way ratchet rationale in questions regarding the reach of the Suspension Clause).

view of habeas and the "one-way ratchet" effect does not apply to asylum seekers' pursuit of habeas review of adverse credible-fear determinations.[137]

I argue that, to resolve the question at hand, the Court should recognize that the Suspension Clause runs parallel to Congress's plenary power over immigration and that the relevant procedures either do or do not supply an adequate substitution for habeas review in accordance with *Boumediene*. To avoid that analysis and deny asylum seekers habeas protections, the Court may seek to endorse another view of habeas articulated by Justice Scalia in *St. Cyr*. Justice Scalia argued that a failure to create habeas review is not a suspension of habeas review.[138] In other words, the Suspension Clause is not "self-executing," and the reach of habeas is defined by Congress. According to this view, to enact a law without granting a corresponding habeas right is not a suspension of the Writ. This presupposes that no overarching right to habeas corpus flows from the Constitution. Scalia pointed out that the Judiciary Act of 1789, passed by the First Congress of the United States, meant to give the privilege of habeas corpus "life and activity."[139] According to Justice Scalia, this was proof that the Suspension Clause provided nothing before Congress acted.

If the Justices venture down that road, they may find themselves in the middle of "the constitutional puzzle of habeas corpus."[140] Commentators have observed that a self-executing Suspension Clause may be difficult to reconcile with three other constitutional principles.[141] First, that inferior courts are constitutionally optional; second, that Congress cannot expand the Supreme Court's original jurisdiction beyond the cases included in Article III; and third, that state courts have no power to issue habeas corpus in cases of federal custody.[142] If there is a constitutional right to habeas corpus but Congress did not provide inferior courts, that right may be meaningless.

One proposal is that individual Supreme Court justices retain power to issue writs of habeas corpus.[143] Another is that the D.C. Superior Court, as the one court with authority to issue common-law habeas relief against

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137. This comports with Judge Kavanaugh's interpretation of *Boumediene* in *Omar v. McHugh* before the D.C. Circuit in 2011. *See* Omar v. McHugh, 646 F.3d 13, 24 (D.C. Cir. 2011) ("In light of the Constitution's guarantee of habeas corpus, Congress cannot deny an American citizen or detainee in U.S. territory the ability *to contest the positive legal authority* (and in some situations, also the factual basis) for his detention or transfer unless Congress suspends the writ because of rebellion or invasion." (emphasis added)). According to the distinctions drawn in *Yamataya*, there can be no positive legal authority to *arbitrarily* deny asylum seekers the process they are due at the border. Congress has provided processes for translation and other procedures in credible-fear determinations to protect the rights of asylum seekers in expedited removal proceedings. There is no positive legal authority to arbitrarily deny Thuraissigiam and others these procedural rights, yet, §1252(e) denies asylum seekers the ability to contest that abuse.

138. *St. Cyr*, 533 U.S. at 337.

139. *St. Cyr*, 533 U.S. at 340 (Scalia, J., dissenting) (quoting *Ex parte* Bollman, 8 U.S. 75, 95 (1807)).

140. Stephen J. Vladeck, *The Riddle of the One-Way Ratchet*, 12 GREEN BAG 2D 71 (2008); Edward A. Hartnett, *The Constitutional Puzzle of Habeas Corpus*, 46 B.C. L. REV. 251 (2005).

141. *See Vladeck*, *supra* note 140, at 71.

142. Hartnett, *supra* note 140, at 251–52.

143. *Id*. at 254.

federal officers, solves the riddle.[144] It may be that habeas is a foundational principle "implicit in the structure of the Constitution," akin to state sovereign immunity.[145] One commentator has observed that the *Bollman* dicta relied on by Justice Scalia may be unreliably anachronistic, because it was decided before the Court held that state courts could not issue habeas in cases of federal detention.[146]

Wherever the Court places this responsibility, it cannot render the Suspension Clause meaningless. "It cannot be presumed that any clause in the Constitution is intended to be without effect."[147] Rather, the Court must reaffirm the principle that the Clause provides for the separation of powers. The Court should not point to a puzzle of its own creation as proof that there is no constitutional right to habeas corpus. If there is no habeas right until granted by Congress, every statute that grants habeas review is in effect a one-way ratchet. It must follow that, since there can be no one-way ratchet effect in the context of habeas review, the Clause is meaningless. To embrace this fallacy would be to unilaterally disarm the judiciary and do grave harm to the ability of the separation of powers to protect individual liberty. Instead, the Court should reaffirm the role of the Suspension Clause as inextricably tied to the separation of powers and resolve the *Thuraissigiam* question at the second step of the *Boumediene* analysis.

V. THE STAKES: ASYLUM SEEKERS AND THE *BOUMEDIENE* RATIONALE

When we apply Justice Kennedy's rationale in *Boumediene* to asylum seekers, the need for habeas review of credible-fear determinations becomes painfully clear. To explain the importance of habeas review of administrative detention, Justice Kennedy noted that executive detention raises a need for collateral review more pressing than detention pursuant to a criminal conviction. "A criminal conviction in the usual course occurs after a judicial hearing before a tribunal disinterested in the outcome and committed to procedures designed to ensure its own independence. These dynamics are not inherent in executive detention orders or executive review procedures."[148] Thus, a critical question is whether or not, in the context of immigration enforcement, the adjudicatory regime is disinterested in the outcome and committed to procedures designed to ensure independence.

To answer that question, it is important to note that an asylum applicant bears the burden of proving both statutory eligibility for asylum and that she

144. Vladeck, *supra* note 140, *at* 79–80.
145. Janet Cooper Alexander, *Jurisdiction-Stripping in a Time of Terror*, 95 CALIF. L. REV. 1193, 1221 (2007).
146. Baher Azmy, *Executive Detention, Boumediene, and the New Common Law of Habeas*, 95 IOWA L. REV. 445, 486 (2010).
147. Marbury v. Madison, 5 U.S. 137, 177 (1803).
148. *Boumediene*, 553 U.S. at 783.

merits asylum "as a matter of discretion."[149] Considering the discretionary nature of that determination in light of recent efforts and statements by the Trump administration to curb admission of asylum seekers at the border through policies of deterrence, it is clear the adjudicatory regime falls within the area of concern articulated by Justice Kennedy in *Boumediene*.[150]

In July 2019, the administration instituted a rule to strip asylum eligibility from any individual who "enters, attempts to enter, or arrives in the United States across the southern land border . . . after transiting through at least one country outside the alien's country of citizenship, nationality, or last lawful habitual residence en route to the United States."[151] In September 2019, the administration implemented a policy to require immigrant individuals who fear persecution and claim asylum to wait in Mexico until their cases can be heard.[152] That policy has caused thousands of asylum seekers to wait in makeshift tent camps, just across the border, that have been described as shockingly unsanitary and dangerous.[153] The stated reason for the policy was to prevent asylum seekers from "gaming the system" by gaining admission to the United States and skipping their immigration court date. The president has falsely claimed that as many as 97% of asylum seekers fail to appear in immigration court,[154] when in fact the figure is closer to 11%.[155] The administration recently entered into agreements with Honduras, Guatemala, and El Salvador that would require asylum seekers to seek protection in those countries before reaching the United States,[156] despite evidence that those

149. 8 U.S.C. § 1158(b)(1); 8 U.S.C. § 1229a(c)(4)(A)(ii); *see also* Romilus v. Ashcroft, 385 F.3d 1, 8 (1st Cir. 2004).

150. Camilo Montoya-Galves, *Top Trump official Ken Cuccinelli says asylum restriction will be "deterrent" for migrants*, CBSNEWS.COM (Sep. 15, 2019), https://www.cbsnews.com/news/cuccinelli-says-asylum-restriction-allowed-by-supreme-court-will-be-a-deterrent-for-migrants/; Colleen Long, *Trump official says asylum changes will drive down backlog*, AP (Sept. 13, 2019), https://apnews.com/2aa9efadd56f430cb366ef71024e5790; Daniella Diaz, *Kelly: DHS is considering separating undocumented children from their parents at the border*, CNN (Mar. 7, 2017), https://www.cnn.com/2017/03/06/politics/john-kelly-separating-children-from-parents-immigration-border/index.html.

151. Asylum Eligibility and Procedural Modifications, 84 Fed. Reg. 33,829 (Jul. 16, 2019) (to be codified at 8 C.F.R. pt. 208), *available at* https://www.federalregister.gov/documents/2019/07/16/2019-15246/asylum-eligibility-and-procedural-modifications; *see also* Nicole Narea, *The Supreme Court has delivered a devastating blow to the US asylum system*, VOX.COM (Sep. 12, 2019), https://www.vox.com/policy-and-politics/2019/9/12/20861765/supreme-court-ruling-asylum-rule-southern-border.

152. Nicole Narea, *The Trump administration will start sending most immigrant families arrested at the border back to Mexico*, VOX.COM (Sep. 24, 2019), https://www.vox.com/2019/9/24/20882070/immigrant-families-mexico-catch-release.

153. *This American Life: The Out Crowd*, CHI. PUB. RADIO (Nov. 15, 2019), https://www.thisamericanlife.org/688/the-out-crowd.

154. Linda Qiu, *Trump's Falsehood-Laden Speech on Immigration*, N.Y. TIMES (Nov. 1, 2018), https://www.nytimes.com/2018/11/01/us/politics/fact-check-trump-immigration-.html.

155. *Id*.; Kenji Kizuka, *Fact Check: Asylum Seekers Regularly Attend Immigration Court Hearings*, HUMAN RTS. FIRST, Jan. 25, 2019, https://www.humanrightsfirst.org/resource/fact-check-asylum-seekers-regularly-attend-immigration-court-hearings.

156. U.S. DEP'T OF HOMELAND SEC., FACT SHEET: DHS AGREEMENTS WITH GUATEMALA, HONDURAS, AND EL SALVADOR, https://gt.usembassy.gov/wp-content/uploads/sites/253/fact_sheet_-_agreements_with_northern_region_of_central_america_countries.pdf.

countries are incapable of protecting asylum seekers.[157] Indeed, many asylum seekers come from those three countries.[158] Asylum officers have contacted members of Congress with complaints that Trump administration policies weaponize the asylum system in order to further a "racist agenda of keeping Hispanic and Latino populations from entering the United States."[159]

In a 2017 address to the Executive Office of Immigration Review, then-Attorney General Jeff Sessions proclaimed, "the system is being gamed. The credible-fear process was intended to be a lifeline for persons facing serious persecution. But it has become an easy ticket to illegal entry into the United States."[160] He continued, "we also have dirty immigration lawyers who are encouraging their otherwise unlawfully present clients to make false claims of asylum providing them with the magic words needed to trigger the credible-fear process."[161] The former Attorney General's suggestion that non-meritorious claims of credible fear were being made was baseless.[162] The president has called the legal regime of asylum a "scam"[163] and "a big fat con job."[164]

Amidst the falsehoods and explicit hostility towards asylum seekers, the administration has begun to implement plans to utilize Customs and Border Protection officers to conduct credible-fear interviews at the border.[165] These same officers have been documented "explicitly coerc[ing] separated parents, and through abusive tactics and deplorable conditions of confinement creat [ing] a coercive environment that prevented those parents from meaningfully exercising their rights."[166] A recent disclosure of emails written by Stephen Miller, a White House senior policy adviser, revealed his affinity for white

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157. Nicole Narea, *Trump agreements in Central America are dismantling the asylum system as we know it*, VOX.COM (Nov. 20, 2019), https://www.vox.com/2019/9/26/20870768/trump-agreement-honduras-guatemala-el-salvador-explained.

158. U.S. DEP'T OF HOMELAND SEC., ANNUAL FLOW REPORT, REFUGEES AND ASYLEES: 2017 (2019), https://www.dhs.gov/sites/default/files/publications/Refugees_Asylees_2017.pdf.

159. Greg Sargent, *In scathing manifesto, an asylum officer blasts Trump's cruelty to migrants*, WASH. POST (Nov. 12, 2019), https://www.washingtonpost.com/opinions/2019/11/12/scathing-manifesto-an-asylum-officer-blasts-trumps-cruelty-migrants/.

160. Att'y Gen. Jeff Sessions, Remarks to the Executive Office for Immigration Review (Oct. 12, 2017), https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-executive-office-immigration-review.

161. *Id*.

162. Lindsay M. Harris, *Sessions fundamentally misses the mark on the asylum system*, HILL (Oct. 17, 2017), https://thehill.com/opinion/immigration/355734-sessions-fundamentally-misses-the-mark-on-the-asylum-system.

163. Michelle Mark, *Trump mocks asylum-seekers at the border, says they 'look like they should be fighting for the UFC'*, BUS. INSIDER (Apr. 6, 2019), https://www.businessinsider.com/trump-mocks-asylum-seekers-calls-system-scam-2019-4.

164. Jake Johnson, *'Sickening': Trump Mocks Asylum-Seekers Fleeing Violence at Michigan Rally*, COMMON DREAMS (Mar. 29, 2019), https://www.commondreams.org/news/2019/03/29/sickening-trump-mocks-asylum-seekers-fleeing-violence-michigan-rally.

165. Presidential Memorandum on Additional Measures to Enhance Border Security and Restore Integrity to Our Immigration System (Apr. 29, 2019), https://www.whitehouse.gov/presidential-actions/presidential-memorandum-additional-measures-enhance-border-security-restore-integrity-immigration-system/.

166. Letter from Am. Immigration Council and Am. Immigration Lawyers Ass'n to Dep't of Homeland Sec. (Aug. 23, 2018), https://americanimmigrationcouncil.org/sites/default/files/general_

nationalist writings that warn of a "great replacement" by refugees.[167] This list of illustrations runs on *ad nauseam*.[168]

Compare the officially sanctioned hostility towards asylum applicants to that of the checks and balances baked into the criminal justice system, with government prosecutors, judges and juries, and the appellate process of review. The difference is even starker if you consider that asylum seekers are not entitled to legal representation, that the system is rarely explained to them, and that credible-fear interviews occur just days after their apprehension.[169] It is evident that there is a drastic and pressing need for collateral review of these credible-fear determinations. It may not necessarily be the case that the Trump administration's demonstrable and explicit hostility towards asylum seekers seeps into discretionary judgments of executive officers in credible-fear interviews at the border, but the danger itself is incompatible with the judiciary's role in separation-of-powers protections against arbitrary and abusive executive action in the United States. The answer to Justice Kennedy's question, whether the administrative procedures are disinterested in the outcome and committed to procedures designed to ensure independence, is no.

CONCLUSION

The Suspension Clause exists to secure individual liberty.[170] Whether or not the Court determines that Congress has provided asylum seekers with satisfactory substitute procedures in place of the Suspension Clause, it should recognize and reaffirm that the Clause is essential and parallel to the plenary

litigation/the_use_of_coercion_by_u.s._department_of_homeland_security_officials_against_parents_who_were_forcibly_separated_from_their_children_public_fin_0.pdf.

167. Michael Edison Hayden, *Miller Pushed Racist 'Camp of the Saints' Beloved by Far Right*, SOUTHERN POVERTY LAW CTR. (Nov. 12, 2019), https://www.splcenter.org/hatewatch/2019/11/12/miller-pushed-racist-camp-saints-beloved-far-right.

168. Isaac Chotiner, *How the Trump Administration Uses the "Hidden Weapons" of Immigration Law*, NEW YORKER (Feb. 13, 2020), https://www.newyorker.com/news/q-and-a/how-the-trump-administration-uses-the-hidden-weapons-of-immigration-law ("[t]he Department of Homeland Security . . . is forcing sixty-two thousand-plus asylum seekers to wait in appallingly dangerous conditions with no hope that they'll ever have the opportunity to get a lawyer and virtually impossible chances of ever winning asylum, regardless of the strength of their claims."); Charles Davis, *Bureaucracy as a weapon: how the Trump administration is slowing asylum cases*, GUARDIAN (Dec. 23, 2019), https://www.theguardian.com/us-news/2019/dec/23/us-immigration-trump-asylum-seekers; Hannah Dreier, *Trust and Consequences*, WASH. POST (Feb. 15, 2020), https://www.washingtonpost.com/graphics/2020/national/immigration-therapy-reports-ice/ ("[t]o bolster its policy of stepped up enforcement, the administration is requiring that notes taken during mandatory therapy sessions with immigrant children be passed onto ICE, which can then use those reports against minors in court."); Zolan Kanno-Youngs, *Trump Administration Proposes Adding Minor Crimes to List of Offenses that Bar Asylum*, N.Y. TIMES (Dec. 18, 2019), https://www.nytimes.com/2019/12/18/us/politics/trump-asylum-misdemeanors.html; Oliver Laughland, *Inside Trump's tent immigration courts that turn away thousands of asylum seekers*, GUARDIAN (Jan. 16, 2020), https://www.theguardian.com/us-news/2020/jan/16/us-immigration-tent-court-trump-mexico; Quinn Owen, *Trump admin to expand fast-track returns of asylum seekers at southern border*, ABC NEWS (Jan. 24, 2020), https://abcnews.go.com/US/trump-admin-expand-fast-track-returns-asylum-seekers/story?id=68517675.

169. U.S. COMM'N ON INT'L RELIGIOUS FREEDOM, *supra* note 10, at 36, 52.

170. *Boumediene*, 553 U.S. at 723.

power doctrine. The Court cannot endorse a principle that blinds the judiciary to executive administration of power over asylum seekers, who rank among the most vulnerable people on earth. That principle would then "lie about like a loaded weapon ready for the hand of any authority" that may abuse it.[171] Instead, the Court should take the opportunity presented in *Thuraissigiam* to analyze the relevant immigration laws under the second step of the *Boumediene* test after it rejects the Third Circuit's dangerous contention that the Constitution does not apply.

171. Korematsu v. United States, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting).