LEADING CASES

CONSTITUTIONAL LAW

Article I — Suspension Clause — Expedited Removal Challenges — Department of Homeland Security v. Thuraissigiam

The privilege of the writ of habeas corpus, enshrined in the Constitution through the Suspension Clause, enables individuals to invoke judicial review to challenge the legality of the government's restraints on their liberty.[1] Last Term, in *Department of Homeland Security v. Thuraissigiam*,[2] the Supreme Court held that the limited judicial review afforded to a noncitizen challenging an expedited removal order did not violate his rights under the Suspension Clause.[3] In upholding this regime of limited judicial review for asylum seekers, the Court anchored its reasoning in the original meaning of the Suspension Clause and the clause's protection of the writ as it existed in 1789.[4] Yet the Court discussed case law after the Founding era without describing the weight of this more recent body of law in its decisionmaking.[5] In turn, the lack of explanation around the role of post-1789 habeas law in the decision drives methodological confusion, opens the door to narrow interpretations of recent precedent in future habeas challenges, and potentially deepens the impact of increasingly expansive immigration restrictions.

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996[6] (IIRIRA) bolstered resources for immigration law enforcement[7] and curbed judicial review of a range of removal decisions.[8] Under IIRIRA's expedited removal provision, 8 U.S.C. § 1225(b), officials may order the removal of a noncitizen who was not admitted into the United States and cannot prove his continuous presence in the country over the preceding two-year period.[9] If the noncitizen demonstrates a "credible

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[1] The Suspension Clause states that "[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." U.S. CONST. art. I, § 9, cl. 2; *see also, e.g.*, Paul D. Halliday & G. Edward White, *The Suspension Clause: English Text, Imperial Contexts, and American Implications*, 94 VA. L. REV. 575, 699 (2008) (characterizing the writ of habeas corpus as "a common law instrument by which courts inspected the behavior of anyone who claimed to detain another according to law").

[2] 140 S. Ct. 1959 (2020).

[3] *See id.* at 1964.

[4] *See id.* at 1969 & n.12.

[5] *See id.* at 1975–81.

[6] Pub. L. No. 104-208, 110 Stat. 3009-546 (codified as amended in scattered sections of 8, 18, and 28 U.S.C.).

[7] *See id.* tit. I, 110 Stat. at 3009-553 to -564.

[8] *See id.* § 306, 110 Stat. at 3009-607 to -612; Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 COLUM. L. REV. 961, 966–69 (1998).

[9] *See* 8 U.S.C. § 1225(b)(1)(A)(i), (iii)(II). At the time of the events of this case, the government exercised narrower grounds for expedited removal. *See infra* note 98.

fear of persecution," then he may remain in the country and receive further consideration of his asylum application.[10] If officials instead find that the noncitizen did not demonstrate a credible fear of persecution and order his removal, then the noncitizen may request review of the order by an immigration judge[11] and pursue habeas corpus proceedings per 8 U.S.C. § 1252(e).[12] Section 1252(e) outlines the limited habeas review available for expedited removal orders, foreclosing substantive review of the orders.[13] Between 2010 and 2018, expedited removals accounted for around forty percent of the more than three million noncitizens ordered removed from the country.[14]

In 2017, a Sri Lankan man named Vijayakumar Thuraissigiam entered the United States without documentation or inspection.[15] Immigration officials detained Thuraissigiam about twenty-five yards north of the Mexican border within a day of his entry.[16] Upon his capture, Thuraissigiam "claimed a fear of returning to Sri Lanka" based on a past abduction and assault, though he did not explicitly connect those attacks to any "protected characteristics."[17] Officials concluded that he had not established a credible fear of persecution and ordered his expedited removal pursuant to § 1225(b).[18] Thuraissigiam then filed a habeas petition, alleging that he had fled Sri Lanka after years of persecution, including torture and beatings based on his identity as a member of Sri Lanka's Tamil ethnic minority and his work for Tamil politicians.[19] He called for a "meaningful opportunity" to apply for asylum and asserted that the expedited removal process violated his rights under the Suspension Clause and Due Process Clause.[20]

The United States District Court for the Southern District of California dismissed Thuraissigiam's petition for lack of subject matter

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[10] *See* 8 U.S.C. § 1225(b)(1)(B)(ii); *see also id.* § 1225(b)(1)(B)(v) (defining "credible fear of persecution" as an applicant's "significant possibility" of becoming eligible for asylum). Pending the final credible fear determination, federal officials must detain the noncitizen. *Id.* § 1225(b)(1)(B)(iii)(IV).

[11] *See id.* § 1225(b)(1)(B)(iii)(III).

[12] *Id.* § 1252(e)(2).

[13] *Id.* (confining review to "(A) whether the petitioner is an alien, (B) whether the petitioner was ordered removed under [§ 1252(b)(1)], and (C) whether the petitioner can prove by a preponderance of the evidence that the petitioner is an alien lawfully admitted for permanent residence, has been admitted as a refugee[,] . . . or has been granted asylum").

[14] MIKE GUO & RYAN BAUGH, U.S. DEP'T OF HOMELAND SEC., IMMIGRATION ENFORCEMENT ACTIONS: 2018, at 9 (2019), https://www.dhs.gov/sites/default/files/publications/immigration-statistics/yearbook/2018/enforcement_actions_2018.pdf [https://perma.cc/2VZA-KWGR].

[15] *See* Thuraissigiam v. U.S. Dep't of Homeland Sec., 917 F.3d 1097, 1101 (9th Cir. 2019).

[16] *Id.*

[17] *Thuraissigiam*, 140 S. Ct. at 1967.

[18] *Id.* at 1968.

[19] Thuraissigiam v. U.S. Dep't of Homeland Sec., 287 F. Supp. 3d 1077, 1078 (S.D. Cal. 2018) (describing attacks that led to his hospitalization, long-term scarring, and numbness in his arm).

[20] *See Thuraissigiam*, 917 F.3d at 1102.

jurisdiction.[21] The district court emphasized the "narrow, limited, and explicit terms" of the habeas review allowed under § 1252(e), finding that the provision prohibited review of the credible fear finding.[22] Furthermore, the court held that the review allowed under § 1252(e) did not violate the Suspension Clause since the provision "retain[s] some avenues of judicial review, limited though they may be."[23]

The Ninth Circuit reversed and remanded.[24] Writing for the unanimous panel, Judge Tashima[25] held that § 1252(e) did not provide a meaningful opportunity for review of Thuraissigiam's claims, thus violating the Suspension Clause.[26] Citing the statutory text and Ninth Circuit precedent, the panel first found that § 1252(e) stripped the court of jurisdiction over Thuraissigiam's claims.[27] The panel then considered his constitutional challenge. Using the Supreme Court's holdings in *INS v. St. Cyr*[28] and *Boumediene v. Bush*[29] as "analytical blueprint[s],"[30] the panel conducted a two-step inquiry.[31] First, upon review of common law history and case law from the "finality era" — a period from the late 1800s to the mid-1900s in which statutes limited judicial review of immigration challenges[32] — the panel held that a noncitizen entering the country may invoke the Suspension Clause.[33] Second, based on the finding that § 1252(e) "precludes review of the agency's application of relevant law," the panel held that the provision "violates the Suspension Clause as applied."[34]

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[21] *See Thuraissigiam*, 287 F. Supp. 3d at 1080. The court also denied Thuraissigiam's motion for a stay of removal. *Id.* at 1083–84.

[22] *Id.* at 1080; *see id.* at 1081.

[23] *Id.* at 1082 (alteration in original) (quoting Pena v. Lynch, 815 F.3d 452, 456–57 (9th Cir. 2016)). The court also found that *INS v. St. Cyr*, 533 U.S. 289 (2001), a 2001 Supreme Court case regarding a noncitizen's right to judicial review of a removal order, did not apply. *See Thuraissigiam*, 287 F. Supp. 3d at 1082.

[24] *Thuraissigiam*, 917 F.3d at 1119.

[25] Judge Tashima was joined by Judges McKeown and Paez.

[26] *See Thuraissigiam*, 917 F.3d at 1119.

[27] *See id.* at 1103–04.

[28] 533 U.S. 289.

[29] 553 U.S. 723 (2008).

[30] *Thuraissigiam*, 917 F.3d at 1106.

[31] *Id.* at 1107. The panel opted not to follow a Third Circuit holding that the lack of due process rights of petitioners like Thuraissigiam barred consideration of his Suspension Clause claim. *Id.* at 1110–12 (discussing Castro v. U.S. Dep't of Homeland Sec., 835 F.3d 422 (3d Cir. 2016)). In a footnote, the panel also disagreed with the Third Circuit's underlying finding that "a person like Thuraissigiam lacks all procedural due process rights." *Id.* at 1111 n.15.

[32] *See Thuraissigiam*, 140 S. Ct. at 1976–77. The panel noted that the Supreme Court continued to grant habeas review to noncitizens despite these statutory limitations and that the Court later clarified that the Suspension Clause was the "specific source of [habeas] review." *Thuraissigiam*, 917 F.3d at 1115.

[33] *See Thuraissigiam*, 917 F.3d at 1113–15.

[34] *Id.* at 1119. Finding only one possible interpretation of the statute, the panel declined to adopt an alternative interpretation of § 1252 pursuant to the constitutional avoidance canon. *See id.*

The Supreme Court reversed and remanded.[35] Writing for the Court, Justice Alito[36] held that "neither the Suspension Clause nor the Due Process Clause . . . require[d] any further review of [Thuraissigiam's] claims" and that § 1252(e) was "constitutional as applied."[37] The Court first framed expedited removal as a means to mitigate the financial and administrative burden of removal proceedings[38] and streamline consideration of fraudulent or dubious asylum claims.[39]

The Court then turned to Thuraissigiam's claims under the Suspension Clause, grounding its inquiry in the scope of the writ as it existed in 1789 based on its reading of a footnote in Thuraissigiam's brief.[40] Consulting treatises and British and American legal history, the majority concluded that the writ at the time of the Founding "simply provided a means of contesting the lawfulness of restraint and securing release" rather than contesting a removal order and securing the right to enter or remain in the country, as asserted by Thuraissigiam.[41] The Court found Thuraissigiam's citation to two pre-1789 cases involving habeas review in noncitizen removal challenges unpersuasive[42] and distinguished other early habeas decisions.[43] Notably, the Court did not explore whether the writ "might have evolved since the adoption of the Constitution."[44]

The majority also rebutted Thuraissigiam's argument that finality-era cases and more recent precedent reflected a broader privilege to the writ under the Suspension Clause.[45] The Court found that the finality-era decisions "were based not on the Suspension Clause but on the habeas statute and the immigration laws then in force."[46] Further, the Court differentiated Thuraissigiam's case from *Boumediene* and *St. Cyr*.[47]

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[35] *Thuraissigiam*, 140 S. Ct. at 1983.

[36] Justice Alito was joined by Chief Justice Roberts and Justices Thomas, Gorsuch, and Kavanaugh.

[37] *Thuraissigiam*, 140 S. Ct. at 1964.

[38] *See id.* at 1964, 1966–67.

[39] *See id.* at 1963.

[40] *Id.* at 1969 (quoting Brief for Respondent at 26 n.12, *Thuraissigiam*, 140 S. Ct. 1959 (2020) (No. 19-161)); *see also id.* at 1975; *infra* note 79 (discussing the Court's interpretation of Thuraissigiam's brief).

[41] *Thuraissigiam*, 140 S. Ct. at 1969. The Court added: "While respondent does not claim an entitlement to release, the Government is happy to release him — provided the release occurs in the cabin of a plane bound for Sri Lanka." *Id.* at 1970.

[42] The Court noted that one case lacked an official report, *id.* at 1972, and argued that the other case resulted in the petitioner's ability to remain in the country as a "collateral consequence" of his release given the lack of "modern immigration restrictions" that would have otherwise resulted in his deportation, *id.* at 1973.

[43] *See id.* at 1972–74 (dismissing cases about conditional release, foreign deserters, and extradition).

[44] *Id.* at 1975.

[45] *See id.* at 1975–81.

[46] *Id.* at 1976. The majority distinguished the finality-era habeas statute from the current federal habeas statute, *id.*, and disputed Thuraissigiam's interpretation of finality-era cases, *id.* at 1977–80.

[47] The Court noted that *Boumediene*, which involved noncitizens challenging their detention in Guantanamo Bay, was "not about immigration at all" and "reaffirmed that release is the habeas

Finally, the Court held that the limited judicial review allowed under § 1252(e) did not violate the Due Process Clause given the circumscribed due process rights of noncitizens entering the country.[48] Citing the "century-old rule" that the political branches of government determine what constitutes due process for noncitizens seeking entry,[49] the majority found that § 1225(b) outlined all procedures to which Thuraissigiam was entitled.[50] Since the Due Process Clause "provides nothing more" in terms of protections, the Court reasoned, the limited judicial review in § 1252(e) did not violate Thuraissigiam's due process rights.[51]

Justice Thomas concurred, offering a brief history of the writ.[52] He determined that § 1252(e) "bears little resemblance to a suspension as that term was understood at the [F]ounding" since the provision does not enable government detention and even "expressly permits habeas relief."[53]

Justice Breyer concurred in the judgment,[54] underscoring that the Court's holding as to the Suspension Clause applied only to the case at hand.[55] First, Justice Breyer argued that Thuraissigiam's status as an individual who "has never lived in, or been lawfully admitted to, the United States" justified the limited scope of the habeas review provided in his case.[56] Second, he found Congress's limitation on habeas review "consistent with the Suspension Clause" and related precedent[57] given the "factual" nature of two of Thuraissigiam's claims[58] and the "fine-grained questions of degree" raised in his procedural claims.[59]

Justice Sotomayor dissented,[60] arguing that the majority misrepresented Thuraissigiam's petition and misinterpreted the history of the writ.[61] Calling for a "proper reframing" of Thuraissigiam's claims,[62]

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remedy." *Id.* at 1981. In addition, it stated that *St. Cyr*, which involved a noncitizen's challenge to a removal order, did not "signify approval of [Thuraissigiam's] very different attempted use of the writ." *Id.*

48 *See id.* at 1982–83. Justice Alito treated the Ninth Circuit panel's footnote arguing that Thuraissigiam had procedural due process rights as an "independent ground" for the panel's decision. *Id.* at 1982.

49 *Id.* at 1982.

50 *Id.* at 1983. The majority rejected the argument that Thuraissigiam may be entitled to additional due process since he was detained after entering the country. *Id.* at 1982.

51 *Id.* at 1983.

52 *See id.* at 1983–88 (Thomas, J., concurring).

53 *Id.* at 1988.

54 Justice Breyer was joined by Justice Ginsburg.

55 *See Thuraissigiam*, 140 S. Ct. at 1988, 1993 (Breyer, J., concurring in the judgment). Justice Breyer added that this case was not the time to "come to conclusions about the Due Process Clause." *Id.* at 1989.

56 *Id.* at 1990.

57 *See id.*

58 *Id.* at 1991 (discussing claims involving the legal standard and country conditions analysis).

59 *Id.* at 1992 (discussing claims regarding the credible fear interview).

60 Justice Sotomayor was joined by Justice Kagan.

61 *See Thuraissigiam*, 140 S. Ct. at 1993–94 (Sotomayor, J., dissenting).

62 *Id.* at 1994.

Justice Sotomayor characterized his petition as a challenge to the "legality of the exercise of executive power," a claim that the law has "long permitted."[63] She argued that the majority offered a narrow interpretation of the writ, which has historically encompassed challenges outside of the detention context.[64] She also rejected the majority's analysis of the finality-era cases[65] and recent habeas precedent.[66] Further, she framed the majority's due process holding as unnecessary and contrary to the provision of due process to all noncitizens in the country, a practice that the Court "has long affirmed."[67] While acknowledging the majority's policy concerns, she concluded that the decision ignored the "minimal, yet crucial" role of the judiciary in upholding the Constitution[68] and left "significant exercises of executive discretion unchecked."[69]

Thuraissigiam surfaces lingering confusion around the proper role and understanding of historical precedent in applying the Suspension Clause.[70] When considering Thuraissigiam's claims, the Court anchored its inquiry in the original meaning of the clause and its protection of the writ as it existed in 1789.[71] Nevertheless, the majority discussed case law after the Founding era without clarifying its reasoning or the weight of this body of law.[72] This lack of clarity about the function of more recent habeas precedent in the Court's decision creates methodological confusion, enables narrower interpretations of recent case law in future habeas challenges, and likely deepens the impact of an increasingly stringent immigration regime.

History plays a critical part in the interpretation of the Suspension Clause, though the Court has left open the possibility that the clause's protections have expanded since the Founding era. The Suspension Clause restricts the suspension of the writ of habeas corpus,[73] a writ viewed by the Founders as a "vital instrument for the protection of

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[63] *Id.*

[64] *See id.* at 1997–2011. Justice Sotomayor deemed the Court's demand for analogies to Thuraissigiam's case an "exercise in futility" given the lack of immigration restrictions at the Founding. *Id.* at 1998.

[65] *Id.* at 2004–09.

[66] *Id.* at 2009–11.

[67] *Id.* at 2013; *see also id.* at 2012 (noting that due process rights stem from physical presence in the country, not lawful admission).

[68] *Id.* at 2015.

[69] *Id.* at 1993.

[70] For instance, the majority and dissent disagreed on the level of historical support required in a Suspension Clause inquiry. *Compare id.* at 1972 n.18 (majority opinion), *with id.* at 1998 (Sotomayor, J., dissenting).

[71] *See id.* at 1969 & n.12 (majority opinion).

[72] *See id.* at 1970–71, 1975–81.

[73] U.S. CONST. art. I, § 9, cl. 2. Judges and scholars disagree on the extent to which the Suspension Clause affirmatively guarantees the writ. *See Thuraissigiam*, 140 S. Ct. at 1969 n.12; *id.* at 1997 n.1 (Sotomayor, J., dissenting); Amanda L. Tyler, *Is Suspension a Political Question?*, 59 STAN. L. REV. 333, 339–42 (2009).

individual liberty."[74] To apply the clause, the Court typically draws on Founding-era history,[75] stating that "at the absolute minimum, the Suspension Clause protects the writ 'as it existed in 1789.'"[76] As recently as 2008, a majority of Justices noted that "[t]he Court has been careful not to foreclose the possibility that the protections of the Suspension Clause have expanded along with post-1789 developments."[77]

Although the *Thuraissigiam* Court grounded its reasoning in the Founding-era scope of the writ and expressly did not consider the writ's post-Founding evolution,[78] the Court nonetheless analyzed more recent habeas precedent. At the outset of the decision, the Court declared that "[t]he original meaning of the Suspension Clause is the subject of controversy."[79] Then, throughout the opinion, the Court treated 1789 as a kind of bright-line limit on the scope of relief, dismissing cases that did not involve Founding-era understandings of the writ,[80] criticizing the Ninth Circuit panel and the dissent for failing to cite pre-1789 cases that adequately supported Thuraissigiam's claims,[81] and concluding that the focus on the scope of the writ as it existed in 1789 "doom[ed] [Thuraissigiam's] Suspension Clause argument."[82] Still, despite this seemingly exclusive reliance on the Founding-era scope of the writ, the majority also discussed post-1789 case law, including the reach of the rulings in *Boumediene* and *St. Cyr*.[83]

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[74] Boumediene v. Bush, 553 U.S. 723, 743 (2008).

[75] *See* Halliday & White, *supra* note 1, at 580–81.

[76] INS v. St. Cyr, 533 U.S. 289, 301 (2001) (quoting Felker v. Turpin, 518 U.S. 651, 664 (1996)).

[77] *Boumediene*, 553 U.S. at 746.

[78] *See Thuraissigiam*, 140 S. Ct. at 1969.

[79] *Id.* at 1969 n.12; *see also* Amanda L. Tyler, Thuraissigiam *and the Future of the Suspension Clause*, LAWFARE (July 2, 2020, 12:31 PM), https://www.lawfareblog.com/thuraissigiam-and-future-suspension-clause [https://perma.cc/6EBZ-SK7U] ("[Justice] Alito started and ended his inquiry with 1789 . . . ."). The Court limited its holding to the scope of the writ as it existed in 1789 based on its interpretation of a footnote in Thuraissigiam's brief. *Thuraissigiam*, 140 S. Ct. at 1969 (quoting Brief for Respondent, *supra* note 40, at 26 n.12). However, Thuraissigiam's brief arguably does not warrant such a narrow reading and does not suggest that the Court should ignore post-1789 developments. *See* Brief for Respondent, *supra* note 40, at 12 (relying on "decades of finality-era cases" as well as *St. Cyr* and *Boumediene*); *see also* Gerald Neuman, *The Supreme Court's Attack on Habeas Corpus in* DHS v. Thuraissigiam, JUST SEC. (Aug. 25, 2020), https://justsecurity.org/72104/the-supreme-courts-attack-on-habeas-corpus-in-dhs-v-thuraissigiam [https://perma.cc/2GKZ-6B8B] (arguing that the majority "twist[ed] a supposed concession . . . into an excuse for [its] constricted focus"); Tyler, *supra* (arguing that Thuraissigiam's alleged exclusion of the writ's post-1789 expansion "is far from clear"). The Court itself acknowledged that Thuraissigiam's "argument focuse[d] mainly on [finality-era cases], which began a century later." *Thuraissigiam*, 140 S. Ct. at 1976.

[80] *Thuraissigiam*, 140 S. Ct. at 1974 (deeming post-Founding extradition cases not "pertinent"); *see also id.* at 1980 (finding that a 1953 case cited by Thuraissigiam was irrelevant because it failed to address the Founding-era scope of the writ).

[81] *See id.* at 1968, 1974–75.

[82] *Id.* at 1969.

[83] *See id.* at 1981. Nearly one-third of the opinion — about the same portion devoted to the analysis of pre-1789 law — engaged with cases decided during and after the finality era. *Compare*

The Court did not clearly explain the role of more recent habeas precedent in its decision. Moreover, potential reasons for its discussion of this body of law prove difficult to reconcile with the Court's originalist approach. For example, the Court may have analyzed post-1789 case law simply to address all of Thuraissigiam's arguments.[84] Yet this choice would make confusing the majority's repeated statements that Thuraissigiam could obtain relief based only on the scope of the writ as it existed in 1789.[85] After all, if post-1789 law provided an independent avenue for relief, then the Court's insistence on pre-1789 cases to validate the claim would seem misplaced. Meanwhile, if post-1789 law had no bearing on Thuraissigiam's claims, then the Court would not have needed to discuss that body of law. Alternatively, the Court may have turned to post-1789 case law to extract underlying principles of the writ as it existed in 1789. If so, however, the Court probably would have articulated that objective[86] and would not have considered recent cases that lacked strict originalist frameworks.[87] Finally, the Court may have engaged with post-1789 case law to supplement its originalist inquiry due to the difficulties of historical analysis.[88] Yet by that logic, the Court probably would have attributed its discussion of post-1789 precedent to those methodological pain points[89] rather than reaffirming its commitment to Founding-era law.[90]

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id. at 1970–71, 1975–81 (discussing cases decided during and after the finality era), *with id.* at 1969, 1971–75 (discussing Founding-era and early-nineteenth-century law). Justice Sotomayor pointed out the Court's invocation of a 2008 case "[d]espite [its statements] exalting the value of pre-1789 precedent." *Id.* at 2003 (Sotomayor, J., dissenting).

[84] At various points of the opinion, the majority noted Thuraissigiam's invocation of post-1789 case law. *See id.* at 1976, 1981 (majority opinion).

[85] *See id.* at 1969, 1975.

[86] The Court somewhat implied, but did not expressly or consistently state, such a goal. *See, e.g.*, *id.* at 1980–81 (determining that finality-era cases cannot support claims regarding the writ "as it was understood when the Constitution was adopted"). *But see* Neuman, *supra* note 79 (finding that the Court did not analyze early habeas cases to distill "underlying principles" of the writ).

[87] Indeed, in his concurrence, Justice Thomas concluded that "our precedents have departed from the original understanding of the Suspension Clause." *Thuraissigiam*, 140 S. Ct. at 1988 (Thomas, J., concurring); *see also* Richard H. Fallon, Jr., Essay, *The Supreme Court, Habeas Corpus, and the War on Terror: An Essay on Law and Political Science*, 110 COLUM. L. REV. 352, 378 (2010) (stating that the majority in *Boumediene* "began with an originalist analysis" and proceeded to a "more purposive or functional inquiry"); Gerald L. Neuman, *The Habeas Corpus Suspension Clause After* Boumediene v. Bush, 110 COLUM. L. REV. 537, 543 (2010) (arguing that neither *Boumediene* nor *St. Cyr* "commits itself to a strict originalism").

[88] *Cf., e.g.*, Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 HARV. L. REV. 2029, 2096 (2007) (noting difficulties in researching historical habeas proceedings).

[89] The Court remarked on the lack of reported habeas cases from the American colonies, *Thuraissigiam*, 140 S. Ct. at 1971 n.15, and the absence of "modern immigration restrictions" at the time of a 1772 decision, *id.* at 1973, but did not express an interest in referring to post-1789 law due to those analytical obstacles.

[90] In response to the dissent's criticism of a strict originalist approach in light of scholarly reports of "the dearth of reasoned habeas decisions at the [F]ounding," *id.* at 1998 (Sotomayor, J., dissenting)

The absence of an explanation of the role of post-1789 case law in the Court's decision drives methodological confusion for future judges and litigants. For instance, in cases analogous to *Thuraissigiam* — that is, cases involving petitions construed by courts to be limited to the Founding-era scope of the writ[91] — the lack of clarity around the weight of contemporary cases in the *Thuraissigiam* Court's decisionmaking may foster increased unpredictability and inconsistency in Suspension Clause inquiries.[92]

Furthermore, *Thuraissigiam*'s discussion of post-1789 case law may cast a shadow over future habeas challenges based on the evolution of the writ, even though the Court purported not to address that question. In particular, the *Thuraissigiam* majority issued rather narrow interpretations of recent habeas precedent, reflecting a "more limited vision" of the Suspension Clause that diverged from previous understandings.[93] Accordingly, the opinion may set the stage for more restrained conceptions of the clause in cases involving petitions based on the expansion of the writ since 1789. Courts may perceive *Thuraissigiam*'s discussion of post-1789 case law, even if considered dicta, as an invitation to adopt similarly circumscribed views and as a suggestion that the writ has not

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(citing Neuman, *supra* note 8), the majority stated that Thuraissigiam's brief mandated a focus only on the writ as it existed in 1789, *id.* at 1975 (majority opinion).

91 Petitioners may be unlikely to raise such limited claims since the writ has "evolved significantly" since 1789, especially in the immigration context. Noah Feldman, Opinion, *Supreme Court Ruling Weakens Asylum-Seekers' Rights*, BLOOMBERG (June 25, 2020, 12:00 PM), https://www.bloomberg.com/opinion/articles/2020-06-25/supreme-court-hands-trump-a-win-by-gutting-asylum-seekers-rights [https://perma.cc/XK6M-NEJM]. Still, like the *Thuraissigiam* Court, future courts may interpret parties' briefs to limit their analysis to the scope of the writ as it existed in 1789. *Cf. supra* note 79.

92 For example, as part of its analysis of the "historic role of habeas" during the Founding era, the majority invoked *Munaf v. Geren*, 553 U.S. 674 (2008), a case regarding American citizens who were detained in Iraq. *Thuraissigiam*, 140 S. Ct. at 1970. Meanwhile, in its analysis of post-Founding habeas law, the Court deemed a 2008 case regarding noncitizens detained in Guantanamo Bay inapposite and "not about immigration at all." *Id.* at 1981; *see also id.* at 2003 n.5 (Sotomayor, J., dissenting) (noting the Court "embrace[d]" *Munaf* yet "dismisse[d]" *Boumediene*).

93 Tyler, *supra* note 79; *see also* Neuman, *supra* note 79 (stating that the Court "rewrote and marginalized prior precedent on habeas corpus"). As an example, the majority distinguished *Boumediene* from Thuraissigiam's case based on the *Boumediene* Court's use of the writ for *release* rather than entry. *Thuraissigiam*, 140 S. Ct. at 1981. But the *Boumediene* Court remanded for additional proceedings, *see* Boumediene v. Bush, 553 U.S. 723, 798 (2008), offering a remedy similar to the judicial review sought by Thuraissigiam. *See* Tyler, *supra* note 79 (suggesting that *Thuraissigiam* "chart[ed] a different course" from the Court's recent decisions and "potentially scal[ed] back the range of remedies now available under the Suspension Clause"). Similarly, the majority argued that *St. Cyr* simply "reaffirmed" the use of the writ for *release* by noncitizens facing deportation and already living in the country. *Thuraissigiam*, 140 S. Ct. at 1981. Yet, like Thuraissigiam, the petitioner in *St. Cyr* sought additional judicial review and an opportunity to *remain* in the country. *See* INS v. St. Cyr, 533 U.S. 289, 293 (2001); *see also* Michael C. Dorf, *Justice Alito's Opinion in* Dep't of Homeland Security v. Thuraissigiam *Reveals Why "Custody" in the Narrow Sense Should Not Be a Requirement for Habeas*, DORF ON LAW (June 25, 2020, 8:46 PM), http://www.dorfonlaw.org/2020/06/justice-alitos-opinion-in-dept-of.html [https://perma.cc/R35J-NAMN] (critiquing the majority's treatment of *St. Cyr* and *Boumediene*).

evolved to include judicial review of removal orders.[94] Of course, one could argue that the Court's originalist inquiry will not bind decisions implicating the writ's post-1789 expansion.[95] Yet, perhaps in part because the *Thuraissigiam* majority did not clarify the precedential value of its discussion of post-1789 case law, early cases citing *Thuraissigiam* suggest that lower courts may cement the Court's relatively restrictive understanding of the writ and even gradually align Founding-era and contemporary views of the writ.[96]

Increasingly stringent immigration policies deepen the weight of the *Thuraissigiam* decision and its "sweeping" holding.[97] Indeed, two years after Thuraissigiam crossed the United States border, the government extended expedited removal to its statutory limits.[98] Thus, in upholding the limited judicial review accorded to asylum seekers subject to expedited removal, *Thuraissigiam* created methodological confusion that may lead to narrow interpretations of the Suspension Clause and further entrenched the increasingly expansive, "shadowy regime" of expedited removal.[99]

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[94] Two commentators view the Court's analysis of *St. Cyr* and a related 1953 decision as an "extraordinary rejection of well over one hundred years of historical practice" that suggested that the Constitution *requires* judicial intervention in removal cases. Ahilan Arulanantham & Adam Cox, *Immigration Maximalism at the Supreme Court*, JUST SEC. (Aug. 11, 2020), https://www.justsecurity.org/71939/immigration-maximalism-at-the-supreme-court [https://perma.cc/M6PX-JZGX].

[95] *See* Tyler, *supra* note 79 (positing that *Thuraissigiam* "has no precedential value in terms of its methodology" for claims based on post-Founding developments); *see also Thuraissigiam*, 140 S. Ct. at 1969; *cf. id.* at 1988 (Breyer, J., concurring in the judgment) (emphasizing that the issue before the Court was an as-applied challenge).

[96] *See, e.g.*, D.A.M. v. Barr, No. 20-cv-1321, 2020 WL 4218003, at *10 (D.D.C. July 23, 2020) (stating that the *Thuraissigiam* Court "clarified that the Suspension Clause only protects 'core' habeas claims, namely those that challenge present physical confinement" (quoting *Thuraissigiam*, 140 S. Ct. at 1970)); Singh v. Gillis, No. 20-cv-50, 2020 WL 4934680, at *2 (S.D. Miss. July 22, 2020); Mohit v. U.S. Dep't of Homeland Sec., 20-cv-00823, 2020 WL 3971642, at *3–4 (D. Colo. July 14, 2020); *see also* Neuman, *supra* note 79.

[97] Arulanantham & Cox, *supra* note 94; *see id.* (describing *Thuraissigiam* as an "unrestrained" decision on both Suspension Clause and due process grounds); Neuman, *supra* note 79 (noting potential implications of the decision on citizens and noncitizens).

[98] Prior to July 2019, the government authorized expedited removal for noncitizens who had arrived at a designated port of entry, who had entered the country by sea and had spent less than two years in the country, or who were apprehended within one hundred miles of the border and had spent less than fourteen days in the country. *See* HILLEL R. SMITH, CONG. RSCH. SERV., R45314, EXPEDITED REMOVAL OF ALIENS: LEGAL FRAMEWORK 41 (2019), https://fas.org/sgp/crs/homesec/R45314.pdf [https://perma.cc/Y873-3HAE]. Expedited removal now applies to any noncitizen who entered without inspection or documentation and has spent less than two years in the country. *See* Designating Aliens for Expedited Removal, 84 Fed. Reg. 35,409, 35,409 (July 23, 2019) (issued pursuant to 8 U.S.C. § 1225). Recently, a D.C. Circuit panel rejected a challenge to the expedited removal expansion. *See* Make the Rd. N.Y. v. Wolf, 962 F.3d 612, 635 (D.C. Cir. 2020).

[99] Neuman, *supra* note 87, at 565.