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EXPEDITED REMOVAL AND HABEAS CORPUS:

HOW A RECENT SUPREME COURT RULING, COMBINED WITH AN EXECUTIVE ORDER FROM FORMER PRESIDENT TRUMP HAS AFFECTED THE DUE PROCESS RIGHTS OF ILLEGAL IMMIGRANTS DETAINED FOR EXPEDITED REMOVAL

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I. INTRODUCTION

During former President Trump's tenure in office, he expanded the Department of Homeland Security's power to subject undocumented individuals to "expedited removal," a process in which an immigration officer can have a noncitizen deported without the opportunity for a hearing before an immigration court judge.[1] The expedited removal process was previously only authorized for undocumented individuals who entered the United States illegally within the previous two weeks and were apprehended within 100 miles of the border. The Trump Administration policy,

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[1] 8 C.F.R. §235.3 (2020).

however, allowed for expedited removal to be used on any undocumented alien apprehended anywhere in the country who entered illegally within the previous two years.[2] This policy expands the authority of immigration officials to deport individuals based on a *suspicion* that they are undocumented. Once apprehended, the burden of proof is on the undocumented person to prove that they have been in the U.S. for more than two years, a burden that can be difficult to meet when placed in a detention center without the opportunity to appear before a court.

Additionally, the Supreme Court recently resolved a circuit split regarding the issue of whether individuals subjected to expedited removal proceedings have the due process right to challenge the removal via a habeas corpus petition.[3] In its opinion, delivered by Justice Alito, the Court held that such rights do not exist for these individuals and denied the immigrant's habeas petition.[4]

The first part of this note will explore whether former President Trump's recent expansion of the expedited removal power is within the bounds of the Constitution. Specifically, it will attempt to determine if subjecting undocumented individuals to expedited removal without the opportunity to appear before an immigration judge or have a bond hearing is a violation of their due process rights. The second part of this paper will pose alternatives to the expedited removal process as well as examine whether there is potential for significant change under President Joe Biden's administration.

II. EXPEDITED REMOVAL: HISTORY UNDER THE LAW

A. KNAUFF V. SHAUGNESSY

The Supreme Court's 1950 decision in *Knauff v. Shaughnessy*,[5] which has not been overruled, would become

[2] *Id.*
[3] Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959 (2020).
[4] *Id.*
[5] United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537 (1950).

"the foundation of expedited removal."[6] In *Knauff*, the petitioner was born in Germany in 1915, fled during the Hitler regime, and eventually made her way to England in 1939 as a refugee.[7] While in England, she served with the Royal Air Force from 1943 to 1946 and subsequently became employed with the War Department of the United States in Germany as a civilian.[8] In February of 1948, while still in Germany, she married Kurt W. Knauff, a naturalized American citizen who was honorably discharged from the United States Army as a veteran of World War II.[9] In August of 1948, the petitioner sought entry into the United States to be naturalized; she was detained on Ellis Island.[10] The Assistant Commissioner of Immigration and Nationalization denied petitioner's entry and "recommended that she be permanently excluded without a hearing on the ground that her admission would be prejudicial to the interests of the United States[,]" a recommendation adopted by the Attorney General who then entered a final order of exclusion.[11] Petitioner then challenged the Attorney General's right to exclude her without a hearing and filed a habeas corpus petition under the War Brides Act.[12] The War Brides Act allowed alien spouses of members of the United States Armed Forces to enter the U.S. as non-quota immigrants after World War II so long as they were "otherwise admissible under immigration laws."[13] The District Court for the Southern District of New York dismissed the case and the Court of Appeals for the Second Circuit affirmed.[14]

The Supreme Court granted certiorari and held against petitioner, affirming the decision of the Court of Appeals.[15] Justice Minton, writing for the majority, held that

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[6] Gerald Neuman, *The Supreme Court's Attack on Habeas Corpus in DHS v. Thuraissigiam,* JUST SECURITY (Aug. 25, 2020), https://www.justsecurity.org/72104/the-supreme-courts-attack-on-habeas-corpus-in-dhs-v-thuraissigiam/.
[7] *Knauff*, 338 U.S. at 539.
[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] *Id.* at 539-40.
[12] *Id.* at 540.
[13] *Id.* at 546 (internal quotations omitted).
[14] *Id.* at 539.
[15] *Id.* at 547.

the "War Brides Act [did] not relieve petitioner of her alien status[,]" and that "nothing in the War Brides Act or its legislative history to indicate that it was the purpose of Congress . . . to relax the security provisions of the immigration laws."[16] The Court further reasoned that "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."[17]

B. THE ILLEGAL IMMIGRATION REFORM AND IMMIGRANT RESPONSIBILITY ACT

Expedited removal was created as part of the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), which was signed into law by former President Bill Clinton in 1996, amending and expanding the authority given to the federal government under the Immigration and Nationality Act ("INA").[18] Congress's goal in enacting IIRIRA was:

> [T]o improve deterrence of illegal immigration to the United States by increasing border patrol and investigative personnel, by increasing penalties for alien smuggling and for document fraud, by reforming exclusion and deportation law and procedures, by improving the verification system for the eligibility for employment, and through other measures, to reform the legal immigration system and facilitate legal entries into the United States . . . .[19]

In addition to the creation of expedited removal, IIRIRA also retroactively expanded on the definition of aggravated felony to include lesser crimes;[20] combined with the Welfare Reform Act to "reduc[e] substantially the access

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[16] *Id.* at 546-47.
[17] *Id.* at 544 (citing Nishimura Ekiu v. United States, 142 U.S. 651 (1892); Ludecke v. Watkins, 335 U.S. 160, (1948)).
[18] Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009.
[19] H.R. Rep. No. 104-828, at 1.
[20] § 321, 110 Stat. at 3627-628.

of legal immigrants to public benefit programs available to citizens;"[21] and required immigrants admitted under family-based categories to be sponsored by a relative who must submit an affidavit showing they are able and willing to support the immigrant at 125% of the poverty level.[22]

Section 1252(e) of title eight of the U.S. Code grants the authority for expedited removal as it was initially created in 1996. Expedited removal allows immigration officers to quickly deport undocumented individuals who entered the U.S. illegally, so long as they were apprehended within two weeks of their arrival and within 100 miles of the border.[23] The rationale for implementing such a procedure stemmed from Congress's belief that "detaining all asylum seekers until the full-blown removal process is completed would place an unacceptable burden on our immigration system and that releasing them would present an undue risk that they would fail to appear for removal proceedings."[24] This belief is not unwarranted, as there were an estimated 10.6 million undocumented individuals living in the U.S. in 2017, and over 20,000 asylum seekers in that same year.[25] The government, after all, does have a vested interest in keeping U.S. borders secure.

Despite Congress's justifiable reasoning for creating the expedited removal process, it is not without its problems. Among these problems is the fact that immigration officials have nearly unchecked authority when deciding if an individual should be subjected to expedited removal. This is because once an immigration official has taken an individual into custody and made the decision to subject that individual to expedited removal, the burden is on the individual in custody to prove that they should not be expeditiously

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[21] T. ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP PROCESS AND POLICY 29 (8th ed. 2016).
[22] *Id.*
[23] 8 U.S.C. §1252(e) (2020).
[24] *Thuraissigiam*, 140 S. Ct. at 1963.
[25] Robert Warren, *Reverse Migration to Mexico Led to US Undocumented Population Decline: 2010 to 2018*, 8 J. ON MIGRATION AND HUM. SECURITY 32 (2020), https://cmsny.org/publications/warren-reverse-migration-022620/?gclid=EAIaIQobChMIhcvr9KWe7AIVCTiGCh0g-g4JEAAYASAAEgINBfD_BwE.

removed.[26] Furthermore, individuals subjected to expedited removal are rarely given the opportunity to appear in front of a judge for traditional immigration court proceedings, meaning the immigration officials who detained them in the first place are acting as both prosecutor and judge.[27] Individuals subject to expedited removal have no recourse for an appeal and are detained until their removal.[28] Section 1252(e), with a few exceptions, "allows no judicial review of the lawfulness or constitutionality of an expedited removal order, including whether the individual is outside the scope of expedited removal or whether the reasons given are outside the scope of expedited removal."[29] This has allowed immigration officials to subject illegal immigrants to what would otherwise be a due process violation if they were U.S. citizens.

Essentially, IIRIRA was enacted with "a single goal: to increase penalties on immigrants who had violated US law in some way . . . ."[30] It has succeeded in that goal; however, it has not succeeded in effectively deterring illegal immigration. The number of illegal immigrants went from 5 million the year IIRIRA was passed, to 12 million by 2006.[31]

III. FORMER PRESIDENT TRUMP'S EXECUTIVE ORDER

In January of 2017, former President Trump expanded the Department of Homeland Security's ("DHS")

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[26] *See* 8 C.F.R. § 235.3(b)(1)(ii) ("[T]he burden of proof rests with the alien to affirmatively show that he or she has the required continuous physical presence in the United States"); 8 C.F.R. § 235(b)(6) ("The burden rests with the alien to satisfy the examining immigration officer of the claim of lawful admission or parole"). *See also A Primer on Expedited Removal*, AMERICAN IMMIGR. COUNCIL (July 2019), https://www.americanimmigrationcouncil.org/research/primer-expedited-removal.

[27] AMERICAN IMMIGR. COUNCIL., *supra* note 26.

[28] 8 U.S.C. § 225(b)(1)(A)(i) (2020).

[29] Neuman, *supra* note 6.

[30] Dara Lind, *The Disastrous, Forgotten 1996 Law that Created Today's Immigration Problem*, VOX (Apr. 28, 2016), https://www.vox.com/2016/4/28/11515132/iirira-clinton-immigration.

[31] *Id.*

authority to subject undocumented individuals to expedited removal proceedings.[32] Specifically, the executive order eliminated the 100-mile range to which expedited removals could previously only be applied to, now allowing any undocumented individual anywhere in the country to be subjected to expedited removal.[33] Additionally, Trump's executive order expanded the two week time frame to two years.[34] This order essentially allowed any immigration officer anywhere in the country to subject an individual whom he or she suspects is undocumented to expedited removal; thereby requiring the detained individual to meet their burden and show that such proceedings are unwarranted. ICE agents have been allowed to exercise this increased authority since the beginning of October 2020.[35]

IV. DETENTION CENTERS

A. PURPOSE

The current state of our great nation is one of turmoil and unrest; plagued by riots, protests, and calls for police reform. Such unrest is perhaps warranted; however, there remains a large group of individuals that lacks a voice, the ability to protest, or to cry out social injustice—those who are in detention centers awaiting deportation.

Detention centers are privately run and operated, unlike their state and government run counterpart prisons. This essentially means that private entities profit from the rounding up of undocumented individuals for the purposes of being housed in one of their facilities. Of course, there are many undocumented aliens who must be detained because they committed violent crimes, fraud, or misrepresentation, either here in the U.S. or in their home country. Detention centers serve a useful function in this respect. However, a large portion of individuals in detention centers are

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[32] 8 C.F.R. § 235.3 (2020).
[33] *Id.*
[34] *Id.*
[35] Erik Larson, *Trump Gets Path Cleared for Expedited Removal of Immigrants*, BLOOMBERG (June 23, 2020), https://www.bloomberg.com/news/articles/2020-06-23/trump-gets-order-blocking-expedited-removal-of-immigrants-axed.

immigrants who came into this country illegally because it was their only option, or they simply did not have the means to do so otherwise.[36]

There are a number of different reasons that citizens of other countries make the decision to leave their home and come to the United States. Many make the journey for the purposes of earning an education or for better employment opportunities. Many are fleeing their home country due to a credible fear for their safety.[37] Drug-related cartel and gang violence in Mexico as well as Central and South America is a major driving force behind the large number of immigrants that arrive into the United States from those countries.[38] Similarly, many immigrants from Africa and the Middle East are fleeing persecution based on race, religion, or political opinion. There is a legitimate government interest in housing illegal immigrants in detention centers. It is important to understand, however, the diverse backgrounds from which many of these individuals come, and the fact that most have sacrificed a great deal for the opportunity to live in America.

B. CONDITIONS

Reports of inhumane conditions at detention centers have recently made headlines and caught the attention of those within the immigration law community and the country as a whole. One such report from a nurse who worked at a detention center has brought to light just how atrocious the conditions at these centers can be. Her insight has revealed the "jarring medical neglect" that occurs at the hands of the medical personnel employed by these centers. Specifically, she has alleged that mass hysterectomies are being performed on "vulnerable immigrant women," who did

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[36] USA FACTS, https://usafacts.org/articles/why-do-people-immigrate-us/, (last visited Oct. 17, 2020).

[37] AMNESTY INT'L, https://www.amnesty.org/en/what-we-do/refugees-asylum-seekers-and-migrants/, (last visited Feb. 6, 2021).

[38] Kathryn Reid, *Forced to Flee: Top Countries Refugees are Coming From*, WORLD VISION, https://www.worldvision.org/refugees-news-stories/forced-to-flee-top-countries-refugees-coming-from (last visited Oct. 18, 2020).

not understand or consent to the procedure.[39] These allegations have since resulted in legislators calling for the Department of Homeland Security's Inspector General to investigate these claims.[40]

In one specific instance, a detained woman who underwent a hysterectomy was subjected to a negligent doctor who removed the wrong ovary.[41] As a result, she was subjected to another surgery in which the surgeon removed the ovary that should have been removed initially, leaving the woman without ovaries and unable to ever conceive children.[42]

In a separate case, a Jamaican detainee, who had lived in the United States for twenty years before being picked up and placed in a Georgia detention center, was pressured by an outside gynecologist to undergo an invasive gynecological procedure, claiming her menstrual cramps were the result of cysts which needed to be removed.[43] It was only after the woman had been deported back to Jamaica that she was made aware her surgery was unnecessary.[44] Radiologists have since determined that "the cysts she had were small, and the kind that occur naturally and do not usually require surgical intervention."[45]

These allegations led to the further revelations that officials in detention centers have failed to properly adhere to COVID-19 testing protocols and have withheld water from detained individuals performing hunger strikes.[46]

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[39] John Washington, *Number of Women Alleging Misconduct By ICE Gynecologist Nearly Triples*, THE INTERCEPT (Oct. 27, 2020), https://theintercept.com/2020/10/27/ice-irwin-women-hysterectomies-senate/.

[40] Priscilla Alvarez, *Whistleblower alleges high rate of hysterectomies and medical neglect at ICE facility*, CNN (Sept. 16, 2020), https://www.cnn.com/2020/09/15/politics/immigration-customs-enforcement-medical-care-detainees/index.html.

[41] *Id.*

[42] *Id.*

[43] Caitlin Dickerson, Seth Freed Wessler, & Miriam Jordan, *Immigrants Say They Were Pressured Into Unneeded Surgeries*, N.Y. TIMES (Sept. 29, 2020), https://www.nytimes.com/2020/09/29/us/ice-hysterectomies-surgeries-georgia.html.

[44] *Id.*

[45] *Id.*

[46] *Id.*

Additionally, detainees have alleged that conditions in detention centers are unsanitary, with officials feeding detainees food that, if not spoiled, had either mold or cockroaches.[47] It is not difficult to find dozens of these stories with a quick search online, but the reason most go unnoticed is because individuals detained in detention centers are not in a position to voice their grievances.

V. *DEP'T OF HOMELAND SEC. V. THURAISSIGIAM*

A. Overview

A case recently decided by the U.S. Supreme Court involved Vijayakumar Thuraissigiam, a Sri Lankan national, who was apprehended 25 yards from the southern border after illegally crossing into the United States.[48] He was detained for expedited removal and his credible-fear claim for the purpose of obtaining asylum was denied by an asylum officer, a decision later affirmed by both a supervising officer and the Ninth Circuit Court of Appeals.[49] The Supreme Court, in a 5-4 decision, held that Thuraissigiam was not entitled to procedural due process rights in his expedited removal.[50] The Court denied respondent's federal habeas petition and held that section 1252(e)(2) does not violate the Suspension clause.[51] The ruling from this case essentially means that individuals subjected to expedited removal have no due process rights. The cases outlined below represent the precedent relied upon by the Supreme Court in reaching their decision.

B. *INS V. ST. CYR*

In *INS v St. Cyr*, respondent St. Cyr, a Haitian citizen and lawful permanent resident of the United States, was made deportable after pleading guilty to selling a controlled

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[47] *Id.*
[48] *Thuraissigiam*, 140 S. Ct. at 1961.
[49] *Id.* at 1963.
[50] *Id.* at 1964.
[51] *Id.* at 1983.

substance in violation of Connecticut law.[52] At the time of his conviction, St. Cyr would have been eligible for a waiver of deportation under section 212(c) of the INA.[53] However, subsequent to his guilty plea, Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA")[54] as well as the Illegal Immigration Reform and Immigration Responsibility Act of 1996 ("IIRIRA").[5556] The Attorney General claimed that, as a result of these acts, he was precluded from granting St. Cyr a waiver.[57] Specifically, the sections of the acts denying the Attorney General waiver authority were section 401 of the AEDPA (which identified offenses for which convictions would preclude waiver relief), and 8 U.S.C. section 1229b(a)(3) of IIRIRA (which repealed section 212(c) of the INA and replaced it with a section excluding anyone convicted of an aggravated felony from a waiver). The district court accepted St. Cyr's habeas corpus application and the Second Circuit Affirmed.[58]

In an opinion written by Justice Stevens, the Court affirmed the Second Circuit's decision and ruled in Respondent's favor, holding that the acts in question did not eliminate the district court's authority to review habeas corpus challenges.[59] Congress has since responded to this decision with the REAL ID Act, which states that removal orders and CAT orders (Convention Against Torture) may only be reviewed in the courts of appeals, including habeas corpus petitions.[60]

C. *BOUMEDIENE V. BUSH*

In *Boumediene v. Bush,* petitioners were six Algerian nationals who had been seized by Bosnian police after U.S. intelligence classified them as suspects in a plot to attack the U.S. embassy.[61] They were designated as enemy combatants

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[52] INS v. St. Cyr, 533 U.S. 289, 293 (2001).
[53] *Id.* at 292.
[54] Pub. L. No. 104-132, 110 Stat. 1214.
[55] Pub. L. No. 104-208, 110 Stat. 3009.
[56] *St. Cyr*, 533 U.S. at 293.
[57] *Id.*
[58] *Id.*
[59] *Id.* at 326.
[60] 8 U.S.C. §1252(a)(4) (2020).
[61] Boumediene v. Bush, 553 U.S. 723 (2007).

and detained in the U.S. naval station at Guantanamo Bay, Cuba.[62] The issue presented in *Boumediene* was whether the petitioners possessed the constitutional privilege of habeas corpus despite legislation eliminating the federal courts' jurisdiction to hear habeas petitions from detainees designated as enemy combatants. The U.S. Court of Appeals for the D.C. Circuit ("D.C. Circuit") held the statute in question stripped all federal courts of jurisdiction to consider the habeas corpus applications and that the detainees were not entitled to the privilege of the writ or the protections of the Suspension Clause.[63] The Supreme Court granted certiorari and reversed.

Petitioners filed for a writ of habeas corpus in the D.C. Circuit, alleging violations of the Constitution's Due Process Clause.[64] In a 5-4 decision, the Court ruled in favor of petitioners and held that they "may invoke the fundamental procedural protections of habeas corpus."[65] The statute stripping petitioners of their habeas corpus privilege states:

> No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.[66]

The majority opinion, written by Justice Kennedy, held that "28 U.S.C.S. § 241(e) effected an unconstitutional suspension of the writ of habeas corpus" and that the Suspension Clause "has full effect at Guantanamo Bay."[67]

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[62] *Id*. at 732.
[63] *Id*. at 798.
[64] *Id*. at 734.
[65] *Id.* at 798.
[66] 28 U.S.C. § 2241(e) (2020).
[67] *Boumediene*, 553 U.S. at 771. *See also* Nasrallah v. Barr, 140 S. Ct. 1683, 1690 (2020) (holding that federal courts have jurisdiction to review a noncitizen's factual challenges to an

D. *MUNAF V. GEREN*

In *Munaf v. Geren*, petitioners were two American citizens who traveled to Iraq, where they were accused of crimes and detained by the Multinational Force-Iraq ("MNF-I").[68] MNF-I was "an international coalition force operating in Iraq composed of 26 nations, including the United States," which operated under the command of the U.S. military in accordance with rules set forth by the United Nations ("U.N.") security council.[69] Pursuant to a U.N. mandate, MNF-I was charged with performing a "variety of military and humanitarian activities," among which was the detainment of individuals suspected of committing hostile or warlike acts in Iraq.[70] Suspects detained by MNF-I were then subject to investigation and trial in Iraqi courts under Iraqi law.[71]

In *Munaf*, after petitioners were detained by MNF-I, relatives filed next-friend habeas corpus petitions on their behalf in an attempt to enjoin their transfer to the Iraqi government for trial. The court was presented with two issues:

> *First,* do United States courts have jurisdiction over habeas corpus petitions filed on behalf of American citizens challenging their detention in Iraq by the MNF-I? *Second*, if such jurisdiction exists, may district courts exercise that jurisdiction to enjoin MNF-I from transferring such individuals to Iraqi custody or allowing them to be tried before Iraqi courts?[72]

The Court held that habeas corpus was proper, but that petitioners were not entitled to relief because "habeas is not a means of compelling the United States to harbor

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administrative order denying relief under the Convention Against Torture).

[68] Munaf v. Geren, 553 U.S. 674, 681-82 (2008).

[69] *Id.* at 679.

[70] *Id.*

[71] *Id.*

[72] *Id.* at 680.

fugitives from the criminal justice system of a sovereign with undoubted authority to prosecute them."[73]

E. CRITICISM OF *MUNAF*

Given the parallels and factual similarities that exist between *Thuraissigiam* and the established precedent of *St. Cyr* and *Boumediene*, a different outcome in which petitioner's habeas corpus petition was granted seems logical. Instead, the Court decided to go in seemingly the opposite direction of precedent, which will have the effect of denying due process rights to the over one hundred thousand individuals subjected to expedited deportation each year. They did this by relying on *Munaf*, a case that "has nothing to do with *Thuraissigiam*." As one critic put it: "By refusing to hear this case, the Supreme Court has shown that our government is willing to imprison families with children for as long as 18 months, but it is not willing to grant them one hour to present their asylum case before a judge."[74] Another critic, Harvard Law Professor and Author, Gerald Neuman, wrote: "Over a century of immigration law cases supported [Thuraissigiam's] right to habeas inquiry, and so did the principles of habeas corpus law developed prior to 1789 and confirmed by the Court in *St. Cyr* and *Boumediene*."[75] But perhaps none have criticized this decision more succinctly than Justice Sotomayor in her dissent:

> Making matters worse, the Court holds that the Constitution's due process protections do not extend to noncitizens like respondent, who challenge the procedures used to determine whether they may seek shelter in this country or whether they may be cast to an unknown fate. The decision deprives them of any means to ensure the integrity of an expedited removal order, an order which, the

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[73] *Id.* at 697.
[74] Mark Sherman, *Trump Seeks Supreme Court Approval to Speed Deportations*, ASSOCIATED PRESS (Feb. 29, 2020), https://www.inquirer.com/politics/nation/supreme-court-case-deportations-without-due-process-20200229.html.
[75] Neuman, *supra* note 6.

> Court has just held, is not subject to any meaningful judicial oversight as to its substance. In doing so, the Court upends settled constitutional law and paves the way toward transforming already summary expedited removal proceedings into arbitrary administrative adjudications.[76]

These bolstered immigration laws also have an adverse effect on the reliance interests of immigrants who were previously out of reach of expedited removal laws but have now become eligible.

VI. ANALYSIS

The Suspension Clause mandates, "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Case of Rebellion or Invasion the public Safety may require it."[77] In *Thuraissigiam*, the case was deciding whether IIRIRA's expedited removal provision, section 1252(e)(2), violated the Suspension Clause.

The Supreme Court granted certiorari to hear Thuraissigiam's case after the Ninth Circuit ruled in his favor and held that section 1252(e)(2) violated the Suspension Clause.[78] The Ninth Circuit's decision had created a circuit split with the Third Circuit, which previously held that §1252(e)(2) did not violate the Suspension Clause as applied to asylum-seeking families who raise claims relating to their credible fear determinations.[79] As discussed above, the Supreme Court ultimately overturned the Ninth Circuit's ruling and now asylum-seeking immigrants do not have the ability to challenge an immigration official's decision to subject them to expedited removal. This, in conjunction with the recent executive order by former President Trump that expanded the boundaries of expedited removal, will expose tens of thousands of immigrants to nearly unchecked authority of immigration officials and border patrol agents.

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[76] *Thuraissigiam*, 140 S. Ct. at 1993 (Sotomayor, J., dissenting).
[77] U.S. CONST. art. I, § 9, cl. 2.
[78] *Thuraissigiam*, 140 S. Ct. at 1968.
[79] Castro v. Dep't of Homeland Sec., 835 F.3d 422, 449 (2016).

The majority opinion in *Thuraissigiam* incorrectly applied the relevant precedent, specifically *Boumediene* and *St. Cyr,* and should have analyzed the case as the Ninth Circuit did, holding that section 1252(e)(2) violated the Suspension Clause. In *Boumediene*, the Supreme Court upheld the right of designated enemy combatants detained in Guantanamo Bay to petition for a writ of habeas corpus; yet they are now denying that same right to asylum-seekers subjected to expedited removal. The Ninth Circuit correctly applied the two-step approach to determining whether a statute violates the Suspension Clause and whether the detainee's habeas corpus petition will be heard. The Ninth Circuit began its analysis with an overview of the *Boumediene* approach: "at step one, we examine whether the Suspension Clause applies to the petitioner; and, if so, at step two, we examine whether the substitute procedure provides review that satisfies the Clause."[80] For step one, the *Boumediene* court reasoned that "we must determine whether petitioners are barred from seeking the writ or invoking the protections of the Suspension Clause either because of their status, *i.e.*, petitioners' designation by the Executive Branch as enemy combatants, or their physical location, *i.e.*, their presence at Guantanamo Bay."[81] Step two considers whether the writ had been suspended without an adequate substitute for those bringing forth the habeas petition.[82]

The Ninth Circuit answered both questions of this two-step method in the affirmative and held in favor of Thuraissigiam; however, the Supreme Court's majority opinion refused to take this approach, instead asserting that:

> *Boumediene* was not about immigration at all, and *St. Cyr* reaffirmed that the common-law habeas writ provided a vehicle to challenge detention and could be invoked by aliens already in the country who were held in custody pending deportation. It did not approve of respondent's very different

[80] Thuraissigiam v. Dep't of Homeland Sec., 917 F.3d 1097, 1107 (9th Cir. 2018).
[81] *Boumediene*, 553 U.S. at 739.
[82] *Thuraissigiam*, 917 F.3d at 1107.

> attempted use of the writ.[83]

It is true that *Boumediene* did not involve undocumented individuals, but it is much more closely related to *Thuraissigiam* than *Munaf*, the case on which the majority heavily relied in reaching its decision. *Munaf* involved two American citizens, detained in Iraq by an international police force, who petitioned for habeas corpus in order to be released back into the United States.[84] In *Boumediene,* the question before the Court was whether a statute prohibiting two Guantanamo Bay detainees from petitioning for a writ of habeas corpus violated the Suspension Clause.[85] This is essentially the same issue before the court in *Thuraissigiam*, simply relying on a different statute (§1252(e)(2)) and involving respondents who were being detained for expedited removal. Yet the majority claimed that *Boumediene* did not apply, and in doing so proceeded to severely hinder the rights of detained illegal immigrants.

VII. EFFECTS OF NEW LAW

A. EXPEDITED REMOVALS PRIOR TO NEW LAW

The Supreme Court's holding in *Thuraissigiam*, combined with former President Trump's executive order, potentially means that the number of immigrants subjected to expedited removal with no due process rights may increase significantly. As the law stood prior to the enactment of this executive order, the number of expedited removals was already significant. From 2012 to 2019 the number of expedited removals accounted for at least 40% of all alien deportations.[86] Within that time frame, expedited removals were their lowest in 2017 at 121,942 (42%), and at their highest in 2013 with 197,603 (46%).[87] From 2017 to 2019, the number of expedited removals has steadily

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[83] *Thuraissigiam*, 140 S. Ct. at 1962.
[84] *Munaf*, 553 U.S. at 680.
[85] *Boumediene*, 553 U.S. at 739.
[86] DEP'T OF HOMELAND SEC., *Yearbook of Immigration Statistics 2019*, https://www.dhs.gov/immigration-statistics/yearbook (last visited Sept. 22, 2020).
[87] *Id.*

increased from 121,942 in 2017 (42%), to 164,296 in 2019 (46%).[88] With numbers this high under the more restrictive expedited removal laws of previous administrations, it is conceivable that under former President Trump's executive order, these numbers would increase by thousands, if not tens of thousands.

B. EFFECTS ON U.S. CITIZENS

The potential for drastic increase of expedited removals is concerning due to the ease with which individuals could be wrongfully subjected to expedited removal. According to John Sandweg, former head of Immigrations and Customs Enforcement under the Obama administration, "concerns that individuals could be wrongfully ordered deported through expedited removal remain high."[89] Sandweg further stated that "it's really, really, really, really easy to be removing individuals who are not legally eligible to be removed via expedited removal, and, quite frankly, might have really valid claims or defenses to removal."[90]

The majority opinion in *Thuraissigiam*, could potentially "deny the protection of the writ of habeas corpus to anyone who cannot show entitlement to immediate 'simple' release from all custody."[91] Depending on the administration and the power given to authorities to enforce federal laws, this may be a troubling step in the wrong direction. Additionally, individuals here on student visas or as temporary workers would have no recourse if unlawfully subjected to expedited removal, an increasingly likely scenario given the executive order given by former President Trump.

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[88] *Id.*
[89] Larson, *supra* note 35.
[90] *Id.*
[91] Neuman, *supra* note 6.

C. POTENTIAL EFFECT ON THE SUSPENSION CLAUSE & HABEAS CORPUS

The court's decision in *Thuraissigiam* "flouts over a century of [the Supreme Court's] practice,"[92] and declares that the "denial of asylum claims in expedited removal proceedings shall be functionally unreviewable through the writ of habeas corpus,"[93] regardless of what the grounds of such denial happen to be. The Supreme Court was presented with an opportunity in deciding this case to safeguard individual liberties and affirm a "critical component of the separation of powers,"[94] but instead went in the opposite direction, allowing executive discretion to go unchecked in terms of DHS subjecting undocumented individuals to expedited removal. As Justice Sotomayor makes clear in her dissent, the majority's rationale in refusing to grant Thuraissigiam's habeas petition goes against longstanding precedent in immigration cases decided by the Court, including *St. Cyr* and *Boumediene*.[95]

Ultimately, the holding of this case disallows the constitutional guarantee of habeas as a check on unlawful detention and deportation of immigrants. As a result of the majority's opinion, even individuals who are unlawfully subjected to expedited removal will be unable to challenge the lawfulness of their deportation.

VIII. MOVING FORWARD

A. *DEP'T OF HOMELAND SEC. V. THURAISSIGIAM* RULE

Immigration is a major issue and likely will remain one for the foreseeable future. Administrations and Congress have attempted to tackle the problem of immigration in America since the country was founded and the Constitution was ratified. Initially, immigrants came from northern and western Europe, during which anti-Irish and anti-Catholic

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[92] *Thuraissigiam*, 140 S. Ct. at 1993 (Sotomayor, J., dissenting).
[93] *Id.*
[94] *Id.* at 1994.
[95] *Id.* at 1999.

sentiment pervaded.[96] During the mid-19th century, immigrants proceeded to enter America from other parts of the world, and xenophobic sentiments began to shift toward being anti-Italian and anti-Chinese.[97] Currently the majority of undocumented individuals make their way to America from Mexico and Central or South America, and there is a certain degree of contempt for them now as well.[98] The country may well have a completely different immigration problem in twenty years as the political climates of the world's countries continue to change.

It is unlikely that *Thuraissigiam* will be overturned anytime soon, given the current make-up of the Supreme Court, which contains six justices appointed by Republican presidents. This is not to say that somehow conservative justices are prejudicial toward immigration, or somehow anti-immigrant. It simply means that conservative justices usually subscribe to the textualist approach when it comes to statutory interpretation, and "textualism is widely regarded as a politically conservative methodology."[99] This means that any change to the rule set forth in *Thuraissigiam* will likely need to come from Congress. This can be done with the passing of an act that replaces IIRIRA, similar to the way that IIRIRA amended the INA in 1996. It can also be done via a congressional response to the Court's ruling, though not common, specifically when constitutional issues are involved, but still possible. Congress can do this "on an individual basis, as part of larger omnibus bills, or even tacked on to unrelated appropriations or debt ceiling bills."[100]

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[96] Becky Little, *The Birth of 'Illegal' Immigration*, HISTORY STORIES (Jul. 2, 2019), https://www.history.com/news/the-birth-of-illegal-immigration

[97] *Id.*

[98] Hector Tobar, *Latinos Feel The Sting of Trump's Presidency*, THE NEW YORKER (March 8, 2017), https://www.newyorker.com/news/news-desk/latinos-feel-the-sting-of-trumps-presidency.

[99] Margaret H. Lemos, *The Politics of Statutory Interpretation*, 89 NOTRE DAME L. REV. 849, ___ (2013).

[100] Rachel M. Cohen & Marcia Brown, *Congress Has the Power to Override Supreme Court Rulings. Here's How*. THE INTERCEPT (Nov. 24, 2020), https://theintercept.com/2020/11/24/congress-override-supreme-court/.

B. FORMER PRESIDENT TRUMP'S EXECUTIVE ORDER UNDER PRESIDENT BIDEN

Under President Biden's administration, President Trump's executive order has a high likelihood of being reversed, given the stark difference of position each has taken on immigration reform. This would mean that expedited removals could remain as initially intended under IIRIRA and be subject to the 100-mile and two-week restrictions. This would be a step in the right direction, but a far cry from undoing the Supreme Court's ruling in *Thuraissigiam*. President Biden has promised to undo most of President Trump's immigration reforms.[101] Among the changes to immigration reform already promised are the ending the travel ban restricting foreigners from several Muslim-majority countries as well as reinstating Deferred Action for Childhood Arrivals ("DACA").[102] He has also promised to implement a 100-day freeze on deportations when he takes office as well as withdraw from agreements with Guatemala, Honduras, and El Salvador that allowed the U.S. to reject asylum seekers to those countries.[103] Whether he is able to follow through with these promises or not, immigration will continue to be a problem moving forward given its inherent difficulties. Immigration reform is perhaps extremely difficult because it requires a balancing of the Nation's interests as a whole—such as curbing drug trafficking, gang-violence, and counter-terrorism

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[101] *See* THE WHITE HOUSE, FACT SHEET: RESIDENT BIDEN OUTLINES STEPS TO REFORM OUR IMMIGRATION SYSTEM (Feb. 2, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/02/02/fact-sheet-president-biden-outlines-steps-to-reform-our-immigration-system-by-keeping-families-together-addressing-the-root-causes-of-irregular-migration-and-streamlining-the-legal-immigration-syst/.

[102] Jasmine Aguilera, *Biden Has Promised to Undo Trump's Immigration Policies. How Much Is He Really Likely to Reform?*, TIME (Nov. 20, 2020), https://time.com/5909571/joe-biden-immigration-policy/.

[103] Greg Sargent, *Biden is already signaling big moves on immigration. That bodes well.*, WASH. POST (Nov. 12, 2020), https://www.washingtonpost.com/opinions/2020/11/12/biden-is-already-signaling-big-moves-immigration-that-bodes-well/.

operations—with the humanitarian interests of individuals seeking a better life in America.

C. PRESIDENT BIDEN'S PLAN

President Biden's immigration agenda represents a stark contrast to that of the previous administration; he is proposing a plan that grants temporary legal status to illegal immigrants while allowing them to earn green cards after five years with the potential for full citizenship after three more years.[104] Additionally, President Biden's plan provides for an expedited path for "Dreamers,"[105] a new path toward legal immigration for employment-based lawful permanent residents, and four billion dollars in aid for Central American countries to help in the fight against poverty and gang violence.[106]

Furthermore, under the new administration, former President Trump's policies, which were geared toward curbing the threat of COVID-19 exposure from foreign countries, are also likely to be repealed. Within President Biden's plans is the rescission of certain Trump era actions that suspended immigrant and work visas for individuals from certain countries who were deemed to either pose a "financial burden on our health care system" or "deemed to present a risk to U.S. labor markets."[107] However, President Biden's plan, as aggressive as it may be, is still likely to encounter its fair share of opposition. He is the fourth consecutive president to propose comprehensive immigration change, and unlike his three predecessors, he is seeking to

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[104] Gerald F. Seib, *Three Challenges Facing Biden's Immigration Package,* WALL ST. J. (Feb. 1, 2021), https://www.wsj.com/video/three-challenges-facing-bidens-immigration-package/B1F28A6A-5C82-4BE9-AF98-7F45839F2786.html.

[105] The Dream Act of 2019, S.874, 116th Congress (2019) (replacing the Development, Relief and Education for Alien Minors (DREAM) Act first introduced in 2001).

[106] *Id.*

[107] Camilo Montoya-Galvez, *Biden to rescind Trump's pandemic-era limits on immigrant and work visas, top adviser says*, CBS NEWS (Jan. 29, 2021), https://www.cbsnews.com/news/biden-immigration-work-visa-limits-rescind/.

succeed.[108] The President's agenda is not without its criticisms; many think that having such a liberal policy on immigration incentivizes breaking our country's laws, the rationale for that argument being that if an individual crosses illegally into this country and remains here until a sympathetic president comes along, they will be granted amnesty. Whether President Biden is correct in pursuing his agenda, or whether his critics are, remains to be seen; what is relatively certain, however, is that the Supreme Court's decision in *Thuraissigiam*, combined with former President Trump's policies, present a large obstacle for any immigrant to overcome.

IX. CONCLUSION

The combination of the Supreme Court's holding in *Thuraissigiam* and former President Trump's executive order has severely limited the rights of immigrants subjected to expedited removal, specifically in relation to the constitutional right of habeas corpus. Whereas Trump's executive orders may soon all be undone, *Thuraissigiam* may not, meaning that illegal immigrants detained for the purposes of expedited removal have no recourse to challenge their detainment, even if it was done illegally.

[108] Seib, *supra* note 104.