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## A Suspended Death Sentence: Habeas Review of Expedited Removal Decisions

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## NOTE

### A SUSPENDED DEATH SENTENCE: HABEAS REVIEW OF EXPEDITED REMOVAL DECISIONS

*Lauren Schusterman\**

*Expedited removal allows low-level immigration officers to summarily order the deportation of certain noncitizens, frequently with little to no judicial oversight. Noncitizens with legitimate asylum claims should not find themselves in expedited removal. When picked up by immigration authorities, they should be referred for a credible fear interview and then for more thorough proceedings.*

*Although there is clear congressional intent that asylum seekers not be subjected to expedited removal, mounting evidence suggests that expedited removal fails to identify bona fide asylum seekers. Consequently, many of them are sent back to persecution. Such decisions have weighty consequences, but they have remained largely immune from judicial review. This is in part due to a provision of expedited removal, 8 U.S.C. § 1252(e)(2), that prevents the federal courts from hearing habeas petitions that challenge the decisions made in expedited removal. Circuit courts are split on whether this provision violates the Suspension Clause based on diverging interpretations of when noncitizens become entitled to habeas rights.*

*This Note argues that, based on the Supreme Court's interpretation of the Suspension Clause and the historical purpose of habeas review, noncitizens who are physically in the territorial United States are entitled to habeas rights. As a result, 8 U.S.C. § 1252(e)(2) is unconstitutional. Asylum seekers in the United States are entitled to habeas review of their expedited removal determinations unless Congress enacts an adequate substitute for this review.*

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\* J.D. Candidate, May 2020, University of Michigan Law School. I am grateful to Professor Chris Whitman for her mentorship and feedback as well as to Professors Eve Brensike Primus and David B. Thronson for helping me understand the intricacies of habeas and immigration law. Thank you to my parents and sister for their unyielding love and support, to my friends for constantly motivating me, and to all of the *Michigan Law Review* for their helpful edits.

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#### INTRODUCTION

*“The expedited removal system is flawed; it does not account for the realities of immigration . . . . The system is also cruel; it gambles with the lives of hundreds of thousands of people per year by offering few procedural safeguards. We can, and should, do better.”*

—Judge Pregerson<sup>1</sup>

In 2012, Elena fled Honduras.<sup>2</sup> Gang members murdered one of her brothers because he was gay, killed another brother because he refused to join the gang, and shot her sister when she refused a gang leader’s advances after being raped and impregnated by him.<sup>3</sup> A different gang member pur-

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1. United States v. Peralta-Sanchez, 847 F.3d 1124, 1146 (9th Cir. 2017) (Pregerson, C.J., dissenting).

2. Sarah Stillman, *When Deportation Is a Death Sentence*, NEW YORKER (Jan. 8, 2018), <https://www.newyorker.com/magazine/2018/01/15/when-deportation-is-a-death-sentence> [<https://perma.cc/9FTL-CR26>].

3. *Id.*

sued Elena and, when she rejected him, shot at her house.<sup>4</sup> When she learned that this gang member was planning further retaliation against her, she decided to flee Honduras and head to the United States for safety.<sup>5</sup> When Elena crossed into Texas, she told a Customs and Border Patrol (CBP) agent that “she feared for her life.”<sup>6</sup>

Because Elena expressed a fear of returning home, she could not be deported without first having a “credible fear” interview to prove that she had a significant probability of successfully claiming asylum. Elena, like others who have fled persecution, had a legal right to apply for asylum in the United States.<sup>7</sup> To qualify for asylum, a person must show that they have “a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.”<sup>8</sup> The asylum officer made a negative credible fear determination, finding that Elena did not have a “credible fear,” because during her interview she said that her fear was not on account of one of these protected grounds.<sup>9</sup> While her claim likely fell under the protected particular social group category, she probably did not understand what that term meant at the time.<sup>10</sup> Given the complexity of asylum law, which can confound even trained asylum lawyers, it is not plausible that unrepresented asylum seekers will be able to understand and answer these questions accurately.<sup>11</sup> After failing her credible fear interview, Elena requested review of the determination by an immigration judge (IJ).<sup>12</sup> Three months later, Elena finally had her hearing, conducted via video conference, which consisted of only one question before the IJ affirmed the asylum officer’s decision.<sup>13</sup> Without recourse to further judicial review, she was subjected to expedited removal and deported two weeks later.<sup>14</sup>

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4. *Id.*

5. *Id.*

6. *Id.*

7. 8 U.S.C. § 1158(a)(1) (2012) (“Any alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien’s status, may apply for asylum . . .”).

8. 8 U.S.C. §§ 1101(a)(42), 1158(b)(1)(A).

9. Stillman, *supra* note 2.

10. *Cf.* Miriam Jordan, *Her Husband’s Killers Told Her She Was Next. These Days, That’s Not Enough for Asylum.*, N.Y. TIMES (Aug. 7, 2018), <https://www.nytimes.com/2018/08/07/us/asylum-aclu-migrants-border.html> [<https://perma.cc/T8FE-EXSV>] (“The officer, who conducted the interview over the phone, determined that Irene had not proved a ‘credible fear’ of persecution if she returned home. Irene was dumbstruck. What was their definition of fear?”).

11. *See* KATHRYN SHEPHERD & ROYCE BERNSTEIN MURRAY, AM. IMMIGRATION COUNCIL, THE PERILS OF EXPEDITED REMOVAL 2 (2017), [https://www.americanimmigrationcouncil.org/sites/default/files/research/the\\_perils\\_of\\_expedited\\_removal\\_how\\_fast-track\\_deportations\\_jeopardize\\_detained\\_asylum\\_seekers.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/the_perils_of_expedited_removal_how_fast-track_deportations_jeopardize_detained_asylum_seekers.pdf) [<https://perma.cc/9M3A-AUKS>].

12. Stillman, *supra* note 2.

13. *Id.*

14. *Id.*

Elena's story is not unique. Hundreds of thousands of immigrants each year are subject to expedited removal.<sup>15</sup> Created as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), the expedited removal process streamlines deportations at the border by allowing low-level immigration officers to summarily deport nearly anyone who arrives without proper entry documents.<sup>16</sup> In the name of efficiency, immigrants are stripped of their due process rights to challenge their removal orders in court.<sup>17</sup> Indeed, most of them are never afforded even the paltry formal procedural protections that Elena received.<sup>18</sup>

Elena was able to forestall the expedited removal process because she expressed a fear of persecution. She was flagged as an asylum seeker and, accordingly, granted a credible fear interview, as required under section 235 of the Immigration and Nationality Act (INA).<sup>19</sup> But as her experience demonstrates, the mere promise of procedural safeguards is insufficient. Immigrants like Elena, whose asylum claims are deemed not credible, find themselves subject to expedited removal and imminent deportation.<sup>20</sup> This streamlined process has sacrificed accuracy for efficiency and resulted in the erroneous deportation of an incalculable number of bona fide asylum seekers.<sup>21</sup> Subsequent events made clear that Elena was a bona fide asylum seeker. After being deported back to Honduras, she faced the exact persecution she had feared.<sup>22</sup> She was tortured by the gang member who had targeted her previously, and "[o]ther gang members cracked her thirteen-year-old son's skull."<sup>23</sup> She fled to the United States again, and that time, immigration authorities agreed that she had a credible fear based on a protected ground.<sup>24</sup> But because of her previous deportation order, Elena was barred from apply-

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15. AM. IMMIGRATION COUNCIL, A PRIMER ON EXPEDITED REMOVAL 3 (2017) [hereinafter PRIMER ON EXPEDITED REMOVAL], [https://www.americanimmigrationcouncil.org/sites/default/files/research/primer\\_on\\_expedited\\_removal.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/primer_on_expedited_removal.pdf) [<https://perma.cc/8D9C-YTF6>].

16. See Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, § 302, 110 Stat. 3009-546, -579 to -84; Brief of Refugee & Human Rights Organizations & Scholars as Amici Curiae Supporting Petitioners at 25, *Castro v. U.S. Dep't of Homeland Sec.*, 137 S. Ct. 1581 (2017) (No. 16-812) [hereinafter Brief of Refugee & Human Rights Organizations & Scholars]; PRIMER ON EXPEDITED REMOVAL, *supra* note 15, at 2 (explaining that, by law, expedited removal may not be applied to U.S. citizens, green card holders, refugees, asylees, or asylum seekers).

17. JOSE MAGAÑA-SALGADO, FAIR TREATMENT DENIED: THE TRUMP ADMINISTRATION'S TROUBLING ATTEMPT TO EXPAND "FAST-TRACK" DEPORTATIONS 1-3 (2017), [https://www.ilrc.org/sites/default/files/resources/2017-06-05\\_ilrc\\_report\\_fair\\_treatment\\_denied\\_final.pdf](https://www.ilrc.org/sites/default/files/resources/2017-06-05_ilrc_report_fair_treatment_denied_final.pdf) [<https://perma.cc/9SFH-LAAR>].

18. See Stillman, *supra* note 2.

19. 8 U.S.C. § 1225(b)(1)(A)(i)-(ii) (2012).

20. See *id.* § 1225(b)(1)(B)(iii)(I).

21. See Brief of Refugee & Human Rights Organizations & Scholars, *supra* note 16, at 25.

22. See Stillman, *supra* note 2.

23. *Id.*

24. *Id.*

ing for asylum. Instead, she would have to meet the higher showing required for withholding of removal.<sup>25</sup> In a sense, Elena was one of the lucky ones. Many asylum seekers who are erroneously subjected to expedited removal “never get [this] second chance to prove their claims.”<sup>26</sup>

If Elena had access to judicial review to challenge the IJ’s determination before being subjected to expedited removal, she likely would not have faced further persecution before her credible fear was recognized. Typically, a detained person has a constitutional right under the Suspension Clause to challenge the cause of their detention before a federal court by filing a habeas petition.<sup>27</sup> The Suspension Clause, found in Article I of the Constitution, provides that the right to habeas review may not be suspended except “when in Cases of Rebellion or Invasion the public Safety may require it.”<sup>28</sup> Nevertheless, in the absence of a rebellion or invasion, a provision of the IIRIRA, 8 U.S.C. § 1252(e)(2), the “jurisdiction-stripping provision,” essentially nullifies this right by allowing habeas review of only a very narrow set of issues in the expedited removal process.<sup>29</sup> Unfortunately for Elena, habeas review of the “substantive and procedural soundness” of the credible fear determinations made in expedited removal is explicitly barred.<sup>30</sup> Congress may only suspend habeas review in this way if either (1) noncitizens in expedited removal do not have Suspension Clause protections or (2) Congress has enacted an adequate and effective substitute for habeas review.<sup>31</sup>

Circuit courts are split as to whether noncitizens in expedited removal are entitled to habeas rights and whether the jurisdiction-stripping provision of the IIRIRA is constitutional.<sup>32</sup> The Third Circuit has adopted a case-by-case approach, in which the court looks at the noncitizen’s connection to the United States to determine access to habeas rights.<sup>33</sup> In contrast, the Ninth Circuit adopted a bright-line rule: all asylum seekers within the borders of the United States, even recent, surreptitious entrants, are entitled to the Suspension Clause’s protection.<sup>34</sup>

This Note argues that asylum seekers who are subjected to expedited removal after failing their credible fear interviews are entitled to the protec-

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25. *Id.*

26. *Id.*

27. *See* *INS v. St. Cyr*, 533 U.S. 289, 305, 308 (2001).

28. U.S. CONST. art. I, § 9, cl. 2.

29. *See* 8 U.S.C. § 1252(e)(2) (2012).

30. *See id.*; *Castro v. Dep’t of Homeland Sec.*, 835 F.3d 422, 427–28 (3d Cir. 2016).

31. *See Castro*, 835 F.3d at 445; *Swain v. Pressley*, 430 U.S. 372, 381 (1977).

32. This Note focuses on individuals seeking asylum who have failed their credible fear interviews. Throughout this Note, this population is interchangeably referred to as “noncitizens” or “asylum seekers.”

33. *See Osorio-Martinez v. Attorney Gen. U.S.*, 893 F.3d 153, 170 n.13 (3d Cir. 2018); *Castro*, 835 F.3d at 449.

34. *Thuraissigiam v. U.S. Dep’t of Homeland Sec.*, 917 F.3d 1097, 1117 (9th Cir.), *cert. granted*, 140 S. Ct. 427 (2019).

tion of the Suspension Clause. Thus, the jurisdiction-stripping provision is unconstitutional because expedited removal does not provide an adequate substitute for habeas review. Part I provides a broad overview of expedited removal and the Suspension Clause. Part II analyzes the historical purpose of the Suspension Clause, the Court's habeas precedent, and the policy concerns associated with restricted habeas review in expedited removal, and argues in favor of adopting the Ninth Circuit's approach to entitlement to habeas review. Finally, Part III explores the required scope of habeas review and discusses ways to modify expedited removal so that it can be an adequate substitute for habeas review.

#### I. THE SUSPENSION CLAUSE AND ASYLUM SEEKERS IN EXPEDITED REMOVAL PROCEEDINGS

The goal of providing asylum to genuine refugees appears at times to be in tension with the goal of efficiently processing the claims of the many noncitizens who enter the United States every year.<sup>35</sup> In an effort to reconcile these conflicting goals, Congress established expedited removal, a process intended to streamline the deportation of certain noncitizens without legitimate asylum claims.<sup>36</sup> By statute, expedited removal should not apply to asylum seekers who are found to have a credible fear of returning home.<sup>37</sup> But critics of expedited removal procedures have noted that the system—as currently implemented—often fails to identify those with legitimate asylum claims, leading to bona fide asylum seekers being sent back to face the persecution from which they fled.<sup>38</sup> Despite the fact that errors would likely be mitigated by judicial review, a provision of the expedited removal statute strips federal courts' jurisdiction to hear habeas petitions challenging the decisions made in expedited removal proceedings.<sup>39</sup> Consequently, the expedited removal regime and the thousands of decisions it generates each year have largely been immune from judicial review.<sup>40</sup>

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35. See Michele R. Pistone & John J. Hoeffner, *Rules Are Made to Be Broken: How the Process of Expedited Removal Fails Asylum Seekers*, 20 GEO. IMMIGR. L.J. 167, 168 (2006) (“The history of the development of expedited removal makes clear that the inherent conflict between speedy decision-making and accurate and fair decision-making was well understood at the procedure’s inception.”).

36. 142 CONG. REC. 24,783, 24,784 (1996) (statement of Rep. Hyde) (“We recognized that layering of prolonged administrative and judicial consideration can overwhelm the immigration adjudicatory process, serve as a magnet to illegal entry, and encourage abuse of the asylum process. At the same time, we recommended major safeguards against returning persons who meet the refugee definition to conditions of persecution.”).

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

38. See Pistone & Hoeffner, *supra* note 35, at 196 (estimating that annually at least 10,300 bona fide asylum seekers are erroneously deported through expedited removal).

39. See 8 U.S.C. § 1225(b)(1)(D).

40. See *Thuraissigiam v. U.S. Dep’t of Homeland Sec.*, 917 F.3d 1097, 1101 (9th Cir. 2019) (noting that in 2016, DHS removed 141,000 noncitizens through expedited removal).

This Part provides an overview of how the Suspension Clause has historically protected noncitizens and how those protections are relevant in evaluating expedited removal proceedings. Section I.A introduces expedited removal and the limits placed on habeas review. Section I.B analyzes the Suspension Clause's purpose and historical application to noncitizens underlying the Court's more recent habeas cases. Section I.C examines the Court's decisions in *INS v. St. Cyr*<sup>41</sup> and *Boumediene v. Bush*,<sup>42</sup> which provide the relevant framework for asylum seekers' entitlement to habeas review.

### A. *The Expedited Removal Process*

Expedited removal gives discretion to low-level immigration officers to summarily order the deportation of certain noncitizens—undocumented noncitizens and those who have presented fraudulent documents to immigration authorities who do not have documentation of continual presence in the United States for the prior two years.<sup>43</sup> Because expedited removal may not be used against asylum seekers, CBP officers must flag any noncitizen who expresses a fear of returning home.<sup>44</sup> Once flagged, these noncitizens are referred to an asylum officer for a credible fear interview, which seeks to distinguish legitimate, credible fears from unfounded ones.<sup>45</sup> Noncitizens are allowed to speak with an attorney prior to (but not during) this interview and only at personal expense.<sup>46</sup> During the interview, noncitizens who do not speak English must be provided with an interpreter who speaks their native language.<sup>47</sup>

The asylum officer conducting the credible fear interview must determine only whether there is a “significant possibility” that the noncitizen will ultimately qualify for asylum.<sup>48</sup> Congress meant for credible fear to be a low standard,<sup>49</sup> historically, pass rates were around 80 percent.<sup>50</sup> But under the

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41. 533 U.S. 289 (2001).

42. 553 U.S. 723 (2008).

43. MAGAÑA-SALGADO, *supra* note 17, at 1–2.

44. PRIMER ON EXPEDITED REMOVAL, *supra* note 15, at 4 (noting, however, that in many cases “government officers failed to ask if the arriving individual feared return”).

45. *Frequently Asked Questions: Asylum Seekers and the Expedited Removal Process*, HUM. RTS. FIRST (Nov. 2015) [hereinafter *Asylum Seekers and the Expedited Removal Process*], <http://www.humanrightsfirst.org/sites/default/files/FAQ-asylum-seekers-and-the-expedited-removal-process.pdf> [<https://perma.cc/RVD9-S45D>].

46. See 8 U.S.C. § 1225(b)(1)(B)(iv) (2012).

47. See Ingrid Eagly et al., *Detaining Families: A Study of Asylum Adjudication in Family Detention*, 106 CALIF. L. REV. 785, 822 (2018).

48. See *Questions & Answers: Credible Fear Screening*, U.S. CITIZENSHIP & IMMIGR. SERVS. (July 15, 2015), <https://www.uscis.gov/humanitarian/refugees-asylum/asylum/questions-answers-credible-fear-screening> [<https://perma.cc/26KH-F7V3>].

49. See 142 CONG. REC. 25,347 (1996) (statement of Sen. Hatch) (“The standard adopted in the conference report is intended to be a low screening standard for admission into the usual full asylum process.”).

50. Jordan, *supra* note 10.



Trump Administration, credible fear passage rates have plummeted, with record numbers of asylum seekers failing what is meant to be a cursory screening interview.<sup>51</sup> Noncitizens with a credible fear are spared from expedited removal and placed in regular, more thorough removal proceedings in front of an IJ pursuant to INA section 240.<sup>52</sup> There, they are able to apply for asylum as well as other types of relief from deportation, they have a greater opportunity to obtain counsel and relevant evidence, and they have at least minimal Fifth Amendment due process protections.<sup>53</sup>

In the increasing number of cases in which the asylum officer determines that the noncitizen's alleged fear lacks credibility, the consequences are dire.<sup>54</sup> Noncitizens may request that an IJ provide de novo review of the asylum officer's finding of no credible fear, but these review hearings are often rushed affairs. They are typically conducted within twenty-four hours of the initial determination, leaving the noncitizen little time to prepare.<sup>55</sup> On paper, the hearing is intended to provide noncitizens an opportunity to be heard and questioned.<sup>56</sup> In reality, the hearing increasingly functions as a rubber stamp for the asylum officer's determination.<sup>57</sup> As of June 2018, IJs affirmed the negative determination in 85.3 percent of cases, up from 67.3 percent just a year prior.<sup>58</sup> In the rare instances in which the IJ disagrees with the asylum officer and finds a credible fear, the individual is placed in regular (and more thorough) removal proceedings.<sup>59</sup> But if the IJ agrees, as often happens, that the individual lacks a credible fear, the noncitizen is quickly deported.<sup>60</sup> A noncitizen may only file a habeas petition to challenge three narrow issues: whether they are a noncitizen, whether they were ordered removed pursuant to expedited removal, and whether they have previously

51. *See id.*

52. 8 C.F.R. § 1208.30(g)(2)(iv)(B) (2019). *See generally* Brief of Refugee & Human Rights Organizations & Scholars, *supra* note 16, at 3–4 (“[In regular removal proceedings a] noncitizen may be represented by counsel (at her own expense), may examine the evidence offered against her, may present additional evidence on her behalf, and may cross examine government witnesses.” (citing 8 U.S.C. § 1229a(b)(4)(A)–(B) (2012))).

53. MAGAÑA-SALGADO, *supra* note 17, at 2.

54. *See, e.g.*, Stillman, *supra* note 2 (sharing the stories of several individuals who faced abuse or death after asylum officers deported them back to their home countries).

55. *See* 8 U.S.C. § 1225(b)(1)(B)(iii)(III) (2012); *Findings of Credible Fear Plummet amid Widely Disparate Outcomes by Location and Judge*, TRAC IMMIGR. (July 30, 2018), <https://trac.syr.edu/immigration/reports/523/#f5> [<https://perma.cc/M7G4-YH3A>].

56. 8 U.S.C. § 1225(b)(1)(B)(iii)(III).

57. Will Weissert & Emily Schmall, ‘Credible Fear’ for U.S. Asylum Harder to Prove Under Trump, CHI. TRIB. (July 16, 2018, 11:10 AM), <http://www.chicagotribune.com/news/nationworld/ct-credible-fear-asylum-20180716-story.html> [<https://perma.cc/26TS-WDER>].

58. *See Findings of Credible Fear Plummet*, *supra* note 55, tbl.1.

59. *See* 8 C.F.R. § 1208.30(g)(2)(iv)(B) (2019) (“If the immigration judge finds that an alien . . . possesses a credible fear of persecution or torture, the immigration judge shall vacate the order of the asylum officer . . . and the Service may commence [regular removal proceedings] . . .”); *see also Asylum Seekers and the Expedited Removal Process*, *supra* note 45.

60. *See* 8 C.F.R. § 1208.30(g)(2)(iv)(A).

been granted another form of legal status.<sup>61</sup> They may not challenge the asylum officer's compliance with the required procedures or the factual support for the "no credible fear" finding.<sup>62</sup> This "cocktail of jurisdictional bars" effectively ensures that factual errors will go uncorrected and agency officials will not be held accountable for these errors.<sup>63</sup>

Without judicial review, there is a very real "danger that an alien with a genuine asylum claim will be returned to persecution."<sup>64</sup> The constitutionality of the jurisdiction-stripping provision was called into question when asylum seekers facing this danger sought review of their credible fear determinations by filing habeas petitions in federal district courts.<sup>65</sup> In the suits that followed, the Third and Ninth Circuits became the first circuit courts to address the novel question whether these noncitizens are entitled to the protection of the Suspension Clause and, if so, what the scope of that right is.<sup>66</sup>

### B. *The Suspension Clause and Its Historical Application to Noncitizens*

To determine whether the jurisdiction-stripping provision is constitutional, it is helpful to understand the purpose of the Suspension Clause and the way noncitizens have historically used habeas review. The Suspension Clause of the U.S. Constitution provides that, absent proper suspension, individuals have a constitutional right to at least minimum review of the lawfulness of their detention.<sup>67</sup> Procedurally, detained individuals may file a habeas petition, and, if the court grants the writ, they can challenge the legality of their detention in federal court.<sup>68</sup> This review has been viewed as especially critical where the detention is the result of executive action rather than judicial conviction.<sup>69</sup> At common law, the court's role in habeas proceedings "was most extensive in cases of pretrial and noncriminal detention, where there had been little or no previous judicial review of the cause for deten-

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61. 8 U.S.C. § 1252(e)(2) (2012).

62. Gerald L. Neuman, *The Habeas Corpus Suspension Clause After Boumediene v. Bush*, 110 COLUM. L. REV. 537, 573–74 (2010).

63. Jennifer Lee Koh, *When Shadow Removals Collide: Searching for Solutions to the Legal Black Holes Created by Expedited Removal and Reinstatement*, 96 WASH. U. L. REV. 338, 343 (2018).

64. H.R. REP. NO. 104-469, pt. 1, at 158 (1996); see Brief of Refugee & Human Rights Organizations & Scholars, *supra* note 16, at 25.

65. See *Castro v. U.S. Dep't of Homeland Sec.*, 835 F.3d 422, 424, 427, 429 (3d Cir. 2016).

66. See *infra* notes 108–110 and accompanying text.

67. Neuman, *supra* note 62, at 541.

68. FAQs: *What Is Habeas Corpus*, CTR. FOR CONST. RTS. (Oct. 17, 2007), <https://ccrjustice.org/home/get-involved/tools-resources/fact-sheets-and-faqs/faqs-what-habeas-corpus> [<https://perma.cc/KY34-EUVZ>].

69. See *id.*

tion.”<sup>70</sup> Unlike in criminal proceedings, where there is an adjudicator who is “disinterested in the outcome and committed to procedures designed to ensure its own independence,” adjudications by the executive lack such formal protections.<sup>71</sup> The urgency of habeas review in these cases stems from the purpose of the Suspension Clause: to maintain the separation of powers.<sup>72</sup>

Although the Supreme Court has upheld certain limitations on the constitutional rights of noncitizens, those constitutional protections are largely found in the Bill of Rights.<sup>73</sup> In contrast, the Suspension Clause is found in the limitations on congressional power.<sup>74</sup> That habeas rights have consistently been extended to noncitizens is reflective of the fundamental proposition that the separation-of-powers structure requires a judicial check on congressional action as implemented by the executive.<sup>75</sup> Specifically, in the immigration context, the Court has emphasized that “[w]ithin the Constitution’s separation-of-powers structure, few exercises of judicial power are as legitimate or as necessary as the responsibility to hear challenges to the authority of the Executive to imprison a person.”<sup>76</sup>

Reflecting this core purpose of the Suspension Clause, judicial precedent dating back to the late 1700s in England and the founding years of the United States establishes that habeas was available to noncitizens.<sup>77</sup> This judicial review extended to questions of law and mixed questions of law and fact in deportation decisions.<sup>78</sup> The Court has stated that, at a minimum, the Suspension Clause protects habeas review as it existed at the founding,<sup>79</sup> but has not foreclosed the possibility that the scope of the Suspension Clause has since expanded.<sup>80</sup> This history has driven the Court’s analysis of who is entitled to Suspension Clause protections in recent habeas cases involving noncitizens,<sup>81</sup> leading the Court to conclude that habeas review is a right of all people, not just citizens.<sup>82</sup>

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70. *Boumediene v. Bush*, 553 U.S. 723, 780 (2008).

71. *Id.* at 783; see also Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 COLUM. L. REV. 961, 1023 (1998) (“Even where administrative adjudicators are partly insulated from political influence on their decisions, none of them enjoys the full protections against removal and salary reduction provided for federal judges by Article III.”).

72. *Boumediene*, 553 U.S. at 746.

73. See, e.g., *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990); *Johnson v. Eisentrager*, 339 U.S. 763, 770 (1950).

74. See U.S. CONST. art. I, § 9, cl. 2.

75. See *Thuraissigiam v. U.S. Dep’t of Homeland Sec.*, 917 F.3d 1097, 1115 (9th Cir. 2019).

76. *Boumediene*, 553 U.S. at 797.

77. *INS v. St. Cyr*, 533 U.S. 289, 304–06 (2001).

78. *Thuraissigiam*, 917 F.3d at 1117.

79. *St. Cyr*, 533 U.S. at 300–01.

80. Neuman, *supra* note 62, at 543 (quoting *Boumediene*, 553 U.S. at 746).

81. See, e.g., *Osorio-Martinez v. Attorney Gen. U.S.*, 893 F.3d 153 (3d Cir. 2018).

82. Neuman, *supra* note 62, at 545.

C. *Supreme Court Suspension Clause Jurisprudence in the Context of Noncitizens*

The Supreme Court has addressed the applicability and scope of the Suspension Clause in relation to noncitizens twice since Congress enacted expedited removal.<sup>83</sup> These two cases, *INS v. St. Cyr* and *Boumediene v. Bush*, provide “an analytical blueprint” for interpreting the reach of the Suspension Clause.<sup>84</sup> The first of these cases, *St. Cyr*, dealt with a lawful permanent resident who pled guilty to a controlled substance violation that made him eligible for deportation.<sup>85</sup> At issue was a provision of the IIRIRA that appeared to strip the Court of jurisdiction to review a pure question of law: whether *St. Cyr* was eligible for a discretionary grant of relief from deportation.<sup>86</sup> The Court found that construing the statute to preclude judicial review of a purely legal question raised serious constitutional concerns.<sup>87</sup>

In reaching this conclusion, the Court reviewed historical precedents and established that habeas review of questions of law was available to noncitizens in deportation proceedings.<sup>88</sup> The Court held that this minimum judicial review of deportation decisions is required by the Constitution and cannot be foreclosed by Congress.<sup>89</sup> The Court thus reiterated the Suspension Clause’s important role as a separation-of-powers mechanism in which habeas review functions as a judicial check on the deportation decisions made by the executive.<sup>90</sup> Given the serious constitutional concerns raised by the preclusion of habeas review for questions of law, the Court construed the statute so as to not strip habeas jurisdiction.<sup>91</sup> Because the Court reached this result without striking down the statute, it did not address the precise scope of habeas review.<sup>92</sup>

The Court did address the scope of the protections of the Suspension Clause in *Boumediene* when considering noncitizen enemy combatants apprehended and detained outside the borders of the United States.<sup>93</sup> To determine if the statute at issue violated the Suspension Clause, the Court established a two-step framework. The first step involved determining whether the petitioners were entitled to Suspension Clause protection. In making this determination, the Court derived three relevant factors: “(1) the

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83. See *Boumediene v. Bush*, 553 U.S. 723 (2008); *St. Cyr*, 533 U.S. 289.

84. *Thuraissigiam v. U.S. Dep’t of Homeland Sec.*, 917 F.3d 1097, 1106 (9th Cir. 2019).

85. *St. Cyr*, 533 U.S. at 293.

86. *Id.*

87. *Id.* at 300.

88. *Id.* at 307.

89. *Id.* at 300 (citing *Heikkila v. Barber*, 345 U.S. 229, 235 (1953)).

90. See *id.* at 301–08.

91. *Id.* at 300.

92. *Id.* at 301 n.18.

93. See *Boumediene v. Bush*, 553 U.S. 723, 753 (2008) (noting that the United States was exercising jurisdiction over Guantanamo Bay).

citizenship and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner's entitlement to the writ.<sup>94</sup> Notably, consideration of petitioners' entitlement to other constitutional protections was not included as one of the Court's factors. This suggests a recognition that habeas review is so foundational, its protections may extend to noncitizens who lack other constitutional rights. The first step focused instead on the historical scope of habeas review and its importance as a mechanism for enforcing the separation of powers.<sup>95</sup> Using these factors, the Court determined that noncitizens who are imprisoned at Guantanamo Bay are entitled to Suspension Clause protections.<sup>96</sup> Although the detainees' location outside the United States weighed against finding that they had habeas rights, the rudimentary procedures through which they were designated as enemy combatants and the lack of any significant obstacles to adjudicating habeas petitions led the Court to conclude otherwise.<sup>97</sup>

The second step of the inquiry determined whether the jurisdiction-stripping provision was constitutional by asking whether "Congress has provided adequate substitute procedures for habeas corpus."<sup>98</sup> The Court found that, at a minimum, an adequate substitute must provide the prisoner "a meaningful opportunity to demonstrate that he is being held pursuant to 'the erroneous *application or interpretation*' of relevant law."<sup>99</sup> Accordingly, a reviewing court must have the ability to not only examine whether the prescribed procedures were lawful and followed in a given case but also evaluate findings of fact.<sup>100</sup> The Court specified that the scope of review required by the Suspension Clause would depend on the circumstances of a given case, and particularly the rigor of the prior proceedings.<sup>101</sup>

The Court held that the procedures provided to the detainees were not an adequate substitute for habeas review because of the constraints on the detainees' ability to rebut the factual determinations the government had made against them.<sup>102</sup> This was due to several factors: the detainees had "limited means to find or present evidence to challenge the Government's case[,] [they did] not have the assistance of counsel[,] and may not [have] be[en] aware of the most critical allegations that the Government relied upon to order [their] detention."<sup>103</sup> In light of these constraints, the Court rec-

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94. *Id.* at 766.

95. *See id.* at 765.

96. *Id.* at 771.

97. *Id.* at 766–71.

98. *Id.* at 771.

99. *Id.* at 779 (emphasis added) (quoting *INS v. St. Cyr*, 533 U.S. 289, 302 (2001)).

100. *See id.* at 788–89.

101. *Id.* at 779.

102. *Id.* at 783, 787.

103. *Id.* at 783–84.

ognized the high risk that the tribunal would make erroneous findings of fact.<sup>104</sup> Because of the high risk of error and the severe consequences of an error, the Court held that the detainees must be entitled to habeas review or an adequate substitute to remedy errors when they occur.<sup>105</sup> This decision was critical because it was the first time the Court found a procedural substitute inadequate, and thus the first time the Court spoke directly to what the Suspension Clause protects.<sup>106</sup>

Even though the petitioners in *St. Cyr* and *Boumediene* were differently situated than asylum seekers mistakenly subjected to expedited removal, the reasoning used in both cases and the general framework the Court established in *Boumediene* provide the relevant legal backdrop for Suspension Clause challenges to expedited removal.<sup>107</sup> *St. Cyr* and *Boumediene* involved noncitizens very differently situated from each other, and yet the core of the Court's analysis in both cases was similar. Each focused on the Suspension Clause's historical scope and the critical role of the Suspension Clause in maintaining the separation of powers. The same history and separation-of-powers concerns that animate the Suspension Clause should inform the answer to whether noncitizens in expedited removal are entitled to habeas rights.

## II. CONFLICTING INTERPRETATIONS OF THE REACH OF THE SUSPENSION CLAUSE

Given the lack of Supreme Court precedent on point, circuit courts have reached diverging conclusions on the extension of habeas rights to noncitizens in the United States. In *Castro v. Department of Homeland Security*, the Third Circuit was the first federal court of appeals to address the Suspension Clause rights of noncitizens in expedited removal.<sup>108</sup> In addressing this novel issue, the court found that these asylum seekers were not entitled to habeas rights and thus upheld the jurisdiction-stripping provision.<sup>109</sup> Subsequently, in *Thuraissigiam v. Department of Homeland Security*, the Ninth Circuit reached the opposite conclusion. There, the court held that asylum seekers within the boundaries of the United States *are* entitled to habeas rights and

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104. *Id.* at 785.

105. *Id.* at 792.

106. Neuman, *supra* note 62, at 538–39.

107. See, e.g., *Osorio-Martinez v. Attorney Gen. U.S.*, 893 F.3d 153, 166 (3d Cir. 2018) (applying the *Boumediene* steps to determine whether petitioners were prohibited from invoking the Suspension Clause).

108. See *Castro v. U.S. Dep't of Homeland Sec.*, 835 F.3d 422, 425 (3d Cir. 2016) (noting that the question whether the expedited removal statute violated the Suspension Clause rights of noncitizens was a “very difficult question that neither this Court nor the Supreme Court has addressed”).

109. *Id.*

that expedited removal does not adequately honor those rights.<sup>110</sup> This Part asserts that the Ninth Circuit's holding is correct in light of the purpose of the Suspension Clause and Supreme Court habeas precedent. Section II.A explores the facts of *Castro* and *Thuraissigiam* and the approach each circuit adopted in assessing habeas rights. Section II.B argues that Suspension Clause history and precedent support the conclusion that all noncitizens in expedited removal are entitled to habeas rights. Section II.C addresses the policy concerns that support this Note's proposal that asylum seekers erroneously subjected to expedited removal are entitled to habeas review.

#### A. *Alternative Approaches to the Suspension Clause Rights of Noncitizens*

The Third and Ninth Circuits, despite facing similar facts, adopted different approaches to determining noncitizen entitlement to Suspension Clause rights that lead to different outcomes. The petitioners in both *Castro* and *Thuraissigiam* were asylum seekers who were apprehended within hours of entering the country and detained fairly close to the border.<sup>111</sup> The petitioners in *Castro* were twenty-eight families, including women and their children, who fled brutal gang and domestic violence in Central America.<sup>112</sup> The petitioner in *Thuraissigiam* was a man who fled Sri Lanka after being tortured because of his political views.<sup>113</sup> Upon apprehension, CBP officers determined that each asylum seeker was subject to expedited removal.<sup>114</sup> When the petitioners expressed a fear of returning home, they were referred to asylum officers who conducted credible fear interviews.<sup>115</sup> The asylum officers determined that none of the petitioners had credible fears.<sup>116</sup> The petitioners then requested de novo review of these determinations in front of IJs.<sup>117</sup> The IJs upheld the negative credible fear determinations, and the petitioners were transferred for removal without further review.<sup>118</sup> Each petitioner then filed a habeas petition in federal district court challenging their credible fear determinations.<sup>119</sup> Since the jurisdiction-stripping provision

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110. See *Thuraissigiam v. U.S. Dep't of Homeland Sec.*, 917 F.3d 1097, 1116–17 (9th Cir. 2019).

111. *Id.* at 1101; *Castro*, 835 F.3d at 427.

112. *Castro*, 835 F.3d at 424, 427.

113. *Thuraissigiam*, 917 F.3d at 1101–02.

114. See *id.* at 1101; *Castro*, 835 F.3d at 428.

115. *Thuraissigiam*, 917 F.3d at 1101; *Castro*, 835 F.3d at 428.

116. *Thuraissigiam*, 917 F.3d at 1101; *Castro*, 835 F.3d at 428.

117. *Thuraissigiam*, 917 F.3d at 1102; *Castro*, 835 F.3d at 428. See generally 8 U.S.C. § 1225(b)(1)(B)(iii)(III) (2012) (“The Attorney General shall provide by regulation and upon the alien’s request for prompt review by an immigration judge of a determination under subclause (I) that the alien does not have a credible fear of persecution.”).

118. *Thuraissigiam*, 917 F.3d at 1102; *Castro*, 835 F.3d at 428.

119. *Thuraissigiam*, 917 F.3d at 1102; *Castro*, 835 F.3d at 428 (“Each petitioning family then submitted a separate habeas petition to the District Court, each claiming that the asylum officer and IJ conducting their credible fear interview and review violated their Fifth Amend-

bars habeas review of the substantive issues raised in these petitions, the federal courts had to address whether this jurisdiction-stripping provision is unconstitutional. This determination involved a preliminary question: whether the petitioners were entitled to Suspension Clause protection at all.

In *Castro*, the Third Circuit held that the petitioners did not have *any* constitutional rights, including habeas rights.<sup>120</sup> The court stressed that the petitioners were recent, surreptitious entrants, which made them most analogous to noncitizens who are outside the borders of the country and accordingly lack all constitutional protections.<sup>121</sup> In reaching this conclusion, the court relied heavily on the plenary power doctrine, which is an exercise in extreme judicial deference regarding the procedures chosen by the political branches for admitting and excluding noncitizens.<sup>122</sup> The court highlighted the 1982 Supreme Court decision *Landon v. Plasencia*, which held 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 sovereign prerogative.”<sup>123</sup> The Third Circuit reasoned that because the petitioners were apprehended close to the border and so soon after entry, they were essentially seeking initial admission and thus not entitled to constitutional protections.<sup>124</sup>

During the two years that *Castro* was litigated, four of the petitioner children applied for and were granted Special Immigrant Juvenile Status (SIJS), a classification that provides certain abused, abandoned, or neglected children with enhanced statutory and regulatory rights, including eligibility for lawful permanent residence.<sup>125</sup> These four children and their mothers again filed habeas petitions challenging their expedited removal orders.<sup>126</sup> In this new case, *Osorio-Martinez v. Attorney General*, the court found that stripping habeas review violated the Suspension Clause.<sup>127</sup> The court conducted a thorough analysis of the statutory requirements for SIJS and determined that if the petitioners had satisfied these statutory requirements, they had developed a connection with the United States that triggered constitutional protections.<sup>128</sup> But the court did not establish a clear test for when

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ment procedural due process rights, as well as their rights under the INA . . . and the applicable implementing regulations.” (footnote omitted)).

120. *Castro*, 835 F.3d at 434–35, 445 (“Congress may, consonant with the Constitution, deny habeas review in federal court of claims relating to an alien’s application for admission to the country, at least as to aliens who have been denied initial entry or who, like Petitioners, were apprehended very near the border and, essentially, immediately after surreptitious entry into the country.”).

121. *Id.* at 445–46.

122. *See id.*

123. 459 U.S. 21, 32 (1982); *Castro*, 835 F.3d at 444.

124. *Castro*, 835 F.3d at 445.

125. *Osorio-Martinez v. Attorney Gen. U.S.*, 893 F.3d 153, 159–60 (3d Cir. 2018).

126. *Id.* at 160.

127. *Id.* at 166.

128. *Id.* at 167–68.



noncitizens become entitled to Suspension Clause protections.<sup>129</sup> The Third Circuit's decisions in *Castro* and *Osorio-Martinez* represent a case-by-case approach to Suspension Clause protections that depends on an analysis of the noncitizens' connection to the United States.

In contrast, the Ninth Circuit in *Thuraissigiam* adopted a bright-line rule that all noncitizens physically within the borders of the United States are entitled to habeas rights.<sup>130</sup> To find that the petitioner had habeas rights, the court relied on two principal arguments. First, it emphasized the purpose of the Suspension Clause as enforcing the separation of powers.<sup>131</sup> It noted that "the Suspension Clause protects 'a right of first importance,' even in circumstances . . . where the executive's power is at its zenith."<sup>132</sup> Even where the plenary powers have applied, the protections of the Suspension Clause have not been suspended.<sup>133</sup> Accordingly, to deprive the noncitizens of habeas rights would be an abdication of the courts' responsibility to check executive power. Second, the court cited historical precedent that extended habeas review even to newly arriving noncitizens.<sup>134</sup> Citing many of the same old English cases and early American cases as the *Boumediene* Court, the Ninth Circuit positioned its holding as being aligned with a long chain of precedent.<sup>135</sup>

#### B. *Noncitizens in Expedited Removal Are Entitled to Suspension Clause Protections*

The constitutional rights of noncitizens at the border remain unsettled, and the Supreme Court has never addressed whether noncitizens in expedited removal have habeas rights.<sup>136</sup> Though the Supreme Court has held that noncitizens do not enjoy the full slate of rights guaranteed to U.S. citizens, the Court has never addressed the narrower question whether noncitizens facing expedited removal are entitled to habeas rights. The distinction is significant, because habeas rights are unique. Unlike other constitutional rights,

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129. *Id.* at 170 n.13 ("We need not address here what minimum requirements aliens must meet to lay claim to constitutional protections. We hold merely that SIJ designation and the relationship to the United States to which it attests are more than sufficient.").

130. See *Thuraissigiam v. U.S. Dep't of Homeland Sec.*, 917 F.3d 1097, 1115 (9th Cir. 2019).

131. See *id.* at 1105.

132. *Id.* at 1108 (quoting *Boumediene v. Bush*, 553 U.S. 723, 798 (2008)).

133. See Chloe Kim, *Castro v. Department of Homeland Security: Keeping the Suspension Clause Out of Reach*, CALIF. L. REV.: BLOG (Sept. 2017), <http://www.californialawreview.org/keeping-the-suspension-clause-out-of-reach/> [<https://perma.cc/46CV-V8GC>] ("In fact, in all the plenary power cases, the Court had to recognize the petitioners' right to petition a writ of habeas under the Suspension Clause in order to reach the question of whether their due process rights were violated.").

134. *Thuraissigiam*, 917 F.3d at 1115.

135. *Id.* at 1109.

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

the constitutional right to habeas review has always been extended to noncitizens within the borders of the country. In fact, before the Third Circuit's decision in *Castro*, no federal court of appeals had ever denied the protections of the Suspension Clause to noncitizens within the country's borders.<sup>137</sup> The core of this divergence in interpreting the reach of the Suspension Clause originates from the tension between the plenary power doctrine and the separation-of-powers doctrine.

The plenary power doctrine establishes that immigration matters are the prerogative of the political branches as "a basic attribute of sovereignty."<sup>138</sup> Accordingly, the Court has exercised extreme deference to the exclusion procedures chosen by Congress.<sup>139</sup> Early cases that established the plenary power doctrine left very little room for judicial review of immigration matters.<sup>140</sup> This was especially true in relation to noncitizens detained at ports of entry, where the political branches' plenary power was thought to be at its apex.<sup>141</sup> Under the "entry fiction doctrine," noncitizens detained at ports of entry, though technically within the borders of the country, have the same limited constitutional status as those outside the United States.<sup>142</sup> Asylum seekers just inside the border would be most analogous to these noncitizens at ports of entry.<sup>143</sup>

But the Court's habeas jurisprudence firmly establishes that the Suspension Clause entitles these recent entrants to habeas rights, regardless of what the plenary power and entry fiction doctrines may provide. In any case, those latter doctrines are likely inapplicable to asylum seekers. Because the asylum seekers at issue are physically within the United States' borders, rather than just outside of them at a port of entry, they fall outside the scope of the entry fiction doctrine. Unlike those noncitizens stopped at a port of en-

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137. Brief of the American Bar Ass'n as Amicus Curiae Supporting Petitioners at 4, *Castro*, 835 F.3d 422 (No. 16-812).

138. Jon Feere, *Plenary Power: Should Judges Control U.S. Immigration Policy?*, CTR. FOR IMMIGR. STUD. (Feb. 25, 2009), <https://cis.org/Report/Plenary-Power-Should-Judges-Control-US-Immigration-Policy> [<https://perma.cc/XH69-H859>].

139. See *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953) ("But an alien on the threshold of initial entry stands on a different footing: 'Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.' " (quoting *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950))); *United States v. Ju Toy*, 198 U.S. 253, 263 (1905).

140. See, e.g., *Ekiu v. United States*, 142 U.S. 651, 664 (1892); see also *Castro*, 835 F.3d at 441 ("Thus, the Court's earliest plenary power decisions established a rule leaving essentially no room for judicial intervention in immigration matters . . .").

141. *Castro*, 835 F.3d at 442 (noting that *Mezei* and *Knauff* effectively reversed the impact of the cases limiting the plenary power doctrine, at least in relation to those noncitizens subject to the "entry fiction").

142. See *Ju Toy*, 198 U.S. at 263 ("The petitioner, although physically within our boundaries, is to be regarded as if he had been stopped at the limit of our jurisdiction and kept there while his right to enter was under debate.").

143. See *Osorio-Martinez v. Attorney Gen. U.S.*, 893 F.3d 153, 175 (3d Cir. 2018).

try, whose constitutional rights remain uncertain,<sup>144</sup> those within the territorial United States are entitled to at least minimal constitutional protections.<sup>145</sup> Furthermore, while the Court has upheld restrictions on the due process rights of noncitizens stopped at ports of entry,<sup>146</sup> the Court has never upheld restrictions on Suspension Clause protections. In fact, in each case where the Supreme Court found that the due process rights of noncitizens were properly restricted, it held that those noncitizens were entitled to habeas review; otherwise, the Court would not have had jurisdiction to consider the other constitutional claims raised.<sup>147</sup>

Moreover, plenary powers are never absolute and must be interpreted in accordance with the Constitution's dedication to safeguarding the separation of powers.<sup>148</sup> The Court repeatedly recognized this limitation to the plenary power doctrine during a period termed the "finality era," a roughly sixty-year period that lasted until the mid-twentieth century.<sup>149</sup> During the finality era, Congress passed a variety of immigration statutes that explicitly rendered the executive's deportation determinations final. Despite this instruction from Congress, the Court repeatedly recognized that the Constitution mandated that these determinations be subject to habeas review.<sup>150</sup> Later, in *St. Cyr*, the Court confirmed that the precise source of this constitutionally required review is the Suspension Clause.<sup>151</sup>

The Suspension Clause requires habeas review even when the executive detention is justified by compelling circumstances and concerns a policy area within the purview of the political branches. For example, in *Boumediene*, the Court dealt with another area that is the prerogative of the political branches—war powers.<sup>152</sup> Despite the government's claim that a compelling

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144. See *Castro*, 835 F.3d at 446.

145. See, e.g., *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) ("It is well established that certain constitutional protections available to *persons inside the United States* are unavailable to aliens *outside of our geographic borders*. But once an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to *all 'persons' within the United States*, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent." (emphases added) (citations omitted)); *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886).

146. See, e.g., *Landon v. Plasencia*, 459 U.S. 21 (1982) (upholding limitations on the due process rights of noncitizens).

147. See *Kim*, *supra* note 133.

148. See Richard H. Fallon, Jr., *Applying the Suspension Clause to Immigration Cases*, 98 COLUM. L. REV. 1068, 1090–91 (1998) ("And surely Congress could not, under the Constitution, provide for the summary torture of some illegal immigrants as a deterrent to unlawful entries by others. Once such modest limits are acknowledged, it becomes clear that there is nothing radical in the proposition—which indeed is implicitly recognized already—that governmental powers under the Constitution can be more or less, but never absolutely, plenary.").

149. See *Thuraissigiam v. U.S. Dep't of Homeland Sec.*, 917 F.3d 1097, 1114–15 (9th Cir. 2019).

150. See, e.g., *Heikkila v. Barber*, 345 U.S. 229, 235 (1953); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212–13 (1953).

151. *INS v. St. Cyr*, 533 U.S. 289, 300 (2001).

152. See *Boumediene v. Bush*, 553 U.S. 723, 745 (2008).

state interest in protecting the country from terrorism warranted a suspension of habeas rights for enemy combatants, the Court held that there was no credible argument that the government's "military mission at Guantanamo would be compromised if habeas courts had jurisdiction."<sup>153</sup> Likewise, the government's claims of compelling national security interests are insufficient to justify the deprivation of habeas rights for asylum seekers. Granting prospective asylees these protections in no way threatens the safety and security of Americans.<sup>154</sup> Rather, it would bolster the legitimacy of the immigration system by providing an added layer of review, ensuring that asylees are not summarily deported and forced to return to the persecution from which they fled.

Although the political branches have control over the regulations implemented to exclude and admit noncitizens, the executive may not implement a procedure that dispenses with the judiciary's role in reviewing executive detention. The Suspension Clause was intended to "ensure[] that, except during periods of formal suspension, the Judiciary will have a time-tested device, the writ, to maintain the 'delicate balance of governance' that is itself the surest safeguard of liberty."<sup>155</sup> In the context of expedited removal, habeas review, or an adequate substitute, upholds the separation-of-powers purpose by allowing the judiciary to serve as a check on executive detention and deportation decisions.

### C. *Policy Implications of Instituting Habeas Review for Noncitizens in Expedited Removal*

Policy concerns provide additional support for adopting the clear rule that all asylum seekers within U.S. borders are entitled to habeas review.<sup>156</sup> As the Third Circuit's decisions in *Castro* and *Osorio-Martinez* make clear, drawing a line between which asylum seekers meet the "minimum requirements . . . to lay claim to" habeas rights and which do not is doctrinally diffi-

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153. *Id.* at 769.

154. See Alex Nowrasteh, *Does the Migrant Caravan Pose a Serious Terrorism Risk?*, CATO INST. (Oct. 23, 2018, 5:19 PM), <https://www.cato.org/blog/does-migrant-caravan-pose-terrorism-risk> [<https://perma.cc/JD44-V4MT>] (noting that annually, between 1975 and 2017, there was only a one in 1.3 billion chance of being killed in a terrorist attack perpetrated by an asylum seeker or undocumented immigrant).

155. *Boumediene*, 553 U.S. at 745 (quoting *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004)).

156. It is worth noting that a holding that all noncitizens in expedited removal are not entitled to habeas review is foreclosed by the wide reach of expedited removal. Expedited removal can be applied to anyone in the United States who cannot establish physical presence for the prior two years. 8 C.F.R. § 235.3(b)(1)(ii) (2018). Among those included in this sweeping provision could be a noncitizen who has been in the United States for one year and 364 days or someone who has been in the United States for many years but does not have documentation of continual presence. But there is no question that both of these noncitizens are entitled to at least some constitutional protections. See, e.g., *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001). Since many noncitizens included in the sweep of expedited removal are entitled to constitutional protections, the Court could not hold that noncitizens are not entitled to habeas review.

cult and has large human and judicial costs.<sup>157</sup> Although there is a clear status difference between SIJS designees and recent entrants, the distinction between categories of noncitizens will not always be so clear. For example, if an asylum seeker has been in the country for one week and is thirty miles past the border, will they be entitled to Suspension Clause rights? What about fifty miles past the border? Or one hundred miles past the border, having been in the country for only two days? The Third Circuit's approach raises these difficult questions but provides no workable answer.

Because the Court has never suggested that entitlement to habeas depends on the number of hours a noncitizen has been present in the country or how many miles within the country a noncitizen is apprehended, there is no precedent for lower courts to rely on if forced to make these fact-specific determinations. Thus, courts will not be able to easily apply this case-by-case approach, and its implementation could strain judicial resources. Further, even if a court does determine that an individual is entitled to Suspension Clause rights, it must then determine whether expedited removal is an adequate substitute for habeas proceedings.<sup>158</sup> As *Castro* and *Osorio-Martinez* demonstrate, determination of these issues can take years.

What is perhaps most problematic about this lengthy process of determining whether a given noncitizen is entitled to habeas review is that the INA mandates that asylum seekers be detained during the credible fear process.<sup>159</sup> This means that asylum seekers—including families with young children, like the petitioners in *Castro*—may be kept in immigration detention facilities for upwards of two years.<sup>160</sup> Indefinite detention is particularly concerning given the reports of heinous living conditions at detention centers and evidence revealing the damaging mental and physical toll of lengthy confinement.<sup>161</sup> Asylum seekers have described being held in jail-like facilities without adequate medical care, food, or educational services.<sup>162</sup> Additionally, detaining asylum seekers financially burdens taxpayers.<sup>163</sup> The cost

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157. *Osorio-Martinez v. Attorney Gen.*, 893 F.3d 153, 170 n.13 (3d Cir. 2018).

158. For example, the district court in *Castro* found that the petitioners had Suspension Clause rights, but they were limited in scope, so expedited removal was an adequate substitute. *Castro v. U.S. Dep't of Homeland Sec.*, 163 F. Supp. 3d 157, 168 (E.D. Pa. 2016).

159. See 8 U.S.C. § 1225(b)(1)(B)(iii)(IV) (2012).

160. See *Osorio-Martinez*, 893 F.3d at 179 n.24 (noting that the petitioners were detained for nearly two years).

161. Andrew Gumbel, *They Were Laughing at Us: Immigrants Tell of Cruelty, Illness and Filth in US Detention*, GUARDIAN (Sept. 12, 2018, 4:00 AM), <https://www.theguardian.com/us-news/2018/sep/12/us-immigration-detention-facilities> [<https://perma.cc/4W73-CHKG>].

162. DET. WATCH NETWORK, EXPOSE & CLOSE: ARTESIA FAMILY RESIDENTIAL CENTER, NEW MEXICO (2014), <https://www.detentionwatchnetwork.org/sites/default/files/reports/DWN%20Expose%20and%20Close%20Artesia%20Report.pdf> [<https://perma.cc/3HZS-W44A>].

163. Eagly et al., *supra* note 47, at 802 (noting that in 2017, the federal budget for immigration detention was set at \$1.748 billion).

of detaining a noncitizen for a day is \$126.<sup>164</sup> When these numbers are multiplied by the number of asylum seekers who find themselves at risk of being subject to expedited removal and the possibility of multi-year detentions, the costs are staggering.

A clear rule that all noncitizens physically within the United States are entitled to habeas rights would reduce the fiscal and human toll of extended detention. In each case, instead of litigating the question whether a given noncitizen is entitled to habeas review, the district court can either issue or deny the writ based on the merits of the challenge to the credible fear determination and then either affirm or reverse the determination.

Finally, the suggestion that some asylum seekers may not be entitled to habeas review raises serious concerns in light of evidence of thousands of erroneous deportations.<sup>165</sup> For asylum seekers who fled their home countries due to fear of persecution, deportation may amount to a death sentence.<sup>166</sup> As Elena's story demonstrates, when immigration officers fail to adequately identify an individual as an asylum seeker, that person is sent back to face horrific persecution.<sup>167</sup> Some asylum seekers are quite literally sent home to their deaths.<sup>168</sup> The consequences associated with erroneous deportations are inherent in every claim for asylum, not just those of asylum seekers who are found sufficiently far inside the border of the United States. In light of these weighty policy concerns, the guidance provided by the Court's habeas jurisprudence, and the historical purpose of habeas, all asylum seekers in the United States should be entitled to habeas review.

### III. SUSPENSION CLAUSE RIGHTS OF ASYLUM SEEKERS IN PRACTICE: HABEAS OR AN ADEQUATE SUBSTITUTE

Numerous scholars have argued that noncitizens subject to expedited removal are entitled to the protection of the Suspension Clause,<sup>169</sup> but there has been little discussion about what follows from that conclusion. In both *Thuraissigiam* and *Osorio-Martinez*, the courts found that the jurisdiction-stripping provision violates the Suspension Clause.<sup>170</sup> Both courts drew on *Boumediene* for the proposition that, at a minimum, an adequate substitute for habeas rights must allow for "meaningful review of both the cause for de-

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164. *Id.*

165. Cf. Meredith Hoffman, *The US Keeps Mistakenly Deporting Its Own Citizens*, VICE NEWS (Mar. 8, 2016), [https://news.vice.com/en\\_us/article/pa4mq7/the-us-keeps-mistakenly-deporting-its-own-citizens](https://news.vice.com/en_us/article/pa4mq7/the-us-keeps-mistakenly-deporting-its-own-citizens) [<https://perma.cc/NF5L-2RH7>] (noting that over 4,000 U.S. citizens were erroneously deported in 2010).

166. Stillman, *supra* note 2 (discussing several stories of asylum seekers deported back to their deaths).

167. *Id.*

168. *Id.*

169. See, e.g., Neuman, *supra* note 62, at 571, 577.

170. *Thuraissigiam v. U.S. Dep't of Homeland Sec.*, 917 F.3d 1097, 1119 (9th Cir. 2019); *Osorio-Martinez v. Attorney Gen. U.S.*, 893 F.3d 153, 178 (3d Cir. 2018).

tention and the Executive's power to detain."<sup>171</sup> Because the jurisdiction-stripping provision does not permit review of whether the expedited removal statute was lawfully applied to the petitioners, it is blatantly an inadequate substitute.<sup>172</sup> But even after finding the provision unconstitutional as applied to the petitioners, neither court fully addressed the implications of its holding.

This Note argues that asylum seekers in the United States—especially those improperly placed in expedited removal proceedings—are entitled to habeas rights. Under *Boumediene*, these asylum seekers must have access to either habeas review itself or a congressionally created adequate substitute. Both paths are worth probing: If Congress fails to act, the question remains as to how, precisely, federal district courts should conduct habeas proceedings and what types of relief would be appropriate. Alternatively, if Congress does attempt to create a substitute procedure in place of habeas proceedings, what safeguards are required to ensure that the substitute is adequate? This Part explores these alternative options and what each would look like in practice. Section III.A uses the Court's reasoning in *St. Cyr* and *Boumediene* to argue that the habeas court must be able to review questions of law and fact and grant conditional release. Section III.B proposes reforms to expedited removal that would make it an adequate substitute for habeas review. Section III.C addresses the costs associated with an adequate substitute and proposes several practical solutions to mitigate those costs.

#### A. Habeas Review in Expedited Removal

Traditionally, the scope of habeas review has extended to review of questions of law and, in certain circumstances, questions of fact. The jurisdiction-stripping provision, as written, precludes review of both questions of law and fact. This inability to review questions of law clearly violates the Suspension Clause.<sup>173</sup> To be sure, the court must have the ability to consider "whether the expedited removal statute was *lawfully applied* to petitioners,"<sup>174</sup> including whether there has been an "erroneous application or interpretation' of relevant law."<sup>175</sup> In these cases, a judge must consider whether expedited removal was applied to an asylum seeker with a credible fear, because such noncitizens cannot lawfully be subjected to expedited removal.<sup>176</sup> Currently, this level of review is inaccessible. If changed, a habeas court would be able

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171. *Boumediene v. Bush*, 553 U.S. 723, 783 (2008).

172. *Osorio-Martinez*, 893 F.3d at 177 (noting that § 1252 only allows review of whether an immigration officer issued the order of removal and if that order was for the petitioner).

173. Neuman, *supra* note 62, at 577.

174. *Osorio-Martinez*, 893 F.3d at 177 (quoting *Castro v. U.S. Dep't of Homeland Sec.*, 835 F.3d 422, 432 (3d Cir. 2016)).

175. *Boumediene*, 553 U.S. at 779 (quoting *INS v. St. Cyr*, 533 U.S. 289, 302 (2001)).

176. See 8 U.S.C. § 1225 (2012).

to review whether the immigration officials complied with the required procedures and “applied the correct legal standards.”<sup>177</sup>

The necessary scope of factual habeas review is a function of the earlier proceedings’ rigor.<sup>178</sup> Decisions generated by executive proceedings should be subjected to more exacting judicial review than convictions by a court of record.<sup>179</sup> Even so, in reviewing decisions generated in regular removal proceedings, habeas courts consider questions of fact under the deferential standard of “some evidence” review.<sup>180</sup> The minimalist nature of expedited removal proceedings, “which give aliens no opportunity to be represented (even at their own expense), no opportunity to present witnesses, and no opportunity to obtain documents that they were not carrying when arrested,” weighs in favor of more exacting review than in regular removal proceedings.<sup>181</sup> Looking at the “sum total of procedural protections afforded”<sup>182</sup> leads to the conclusion that fuller factual review after the fact is warranted to ensure accurate outcomes given the relative absence of initial procedural protections.<sup>183</sup>

The ability to review questions of law and fact is necessary because asylum seekers are not receiving fair adversary proceedings.<sup>184</sup> Specifically, on habeas review an asylum seeker must be allowed to introduce relevant evidence.<sup>185</sup> Considering this evidence, which may not have been provided at an earlier stage, the court will be able to assess whether the asylum seeker has a “significant probability” of qualifying for asylum.<sup>186</sup> As in *St. Cyr*, the habeas court is not reviewing a discretionary decision itself—here a grant of asylum—but instead is reviewing a nondiscretionary decision: whether an individual is eligible to seek asylum in regular removal proceedings.<sup>187</sup> Habeas review would ensure that noncitizens who have legitimate asylum claims are entitled to the procedural protections guaranteed by INA section 240.<sup>188</sup>

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177. *Thuraissigiam v. U.S. Dep’t of Homeland Sec.*, 917 F.3d 1097, 1118 (9th Cir. 2019).

178. *Boumediene*, 553 U.S. at 782–83.

179. *Id.*

180. See Neuman, *supra* note 62, at 576. See generally *INS v. St. Cyr*, 533 U.S. 289, 306 (2001) (explaining that “some evidence” review consists of looking to see whether the order was supported by some evidence).

181. Neuman, *supra* note 62, at 576.

182. *Boumediene*, 553 U.S. at 783.

183. Neuman, *supra* note 62, at 576.

184. Cf. *Boumediene*, 553 U.S. at 782 (“Both aspects of federal habeas corpus review are justified because it can be assumed that, in the usual course, a court of record provides defendants with a fair, adversary proceeding.”).

185. See *id.* at 786 (“Federal habeas petitioners long have had the means to supplement the record on review, even in the postconviction habeas setting.”).

186. See *id.* (noting that the habeas court must have “some authority to assess the sufficiency of the Government’s evidence” against the noncitizen).

187. See *id.*

188. See generally 8 U.S.C. § 1229a (2012).



Asylum seekers must be able to vindicate their right to a fair credible fear proceeding. Habeas review would provide a judicial backstop in situations where an asylum officer improperly makes a negative credible fear determination for a bona fide asylum seeker. In these situations, a habeas court could essentially reverse the asylum officer's negative credible fear determination if it determined that the asylum seeker demonstrated a "significant probability" of qualifying for asylum. The habeas court would then need to determine the appropriate remedy.

First and foremost, a habeas court would allow the asylum seeker to make their case in traditional, nonexpedited section 240 removal proceedings. In doing so, the habeas court would remove the asylum seeker from expedited removal proceedings and eliminate the prospect of a fast-track deportation. Further, as the Court noted in *Boumediene*, habeas courts must be empowered "to order the conditional release of an individual unlawfully detained—though release need not be the exclusive remedy and is not the appropriate one in every case."<sup>189</sup> Asylum seekers should be granted conditional release as they await their formal section 240 removal proceedings. The risk of flight is low: studies have shown that 95 percent of those with asylum claims who are released from detention attend all of their hearings.<sup>190</sup> If Congress enacts an adequate substitute for habeas review, the scope of such review may be narrowed, but if Congress retains expedited removal in its current form, the habeas court must be able to review questions of law and fact and have the authority to grant conditional release.

#### B. *What Would an Adequate Substitute Look Like?*

Congress may restrict access to habeas review only if it enacts an adequate and effective substitute.<sup>191</sup> As *Thuraissigiam* and *Osorio-Martinez* demonstrate, expedited removal in its current form is not an adequate or effective substitute.<sup>192</sup> In fact, this was so clear that the courts did not feel the need to engage in an analysis of what an adequate substitute might include.<sup>193</sup> In *Boumediene*, the Court was troubled by the constraints on the detainees' ability to rebut the factual determinations the government had made against them.<sup>194</sup> Of particular concern was that "the detainee[s] [had] limited means to find or present evidence to challenge the Government's case, [did] not have the assistance of counsel, and may not [have] be[en] aware of the most critical allegations that the Government relied upon to or-

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189. *Boumediene*, 553 U.S. at 779.

190. See Eagly et al., *supra* note 47, at 847 fig.15.

191. See *Swain v. Pressley*, 430 U.S. 372, 381 (1977).

192. *Thuraissigiam v. U.S. Dep't of Homeland Sec.*, 917 F.3d 1097, 1118 (9th Cir. 2019); *Osorio-Martinez v. Attorney Gen. U.S.*, 893 F.3d 153, 177 (3d Cir. 2018).

193. *Osorio-Martinez*, 893 F.3d at 177 n.22.

194. See *Boumediene*, 553 U.S. at 784.

der his detention.”<sup>195</sup> Each of these concerns arises in expedited removal as well.

In credible fear interviews, asylum officers must make a factual determination about whether a noncitizen has a credible fear of returning home. A negative credible fear determination—barring an unlikely reversal by an IJ—will push the noncitizen into expedited removal and imminent deportation.<sup>196</sup> As currently implemented, expedited removal does not provide asylum seekers with an adequate and effective opportunity to rebut this determination.<sup>197</sup> Without this opportunity for asylum seekers to present their case, there is a serious concern that executive officers will make erroneous findings of fact. Where these errors have such weighty consequences—potentially death or, as in the case of Elena, further persecution—the lack of judicial review is particularly concerning.<sup>198</sup>

In order for expedited removal to serve as an adequate substitute, Congress must reform the IIRIRA. First, expedited removal as enacted prescribes procedural protections that the executive is not implementing in practice.<sup>199</sup> The IIRIRA should be amended to allow habeas review to serve as a backstop to ensure “important oversight of whether DHS complied with the required credible fear procedures.”<sup>200</sup> Second, Congress must provide counsel and the opportunity to gather and present evidence to ensure that noncitizens can adequately rebut the factual determinations being made against them. The reforms suggested in this Part are largely framed as individual rights, but they also serve the separation-of-powers purpose of the Suspension Clause because more rigorous procedures reduce the risk of executive error and therefore decrease the urgency of judicial review.

There are several procedural protections built into the expedited removal statute that, if fully implemented, would better allow noncitizens to rebut the factual findings being made against them. First, the regulations implementing expedited removal require translation services for noncitizens who do not speak English,<sup>201</sup> but there have been numerous reports that translation services are “often inadequate or wholly unavailable.”<sup>202</sup> Additionally, although the INA mandates that asylum officers conducting credible fear interviews provide noncitizens with a written explanation for their determinations,<sup>203</sup> there is evidence that many asylum officers do not provide this

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195. *Id.*

196. *Findings of Credible Fear Plummet*, *supra* note 55.

197. *See Thuraissigiam*, 917 F.3d at 1116–17; *Osorio-Martinez*, 893 F.3d at 177.

198. *See Stillman*, *supra* note 2.

199. Brief of Refugee & Human Rights Organizations & Scholars, *supra* note 16, at 17–18.

200. *Thuraissigiam*, 917 F.3d at 1118.

201. 8 C.F.R. § 208.30(d)(5) (2019).

202. Brief of Refugee & Human Rights Organizations & Scholars, *supra* note 16, at 14–18 (noting that mistranslation essentially nullifies the right to express a credible fear).

203. 8 U.S.C. § 1225(b)(1)(B)(iii)(II) (2012).

requisite analysis.<sup>204</sup> Furthermore, noncitizens are not given their statutory right to present evidence or be heard at their hearings,<sup>205</sup> and this issue is compounded when adjudicators apply an erroneously high legal standard for establishing a credible fear.<sup>206</sup> Taken together, these errors prevent bona fide asylum seekers from being accurately identified and from understanding the findings that have been made against them. It is difficult for legitimate asylum seekers to adequately contest their negative credible fear determination<sup>207</sup> because they will often not be aware of even the most critical findings made by the asylum officer.

There is also evidence that IJs are not adhering to the procedural protections prescribed by the expedited removal statute. IJs are required to provide independent review of asylum seekers' cases, but there is evidence that IJs merely rubber-stamp asylum officer determinations.<sup>208</sup> Because IJs are evaluated based on the speed and efficiency with which they process cases<sup>209</sup> and face pressure to adhere to the executive's political agenda,<sup>210</sup> the incentives to defer to the negative credible fear determinations of asylum officers are weighty. IJs have begun to make categorical determinations regarding types of asylum claims, rather than analyzing each case based on its facts, even though this practice has been rejected by the federal courts.<sup>211</sup> Given the evidence that the executive branch is not adhering to the procedures enacted by Congress, Congress *must* create an oversight mechanism. This oversight could take the form of adding a provision to expedited removal that allows for habeas review of whether the executive complied with the required procedures. Such a provision would create judicial oversight of both asylum of-

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204. See Brief of Refugee & Human Rights Organizations & Scholars, *supra* note 16, at 17–18 (“As Petitioners’ cases demonstrate, asylum officers often issue a boilerplate form and simply check a box indicating that a noncitizen failed to meet a particular legal requirement.”).

205. See, e.g., Jeffrey S. Chase, *Attorneys and Credible Fear Review*, OPINIONS/ANALYSIS ON IMMIGR. L. (July 22, 2018), <https://www.jeffreyschase.com/blog/2018/7/22/attorneys-and-credible-fear-review> [https://perma.cc/4APD-LL87].

206. See Anneliese Hermann, *Asylum in the Trump Era*, CTR. FOR AM. PROGRESS (June 13, 2018, 9:02 AM), <https://www.americanprogress.org/issues/immigration/reports/2018/06/13/452025/asylum-trump-era/> [https://perma.cc/B8FN-T7B4].

207. See Brief of Refugee & Human Rights Organizations & Scholars, *supra* note 16, at 17–18.

208. Weissert & Schmall, *supra* note 57.

209. Tal Kopan, *Justice Department Rolls Out Case Quotas for Immigration Judges*, CNN (Apr. 2, 2018, 8:55 PM), <https://www.cnn.com/2018/04/02/politics/immigration-judges-quota/index.html> [https://perma.cc/DP2L-TWHM] (“Creating an environment where the courts care more about the speed than the accuracy, and where judges are evaluated and even rewarded based on quantity rather than quality is unacceptable and a violation of due process . . . .” (quoting Laura Lynch)).

210. See Weissert & Schmall, *supra* note 57.

211. See, e.g., *Grace v. Whitaker*, 344 F. Supp. 3d 96 (D.D.C. 2018); Ted Hesson, *Judge Strikes Down Trump Policy Blocking Domestic Violence Victims from Asylum*, POLITICO (Dec. 19, 2018, 12:30 PM), <https://www.politico.com/story/2018/12/19/trump-policy-domestic-violence-victims-asylum-1069107> [https://perma.cc/F4HB-TQ5R].

ficers' and IJs' actions. Enforced adherence to these procedural protections would mitigate the need for federal judicial review. But further changes to expedited removal are necessary even with this judicial oversight because noncitizens need to be able to adequately contest the government's findings against them.

Another constraint on asylum seekers' ability to rebut the government's findings is their "limited means to find or present evidence to challenge the Government's case."<sup>212</sup> Notice and a meaningful opportunity to gather necessary evidence are, at a minimum, composed of two elements—time (ideally outside of detention) and legal counsel.<sup>213</sup> Although expedited removal proceedings are meant to be expeditious, it is often impracticable for noncitizens to gather the evidence necessary to satisfy the asylum officer and IJ in such a short time frame. Additionally, detention makes it more difficult, if not impossible, for noncitizens to collect necessary evidence or prepare to testify themselves.<sup>214</sup> There is a growing body of research showing that detention conditions are atrocious and may lead to retraumatization and severe mental health problems for detained asylum seekers.<sup>215</sup> Traumatized asylum seekers may not be able to accurately convey their stories to asylum officers or IJs.<sup>216</sup> Congress should therefore amend the IIRIRA to remove the mandatory detention provision (8 U.S.C. § 1225(b)(1)(B)(iii)(IV)) and allow for more time between the initial credible fear interview and IJ review if requested. As in *Boumediene*, the asylum seeker's "ability to rebut the Government's evidence against him is limited by the circumstances of his confinement and his lack of counsel."<sup>217</sup>

The Court in *Boumediene* emphasized that legal counsel is critical to an adequate substitute for habeas review.<sup>218</sup> For asylum seekers to truly understand what they need to prove their claim and how to prove it, Congress must amend the IIRIRA to provide access to legal counsel to noncitizens in expedited removal. It is a fundamental principle in American law that a

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212. See *Boumediene v. Bush*, 553 U.S. 723, 783 (2008).

213. See *id.* at 767 ("[H]is ability to rebut the Government's evidence against him is limited by the circumstances of his confinement and his lack of counsel . . .").

214. ELEANOR ACER & JESSICA CHICCO, HUMAN RIGHTS FIRST, U.S. DETENTION OF ASYLUM SEEKERS: SEEKING PROTECTION, FINDING PRISON 7 (2009), <https://www.humanrightsfirst.org/wp-content/uploads/pdf/090429-RP-hrf-asylum-detention-report.pdf> [<https://perma.cc/66XZ-ZG5Z>].

215. See ELIZABETH CASSIDY & TIFFANY LYNCH, U.S. COMM'N ON INT'L RELIGIOUS FREEDOM, BARRIERS TO PROTECTION: THE TREATMENT OF ASYLUM SEEKERS IN EXPEDITED REMOVAL 38–39 (2016) [hereinafter BARRIERS TO PROTECTION], <https://www.uscirf.gov/sites/default/files/Barriers%20To%20Protection.pdf> [<https://perma.cc/4UVM-MKSX>] (noting that in FY 2013, 193,032 noncitizens were expeditiously removed).

216. See PRIMER ON EXPEDITED REMOVAL, *supra* note 15.

217. *Boumediene*, 553 U.S. at 767.

218. See *id.*

criminal hearing cannot be fair without access to legal counsel.<sup>219</sup> As the Supreme Court famously stated in *Powell v. Alabama*, “[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel.”<sup>220</sup> Although immigration cases are civil rather than criminal, the adversarial nature of the proceedings and the weighty consequences are the precise aspects of the criminal proceedings that prompted the Court to declare the importance of legal counsel.<sup>221</sup> In the case of expedited removal, noncitizens have the statutory right to be heard,<sup>222</sup> but that right is of little avail without legal representation. The impact of legal representation is undeniable. Statistics show that asylum seekers are five times more likely to succeed on their asylum claims if represented by a lawyer.<sup>223</sup> Some observers have gone so far as to conclude that legal representation is “almost a necessity for winning asylum.”<sup>224</sup>

Asylum law is notoriously complex,<sup>225</sup> and it is unreasonable to expect that pro se asylum seekers would understand what is required for them to prove their claims. Given the critical role of lawyers, the *Boumediene* Court held that legal representation is necessary to an adequate and effective substitute for habeas review.<sup>226</sup> Further, providing legal counsel would not only lead to more robust proceedings but also save time during those proceedings. A lawyer can listen to the asylum seeker’s testimony and then help them formulate their claim and obtain relevant corroborating evidence. This would allow for greater focus during both the initial credible fear interview and subsequent de novo IJ review, as the lawyer could clearly frame the asylum seeker’s claim for the adjudicator.<sup>227</sup> The adjudicator bears the burden

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219. Cf. *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) (“[I]n our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime.”).

220. 287 U.S. 45, 68–69 (1932).

221. See *Padilla v. Kentucky*, 559 U.S. 356, 365–66 (2010) (noting that although immigration proceedings are civil, “deportation is nevertheless intimately related to the criminal process”); INGRID EAGLY & STEVEN SHAFER, AM. IMMIGRATION COUNCIL, ACCESS TO COUNSEL IN IMMIGRATION COURT 1 (2016), [https://www.americanimmigrationcouncil.org/sites/default/files/research/access\\_to\\_counsel\\_in\\_immigration\\_court.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/access_to_counsel_in_immigration_court.pdf) [<https://perma.cc/GTS3-XT5H>].

222. 8 U.S.C. § 1225(b)(1)(B)(iii)(III) (2012).

223. *Continued Rise in Asylum Denial Rates: Impact of Representation and Nationality*, TRAC IMMIGR. (Dec. 13, 2016), <https://trac.syr.edu/immigration/reports/448/> [<https://perma.cc/HQE2-69E2>].

224. *Id.*

225. See BARRIERS TO PROTECTION, *supra* note 215, at 53.

226. See *Boumediene v. Bush*, 553 U.S. 723, 783–87 (2008).

227. See BARRIERS TO PROTECTION, *supra* note 215, at 53 (“Lack of counsel not only disadvantages detainees but also burdens the system, since unrepresented cases are more difficult and time consuming for adjudicators to decide.”).

of developing the requisite factual record,<sup>228</sup> and a lawyer's presence could expedite the interview or hearing by directing the adjudicator toward the relevant facts and evidence.

In sum, if Congress chooses to continue restricting access to habeas review for noncitizens subject to expedited removal, it must enact an adequate and effective substitute. An adequate and effective substitute in this context must include habeas review of executive compliance with expedited removal procedures, provision of legal counsel, and reduced constraints on noncitizens' ability to obtain and present evidence.

### C. *Addressing the Costs Associated with an Adequate Substitute*

The costs that these procedures would impose on both the executive and the judiciary are not insignificant. In fact, these costs present the strongest argument against finding that noncitizens subject to expedited removal are entitled to habeas protections. Reviewing habeas petitions would strain judicial resources, and the suggested reforms to expedited removal would require an increase in expenditures by the executive. But the Court has found that such costs are not dispositive.<sup>229</sup> For example, the costs of the decision in *Boumediene* were not minimal. The decision was made during the height of the war on terror, and the government was faced with the weighty task of preventing acts of terrorism.<sup>230</sup> The Court recognized that “[h]abeas corpus proceedings may require expenditure of funds by the Government and may divert the attention of military personnel from other pressing tasks.”<sup>231</sup> In the context of expedited removal, there are serious concerns about resources and efficiency in processing noncitizens' claims. But these are analogous to the concerns that the Court specifically held were not determinative of the reach and scope of the Suspension Clause in *Boumediene*.<sup>232</sup> The costs associated with habeas review or reforming expedited removal to make it an adequate substitute are also far less than recent immigration policies like military deployment to the border.<sup>233</sup>

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228. 8 U.S.C. § 1225(b)(1)(B)(iii)(II) (2012); cf. *Agyeman v. INS*, 296 F.3d 871, 877 (9th Cir. 2002) (“Because aliens appearing pro se often lack the legal knowledge to navigate their way successfully through the morass of immigration law, and because their failure to do so successfully might result in their expulsion from this country, it is critical that the IJ ‘scrupulously and conscientiously probe into, inquire of, and explore for all the relevant facts.’” (quoting *Jacinto v. INS*, 208 F.3d 725, 733 (9th Cir. 2000))).

229. See *Boumediene*, 553 U.S. at 769.

230. See *id.* at 796.

231. *Id.* at 769.

232. See *id.* (“While we are sensitive to these concerns, we do not find them dispositive. Compliance with any judicial process requires some incremental expenditure of resources.”).

233. See Maya Rhodan, *The Number of Asylum Seekers Has Risen by 2,000% in 10 Years. Who Should Get to Stay?*, TIME (Nov. 14, 2018), <http://time.com/longform/asylum-seekers-border/> [https://perma.cc/U4JY-SMJY] (estimating that this military deployment cost the government between \$42 and \$110 million).

Further, there are ways to create a more robust expedited removal regime that will reduce the need for federal habeas review without putting an insurmountable burden on the executive.<sup>234</sup> Asylum officers could be given the authority to grant asylum at the credible fear stage in certain circumstances.<sup>235</sup> If the asylum officer determines that the claim is likely meritorious but needs more development, the claim could be referred to an asylum office rather than the immigration court.<sup>236</sup> Diverting those applicants who have been determined likely to be successful on the merits of their claims would reduce the burden placed on the immigration courts. Though this proposal would require hiring new asylum officers, it would still cost the government less than hiring new IJs. Asylum officers only need to be trained in asylum law, whereas IJs need to be trained in all areas of immigration law.

In addition, the government may reduce the burden imposed by these reforms by increasing use of the expedited removal provision allowing for discretionary grants of voluntary withdrawal of application for admission.<sup>237</sup> When asylum officers make negative credible fear determinations, they can present noncitizens with two options. One option is the appeals process—officers would explain the process as well as the consequences of failure on appeal. When a noncitizen fails on appeal and an order of removal is entered, there is a five-year bar on reentry and a permanent bar on applying for asylum.<sup>238</sup> Asylum officers may also use their discretion to present a second option: voluntary withdrawal of the noncitizen's admission application.<sup>239</sup> This option results in immediate deportation but no order for removal.<sup>240</sup> If the noncitizen voluntarily accepts the grant of voluntary withdrawal of application for admission, there is no need for further proceedings. This would deter those without legitimate asylum claims from filing frivolous habeas petitions.

If Congress were to enact these suggested reforms, expedited removal could be an adequate substitute for habeas review, and individual recourse to habeas could be retained as solely a backstop to ensure executive compliance with legislation. These reforms, although implemented at the individual level, serve the broader purpose of a check on executive action. As expedited

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234. See *Boumediene*, 553 U.S. at 776.

235. See BARRIERS TO PROTECTION, *supra* note 215, at 54 (“Asylum officers have the legal background and training to adjudicate asylum claims, and do so for affirmative asylum cases.”).

236. See, e.g., *Minor Children Applying for Asylum by Themselves*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/humanitarian/refugees-asylum/asylum/minor-children-applying-asylum-themselves> [<https://perma.cc/M2XQ-GUZG>] (noting that asylum officers regularly adjudicate asylum claims with affirmative asylum filings).

237. See 8 U.S.C. § 1225(a)(4) (2012).

238. BARRIERS TO PROTECTION, *supra* note 215, at 12.

239. See 8 U.S.C. § 1225(a)(4).

240. See Sarah E. Murphy, *Withdrawal of Application for Admission*, BORDER IMMIGR. LAW., <http://www.borderimmigrationlawyer.com/withdrawal-of-application-for/> [<https://perma.cc/KZ6Y-5M4Z>].

removal procedures become more rigorous, confidence in the accuracy of the factual determinations generated by low-level immigration officers would increase. If immigration officers are accurately identifying bona fide asylum seekers rather than sending them back to persecution, the urgency of judicial review diminishes.

#### CONCLUSION

By foreclosing habeas review of credible fear determinations, Congress has violated the Suspension Clause rights of asylum seekers who are within the borders of this country. In light of the historic purpose of the Suspension Clause and recent Supreme Court precedent on the habeas rights of noncitizens, the Court should recognize that asylum seekers physically in the United States are entitled to habeas rights. Since these asylum seekers are protected by the Suspension Clause, Congress may only strip the courts of habeas jurisdiction if it enacts an adequate substitute for habeas review—something that expedited removal currently is not. Accordingly, asylum seekers must be entitled to habeas review.

It is possible that expedited removal, if reformed, could serve as an adequate substitute, diminishing the need for habeas review. But first, Congress must add a provision to expedited removal allowing for habeas review of executive compliance with the credible fear procedures both in the initial credible fear interview and subsequent IJ review. In addition, with habeas review as a backstop, the statute must be amended to provide legal counsel and adequate time to gather evidence to noncitizens during the credible fear proceedings. The enactment of more rigorous proceedings would mitigate the serious separation-of-powers concerns currently arising from expedited removal. Such procedures would increase the executive's accuracy in identifying bona fide asylum seekers and accordingly diminish the need for judicial review. But without congressional reform of expedited removal, habeas review is a necessary and critical judicial check on the executive's erroneous interpretation and application of the law leading to the detention and deportation of bona fide asylum seekers.



