



Supreme Court Upholds Limited Review of Expedited Removal

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Certain non-U.S. nationals (aliens) who lack authorization to enter the United States are subject to a streamlined “[expedited removal](#)” process, which affords fewer procedural protections to the alien than standard removal proceedings and typically results in the quicker expulsion of the alien from the United States. [Federal statute](#) also [precludes judicial review](#) of an expedited removal order except in limited circumstances, including habeas corpus proceedings concerning whether the alien is lawfully detained. But habeas review is limited to three narrow grounds, and does not include review of threshold determinations about asylum eligibility or any other aspect of the merits of the underlying expedited removal proceedings. In *DHS v. Thuraissigiam*, the Supreme Court considered whether these statutory limitations violate the [Suspension Clause](#), which normally forbids the government from restricting an individual’s ability to contest his or her detention in a habeas action. The Court held that the statute’s restrictions on the ability of an alien in expedited removal to challenge matters other than the lawfulness of his detention did not violate the Suspension Clause. The Court also held that the statute’s limitations on judicial review did not violate the Fifth Amendment’s Due Process Clause because aliens seeking initial entry to the United States—which comprise most aliens in expedited removal—have limited due process protections.

Constitutional Rights of Aliens: Due Process and the Suspension Clause

The Supreme Court has [long recognized](#) that Congress has plenary power over immigration that applies with most force to the admission and exclusion of aliens seeking to enter the United States. Thus, the Court has held that aliens seeking initial entry, including those detained within the United States pending determinations as to their admissibility, have [no constitutional rights](#) regarding their applications for admission, and are entitled only to whatever procedures Congress provided by statute. Conversely, aliens who have [physically entered](#) the United States, including those who entered [unlawfully](#), are “persons” entitled to protections under the Fifth Amendment’s Due Process Clause, which generally requires the government to provide a hearing and a [meaningful opportunity to be heard](#) before deprivation of a liberty interest. In various opinions, though, the Court has suggested that the scope of due process [may turn upon whether the alien has been admitted into the United States or developed substantial ties](#) to this country.

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While the scope of due process protections may turn on whether an alien has entered the United States or developed ties to the country, aliens placed in immigration custody may seek review of the legality of their detention in federal court in habeas corpus proceedings. The [Suspension Clause](#) provides that “[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.” In *INS v. St. Cyr*, the Supreme Court construed a federal statute limiting judicial review of final orders of removal [as preserving habeas review](#) for aliens detained in the United States, concluding that to interpret the statute otherwise “would raise serious constitutional questions” under the Suspension Clause. The privilege of habeas may also extend to noncitizens held outside the United States in some instances. In *Boumediene v. Bush*, the Court held that the privilege extended to enemy belligerents held at a detention facility in Guantanamo Bay, Cuba, because the United States had “complete and total control” over the territory in which they were detained.

Expedited Removal Framework

Under the expedited removal framework set forth in [Section 235\(b\)\(1\)](#) of the Immigration and Nationality Act (INA), certain aliens who have arrived at a U.S. port of entry, or who are apprehended after recently entering the country without inspection, will be removed from the United States *without a hearing or further review* if they lack valid entry documents or tried to procure admission by fraud or misrepresentation. [Further administrative review](#) is to occur if the alien indicates an intent to seek asylum or otherwise claims a fear of persecution if removed. Aliens showing a [credible fear of persecution or torture must be placed in](#) standard removal proceedings where asylum and [related protections](#) may be pursued. Generally, an alien initially placed in expedited removal [must be detained](#) during subsequent proceedings.

The INA generally [bars judicial review](#) of an expedited removal order, including an asylum officer’s credible fear determination. But under INA § 242(e)(2), an alien may challenge an expedited removal order in habeas corpus proceedings concerning the legality of the alien’s detention. The habeas court’s jurisdiction is limited to reviewing whether (1) the petitioner in the habeas action is an alien; (2) the petitioner was “ordered removed” under INA § 235(b)(1)’s expedited removal provisions; and (3) the petitioner can prove that he or she is a [lawful permanent resident \(LPR\), refugee, or asylee](#). A separate provision, INA § 242(e)(5), limits the scope of inquiry with regard to whether an alien was “ordered removed” under § 235(b)(1) “to whether such an order in fact was issued and whether it relates to the petitioner.” Consequently, “[t]here shall be no review of whether the alien is actually inadmissible or entitled to any relief from removal.” Thus, although habeas review is available to detained aliens placed in expedited removal, the governing statute limits the court’s review to three issues, and precludes any review of the merits of the underlying proceedings that led to the expedited removal order.

Procedural Background in *Thuraissigiam*

Thuraissigiam, a Sri Lankan national, was [placed into expedited removal](#) shortly after entering the United States without inspection. Following an asylum officer’s [negative credible fear finding](#), he was ordered removed. Thuraissigiam [filed a habeas petition](#) arguing that the asylum officer failed to follow proper standards and procedures during the credible fear screening. He requested another opportunity to pursue asylum. A federal district court dismissed the petition, [ruling](#) that Thuraissigiam’s claims did not fall within any of INA § 242(e)(2)’s specified grounds. The U.S. Court of Appeals for the Ninth Circuit [agreed](#) that § 242(e)(2) barred judicial review. But [observing](#) that habeas relief has always been available to aliens, [including](#) those stopped at the border, the court determined that Thuraissigiam [could invoke](#) the Suspension Clause to challenge the statute’s limits on the scope of habeas review. The court held that § 242(e)(2) [violated the Suspension Clause](#) by denying Thuraissigiam the opportunity to contest the validity of his expedited removal proceedings, including his credible fear screening. The court also [determined](#)

that due process protections attached to Thuraissigiam because he was apprehended within the United States.

The Supreme Court's Decision

The Supreme Court **reversed**, holding that INA § 242(e)(2)'s constraints on judicial review of expedited removal in habeas proceedings do not violate the Suspension Clause. Writing for the majority of the Court, Justice Alito (joined by Chief Justice Roberts and Justices Gorsuch, Kavanaugh, and Thomas) **determined** that Thuraissigiam could not invoke the Suspension Clause to challenge § 242(e)(2) because the relief he requested fell outside the scope of habeas corpus. The Court **reasoned** that, at the time of the Constitution, habeas corpus was understood as “a means of contesting the lawfulness of restraint and securing release.” And the Court **observed** that opinions in habeas cases issued around that time “are about release from restraint.” But here, Thuraissigiam **did not seek release** from custody or dispute that his detention during expedited removal was lawful. Instead, he requested further review of his asylum claim—and whether he should remain in the United States—which “**falls outside the scope of the common-law habeas writ**” that the Suspension Clause sought to protect.

Additionally, in support of his Suspension Clause argument, Thuraissigiam **cited** later, “finality era” cases from the 19th and 20th centuries, in which the Supreme Court reviewed habeas claims challenging whether federal officers complied with immigration laws. But the *Thuraissigiam* Court **observed** that it had “exercised habeas jurisdiction in the finality era cases because the [then-existing] habeas statute conferred that authority, not because it was required by the Suspension Clause.”

The Court also briefly **considered** the applicability of its decisions in *Boumediene* and *St. Cyr.* to Thuraissigiam's habeas claims. *Boumediene*, the Court contended, was inapposite here. While the Court there said that habeas provided a means by which suspected enemy belligerents held at Guantanamo Bay could challenge the legality of their detention, the detainees there sought *release* from custody, and that decision never indicated that habeas corpus could be used to gain entry into the United States. The Court also **characterized** *St. Cyr.* as simply reaffirming that aliens could secure their release from custody through habeas, not that habeas could be used for other purposes unrelated to custody.

The Court also **rejected** as “contrary to more than a century of precedent” the Ninth Circuit's conclusion that INA § 242(e)(2)'s restrictions on judicial review implicated Thuraissigiam's right to due process. The Court **observed** that aliens seeking initial entry to the United States have limited due process protections, and may only avail themselves of the procedures Congress provided by statute. The Court determined that, although Thuraissigiam was 25 yards within the United States when apprehended, he could still be “treated for due process purposes as if stopped at the border.” To conclude otherwise, the Court **warned**, would “undermine the sovereign prerogative of governing admission to this country and create a perverse incentive to enter at an unlawful rather than a lawful location.”

While joining the majority opinion, Justice Thomas wrote a **separate concurrence** where he **interpreted** the Suspension Clause as limiting “the power to detain without bail or trial based on mere suspicion of a crime or dangerousness,” and concluded that it therefore likely did not apply in the expedited removal context. Justice Breyer, joined by Justice Ginsburg, issued an opinion **concurring in the Court's judgment**, as to the particular facts of Thuraissigiam's case. But he suggested that the Suspension Clause might protect an alien's ability, through habeas, to challenge removal decisions in other circumstances, such as if an alien subject to removal has lived in the United States for many years.

In a **dissenting opinion**, Justice Sotomayor (joined by Justice Kagan) argued that Thuraissigiam's claims “fall within the heartland of habeas jurisdiction” because courts have **long permitted** habeas **review of** “a range of legal and constitutional questions arising in immigration decisions” beyond detention itself, including whether an individual may remain in the United States. Thus, in Justice Sotomayor's **view**, other forms of relief apart from release from custody fall within the scope of a request for habeas corpus.

For that reason, Justice Sotomayor [argued](#), Thuraissigiam could invoke the Suspension Clause to obtain habeas review of his legal challenge to his expedited removal order, including the credible fear determination. Further, Justice Sotomayor [argued](#), because Thuraissigiam was “within the territorial limits of the United States” he could challenge his expedited removal on due process grounds.

Implications of the Court’s Decision

The Supreme Court’s decision reinforces that aliens in expedited removal have very limited avenues to challenge removal decisions, including credible fear determinations. While aliens detained at the border may pursue habeas claims, the Court has construed those protections as being limited to challenges to the legality of their detention, not claims related to their ability to seek relief from removal. Furthermore, the Court’s decision underscores that aliens seeking initial entry into the United States have limited due process protections regarding their applications for admission. The Court’s decision signals that limited due process protections may attach in removal proceedings involving aliens who have physically entered the United States, but have not “established connections” with the country (i.e., those apprehended near the border soon after their unlawful entry), and are still considered to be “on the threshold” of entry.

But the Court’s decision calls into question whether these limitations would apply to aliens apprehended farther into the interior of the United States. Until recently, immigration authorities have [applied expedited removal](#) only for aliens apprehended at or near the border. The Department of Homeland Security has [expanded](#) expedited removal to the full degree authorized by INA § 235(b)(1), to cover certain unlawfully present aliens in any part of the United States who have been in the country less than two years. In his concurrence, Justice Breyer [suggested](#) that a “person apprehended years after she crossed our borders clandestinely and started a life in this country” may be entitled to a broader range of habeas review under the Suspension Clause. The majority opinion also [recognized](#) that aliens who have “[established connections](#)” in the United States have more robust due process protections. In *Thuraissigiam*, the Court did not assess the nature of those connections, beyond [determining](#) that an alien apprehended 25 yards from the border could be “treated for due process purposes as if stopped at the border.” But the Court’s decision may inform how lower courts consider [ongoing constitutional challenges](#) to the expansion of expedited removal into the interior of the United States.

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