US Supreme Court

Case: *DHS v. Thuraissigiam*, 140 S. Ct. 1959 (2020)
Date: June 25, 2020 **Votes:** 7-2 for DHS

Opinion: Alito **Concurrences:** Thomas; Breyer (with Ginsburg)
Dissents: Sotomayor (with Kagan)

Tags: Immigration, asylum, expedited removal, credible fear determinations, judicial review, habeas petitions, Suspension Clause, Due Process Clause, 5th Amendment.

Question(s) Presented:

- Is the expedited removal sans judicial review system an unconstitutional suspension of the writ of habeas corpus and a violation of a noncitizen's due process rights?

Procedural History:

- **NTA/CFI/Reviewed by supervisor/Reviewed by IJ:** denied, ordered removed
- **Federal Habeas Petition:** for lack of procedural due process in his CFI, demanding new opportunity to apply for asylum—but not release from custody. 1968
- **District Court:** dismissed petition: no review of negative credible fear determination
- **Ninth Circuit:** Found that expedited removal sans judicial review unconditionally suspends writ of habeas corpus and violates asylum seekers' right to due process.
    - "The Ninth Circuit's decision invalidated the application of an important provision of federal law and conflicted with a decision from another Circuit." 1968

Holdings: Reversed.

- Expedited removal sans judicial review does not violate the Suspension Clause or the Due Process Clause, so it does not require any further judicial review. 1964
- "In short, under our precedents, neither the Suspension Clause nor the Due Process Clause of the Fifth Amendment requires any further review of respondent's claims, and IIRIRA's limitations on habeas review are constitutional as applied." 1964

Rationale:

- "Habeas has traditionally been a means to secure release from unlawful detention, but respondent invokes the writ to achieve an entirely different end, namely, to obtain additional administrative review of his asylum claim and ultimately to obtain authorization to stay in this country." 1963

- "While aliens who have [1964] established connections in this country have due process rights in deportation proceedings, the Court long ago held that Congress is entitled to set the conditions for an alien's lawful entry into this country and that, as a result, an alien at the threshold of initial entry cannot claim any greater rights under the Due Process Clause." 1963-64

- "Respondent attempted to enter the country illegally and was apprehended just 25 yards from the border. He therefore has no entitlement to procedural rights other than those afforded by statute." 1964
- "**Like an alien detained after arriving at a port of entry, an alien like respondent is "on the threshold."** 1983
- "The rule advocated by respondent and adopted by the Ninth Circuit 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." 1983

Facts: (1967-68) Citizen of Sri Lanka crossed southern border EWI in 2017 and was stopped by CBP within 25 yards of the border. Detained for expedited removal. Claimed fear of returning because of assault in his home country, though he could not identify his assailants or connect the attack to a protected ground. Asylum officer, supervising officer, and IJ did not find that he had a credible fear of persecution based on a protected ground.

Respondent's Arguments:

- "Because he succeeded in making it 25 yards into U. S. territory before he was caught, he claims the right to be treated more favorably. The Ninth Circuit agreed with this argument." 1982

Appeals to Statute & Precedent:

- **8 U.S.C. § 1182 / INA §212:** Inadmissible aliens
- **8 U.S.C. §1252(e)(2) / INA §242:** limits the habeas review obtainable by an alien detained for expedited removal
  - "no court shall have jurisdiction to review" any other "individual determination" or "claim arising from or relating to the implementation or operation of an order of [expedited] removal."
  - In particular, courts may not review "the determination" that an alien lacks a credible fear of persecution.
- **8 U.S.C. §1225(b)(1)(A)(i), (iii)(I)-(II) / INA §235:** Inspection by immigration officers; expedited removal of inadmissible arriving aliens; referral for hearing.
- **Suspension Clause:** "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."
- ***Nishimura Ekiu v. U.S.*, 142 U.S. 651 (1892):** A non-admitted alien cannot claim procedural rights under the Due Process Clause. (1891 Immigration Act & finality of decision of inspection officer)
- ***Castro v. U.S.DHS*, 835 F.3d 422, 445-46 (CA3 2016):** Circuit split with 9th on procedural due process rights of EWI FNs ("applicants for admission lack due process rights regarding their applications").
- ***INS v. St. Cyr*, 533 U.S. 289 (2001):** Suspension Clause protects the writ of habeas corpus as it existed in 1789.
- ***Munaf v. Geren*, 553 U.S. 674 (2008):** "American citizens held in U. S. custody in Iraq filed habeas petitions in an effort to block their transfer to Iraqi authorities for criminal prosecution." 1971
- ***Boumediene v. Bush*, 553 U.S. 723 (2008):** "held that suspected foreign terrorists could challenge their detention at the naval base in Guantanamo Bay, Cuba. . . . They sought only to be released from Guantanamo, not to enter this country." 1981
- ***Knauff* at 544 (195_)** ("Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned")

- ***Mezei* (195_):** Congress gets to decide due process regarding a FN's entry.
- ***Landon v. Plasencia*, 459 U.S. 21, 32, 103 S.Ct. 321, 74 L.Ed.2d 21 (1982):** "This Court has long 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."

Discussion:

- Adding the step of judicial review to credible fear interviews would tax an already overburdened immigration system. 1966
  - "If courts must review credible-fear claims that in the eyes of immigration officials and an immigration judge do not meet the low bar for such claims, expedited removal would augment the burdens on that system. Once a fear is asserted, the process would no longer be expedited." 1967
- Suspension Clause protects write of habeas corpus as it existed in 1789:
  - "This principle dooms respondent's Suspension Clause argument, because neither respondent nor his amici have shown that the writ of habeas corpus was understood at the time of the adoption of the Constitution to permit a petitioner to claim the right to enter or remain in a country or to obtain administrative review potentially leading to that result. The writ simply provided a means of contesting the lawfulness of restraint and securing release." 1969
  - **IOW: writ of habeas corpus is not applicable here.** It's about whether someone is lawfully detained or not.
  - Petitioner is asking for review of his case and another chance to present evidence, not "traditional habeas relief." 1970
  - "Claims so far outside the "core" of habeas may not be pursued through habeas." 1971
  - "In this case as in Munaf, the relief requested falls outside the scope of the writ as it was understood when the Constitution was adopted." 1971
  - "Because respondent seeks to use habeas to obtain something far different from simple release, his cause is not aided by the many release cases that he and his amici have found." 1971
    - [Lots of cases from founding era on: Alito deals with them all.]
    - "in all the cited cases concerning aliens detained at entry, unlike the case now before us, what was sought—and the only relief considered—was release." 1980
- "While respondent does not claim an entitlement to release, the Government is happy to release him—provided the release occurs in the cabin of a plane bound for Sri Lanka." 1970
- Re. *Nishimura Ekiu* (US 1892):
  - "The Court's narrow interpretation of the 1891 Act's finality provision meant that the federal courts otherwise retained the full authority granted by the Habeas Corpus Act of 1867 to determine whether an alien was detained in violation of federal law. Turning to that question, the Court held that the only procedural rights of an alien seeking to enter the country are those conferred by statute." 1977
  - "What is critical for present purposes is that the Court did not hold that the Suspension Clause imposed any limitations on the authority of Congress to restrict the issuance of writs of habeas corpus in immigration matters." 1977
- Re. Due Process at Entry:

- "This rule would be meaningless if it became inoperative as soon as an arriving alien set foot on U. S. soil. When an alien arrives at a port of entry—for example, an international airport—the alien is on U. S. soil, but the alien is not considered to have entered the country for the purposes of this rule. On the contrary, aliens who arrive at ports of entry—even those paroled elsewhere in the country for years pending removal—are "treated" for due process purposes "as if stopped at the border." 1982 (quoting *Mezei* at 215).

Concurrence #1—Thomas 1983-88

- Addresses original meaning of Suspension Clause: statute granting executive "the power to detain w/o bail or trial based on mere suspicion of a crime or dangerousness." 1983 (so expedited removal procedure is likely not a suspension, bcz based on lack of documentation & physical presence.)
- [Long history of habeas corpus]

Concurrence #2—Breyer (with Ginsburg) 1988-93

- Agrees with application to this particular case, but wants to keep it narrow. (Not impressed with evidence in this case.)
- Maybe there would be constitutional issues down the road in other immigration cases regarding expedited removal.
- Leave Due Process out altogether from this decision, because it isn't directly at issue here.
- Re. Respondent's complaints about how CFI was conducted:
  - "Though both claims may reasonably be understood as procedural, they may constitutionally be treated as unreviewable—at least under the border-entry circumstances present in this case." 1992

Dissent—Sotomayor (with Kagan) 1993-2015

- Historical survey of habeas cases yields different results than majority!
- "Making matters worse, the Court holds that the Constitution's due process protections do not extend to noncitizens like respondent, who challenge the procedures used to determine whether they may seek shelter in this country or whether they may be cast to an unknown fate. The decision deprives them of any means to ensure the integrity of an expedited removal order, an order which, the Court has just held, is not subject to any meaningful judicial oversight as to its substance." 1993
- "Today's decision handcuffs the Judiciary's ability to perform its constitutional duty to safeguard individual liberty and dismantles a critical component of the separation of powers." 1994
- "Second, respondent contended that the inadequate procedures afforded to him in his removal proceedings violated constitutional due process. Among other things, he asserted that the removal proceedings by design did not provide him a meaningful opportunity to establish his claims, that the translator and asylum officer misunderstood him, and that he was not given a "reasoned explanation" for the decision." 1995
- "conclusions about the merits of respondent's procedural challenges should not foreclose his ability to bring them in the first place." 1996
- "By [the Court's] account, none of our governing cases, recent or centuries old, recognize that the Suspension Clause guards a habeas right to the type of release that respondent allegedly seeks." 1997

- "*St. Cyr* and *Boumediene* confirm that at minimum, the historic scope of the habeas power guaranteed judicial review of constitutional and legal challenges to executive action. They do not require release as an exclusive remedy, let alone a particular direction of release." 2010
- "By determining that respondent, a recent unlawful entrant who was apprehended close in time and place to his unauthorized border crossing, has no **procedural due process rights** to vindicate through his habeas challenge, the Court unnecessarily addresses a constitutional question in a manner contrary to the text of the Constitution and to our precedents." 2011
- "Noncitizens in this country, however, undeniably have due process rights." 2012 **(Quotes *Yick Wo*, in context)**
    - Also ***Zadvydas v. Davis*** at 693: "once an alien enters the country," he is entitled to due process in his removal proceedings because "the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent."
- "In its early cases, the Court speculated whether a noncitizen could invoke due process protections when he entered the country without permission or had resided here for too brief a period to "have become, in any real sense, a part of our population." ***The Japanese Immigrant Case*, 189 U.S. 86, 100, 23 S.Ct. 611, 47 L.Ed. 721 (1903)**. . . . But the Court has since determined that presence in the country is the touchstone for at least some level of due process protections." 2012
- ***Mathews v. Diaz*, 426 U.S. 67, 77 (1976)** ("There are literally millions of aliens within the jurisdiction of the United States. The Fifth Amendment ... protects every one of these persons .... Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection").
- "More broadly, by drawing the line for due process at legal admission rather than physical entry, the Court tethers constitutional protections to a noncitizen's legal status as determined under contemporary asylum and immigration law. But the Fifth Amendment, which of course long predated any admissions program, does not contain limits based on immigration status or duration in the country: **It applies to "persons" without qualification. Yick Wo, 118 U.S. at 369, 6 S.Ct. 1064**." 2012
- "Fundamentally, it is out of step with how this Court has conceived the scope of the Due Process Clause for over a century: Congressional policy in the immigration context does not dictate the scope of the Constitution." 2013
- "Taken to its extreme, a rule conditioning due process rights on lawful entry would permit Congress to constitutionally eliminate all procedural protections for any noncitizen the Government deems unlawfully admitted and summarily deport them no matter how many decades they have lived here, how settled and integrated they are in their communities, or how many members of their family are U. S. citizens or residents." 2013
- "Both the Constitution and this Court's cases plainly guarantee due process protections to all "persons" regardless of their immigration status, a guarantee independent of the whims of the political branches." 2013
- "In the face of these policy choices, the role of the Judiciary is minimal, yet crucial: to ensure that laws passed by Congress are consistent with the limits of the Constitution. The Court today ignores its obligation, going out of its way to restrict the scope of the Great Writ and the reach of the Due Process Clause." 2015

Commentary:

Expedited Removal

- "An applicant is [1965] subject to expedited removal if, as relevant here, the applicant (1) is inadmissible because he or she lacks a valid entry document; (2) has not "been physically present in the United States continuously for the 2-year period immediately prior to the date of the determination of inadmissibility"; and (3) is among those whom the Secretary of Homeland Security has designated for expedited removal." 1964-65
    - "Once "an immigration officer determines" that a designated applicant "is inadmissible," "the officer [must] order the alien removed from the United States without further hearing or review." 1965
    - Credible fear screening
        - Finding of credible fear → full hearing
        - Adverse credible fear finding → expedited removal

Statutory Provision for Judicial Review

- Only available to review
    - Whether petitioner is a noncitizen
    - Whether petitioner was ordered removed
    - Whether petitioner has already been granted entry as a LPR, refugee, or asylee

Relevant U.S. History:

- **1996 IIRIRA:** Expedited removal
- "As of the first quarter of this fiscal year, there were 1,066,563 pending removal proceedings." 1964

History of Habeas Relief & Suspension Clause

- "In this country, the habeas authority of federal courts has been addressed by statute from the very beginning. The Judiciary Act of 1789, § 14, 1 Stat. 82, gave the federal courts the power to issue writs of habeas corpus under specified circumstances, but after the Civil War, Congress enacted a much broader statute. That law, the Habeas Corpus Act of 1867, provided that "the several courts of the United States ... shall have power to grant writs of habeas corpus in all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States." Judiciary Act of Feb. 5, 1867, § 1, 14 Stat. 385. The Act was "of the most comprehensive character," bringing "within the habeas corpus jurisdiction of every court and of every judge every possible case of privation of liberty contrary" to federal law. Ex parte McCardle, 6 Wall. 318, 325–326, 18 L.Ed. 816 (1868). This jurisdiction was "impossible to widen." Id., at 326; see Fay v. Noia, 372 U.S. 391, 415, 83 S.Ct. 822, 9 L.Ed.2d 837 (1963) (noting the Act's "expansive language" and "imperative tone"). The 1867 statute, unlike the current federal habeas statute, was not subject to restrictions on the issuance of writs in immigration matters, and in United States v. Jung Ah Lung, 124 U.S. 621, 8 S.Ct. 663, 31 L.Ed. 591 (1888), the Court held that an alien in immigration custody could seek a writ under that statute. Id., at 626, 8 S.Ct. 663. This provided the statutory basis for the writs sought in the finality era cases." 1976