AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 12: The Contemporary Era – Criminal Justice/Due Process and Habeas Corpus/Habeas Corpus

**Department of Homeland Security v. Thuraissigiam, 140 S. Ct. 1959** (2020)

*Vijayakumar Thuraissigiam was apprehended by a border patrol agent almost immediately after he entered the United States from Mexico without proper papers. Thuraissigiam requested asylum on the ground he feared persecution should he return to his native Sri Lanka. This plea fell on deaf ears. Asylum officials determined Thuraissigiam was subject to expedited removal because he lacked a credible fear of persecution. Thuraissigiam filed a federal habeas corpus claiming that he did not have a fair opportunity to present his claim that he had a credible fear of persecution and that immigration officials had not correctly applied immigration law in his case. The local district court dismissed his lawsuit on the ground aliens subject to expedited removal under federal law is entitled to federal habeas corpus only they assert they are not an alien, that no removal order exists or that they have already been granted asylum. That decision was reversed by the Court of Appeals for the Ninth Circuit on the ground that the federal law limited habeas corpus cases in expedited removal cases violated the Suspension Clause of the Constitution. The Department of Homeland Security appealed to the Supreme Court of the United States.*

*The Supreme Court overturned the Ninth Circuit. Justice Samuel Alito’s majority opinion held that federal law did not suspend habeas corpus because the writ of habeas corpus did not entitle anyone to enter the United States. Alito insists the crucial issue concerns the scope of habeas corpus in 1789. Who does he determine the scope of habeas at that time? Does Justice Sotomayor’s dissenting opinion challenge Alito’s understanding of habeas law in 1789 or does she assert that 1789 is not dispositive? Who has the better of the argument? Justice Clarence insists that habeas is limited to discretionary executive detentions. What reasons does he give for that conclusion and is that conclusion correct? Justice Breyer insists the case could have been decided on more narrow grounds. Is that argument convincing? What rights should persons entering the United States have to a hearing on whether they merit asylum?*

Justice [ALITO](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0153052401&originatingDoc=I0f78b09cb6f211eab1faf5a0aee61ce8&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I0f78b09cb6f211eab1faf5a0aee61ce8) delivered the opinion of the Court.

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Respondent's Suspension Clause argument fails because it would extend the writ of habeas corpus far beyond its scope “when the Constitution was drafted and ratified.” *Boumediene v. Bush* (2008). . . . 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.

Respondent's due process argument fares no better. While aliens who have 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. 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.

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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* (2001), we wrote that the Clause, at a minimum, “protects the writ as it existed in 1789,” when the Constitution was adopted. And in this case, respondent agrees that “there is no reason” to consider whether the Clause extends any further. . . .

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.

In 1768, Blackstone's Commentaries—usually a “satisfactory exposition of the common law of England” made this clear. Blackstone wrote that habeas was a means to “remov[e] the injury of unjust and illegal confinement.” Justice Story described the “common law” writ the same way. Habeas, he explained, “is the appropriate remedy to ascertain ... whether any person is rightfully in confinement or not.” We have often made the same point.

In this case, however, respondent did not ask to be released. Instead, he sought entirely different relief: vacatur of his “removal order” and “an order directing [the Department] to provide him with a new ... opportunity to apply for asylum and other relief from removal.” Such relief might fit an injunction or writ of mandamus—which tellingly, his petition also requested, but that relief falls outside the scope of the common-law habeas writ.

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*Somerset* v.*Stewart* (K. B. 1772), is celebrated but does not aid respondent. James Somerset was a slave who was “detain[ed]” on a ship bound for Jamaica, and Lord Mansfield famously ordered his release on the ground that his detention as a slave was unlawful in England.  This relief, release from custody, fell within the historic core of habeas, and Lord Mansfield did not order anything else.

It may well be that a collateral consequence of Somerset's release was that he was allowed to remain in England, but if that is so, it was due not to the writ issued by Lord Mansfield, but to English law regarding entitlement to reside in the country. . . . For a similar reason, respondent cannot find support in early 19th-century American cases in which deserting foreign sailors used habeas to obtain their release from the custody of American officials. In none of the cases involving deserters that have been called to our attention did the court order anything more than simple release from custody. . . . In these cases, as in *Somerset*, it may be that the released petitioners were able to remain in the United States as a collateral consequence of release, but if so, that was due not to the writs ordering their release, but to U. S. immigration law or the lack thereof. . . .

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[Turn of the twentieth century] decisions were based not on the Suspension Clause but on the habeas statute and the immigration laws then in force. The habeas statute in effect during this time was broad in scope. It authorized the federal courts to review whether a person was being held in custody in violation of any federal law, including immigration laws. Thus, when aliens claimed that they were detained in violation of immigration statutes, the federal courts considered whether immigration authorities had complied with those laws. This, of course, required that the immigration laws be interpreted, and at the start of the finality era, this Court interpreted the 1891 Act's finality provision to block review of only questions of fact. Accordingly, when writs of habeas corpus were sought by aliens who were detained on the ground that they were not entitled to enter this country, the Court considered whether, given the facts found by the immigration authorities, the detention was consistent with applicable federal law. But the Court exercised that review because it was authorized to do so by statute. The decisions did not hold that this review was required by the Suspension Clause.

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*Nishimura Ekiu v. United States* (1892) is the cornerstone of respondent's argument regarding the finality era cases. . . . [T]he Court held that the only procedural rights of an alien seeking to enter the country are those conferred by statute. . . . 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.

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Like the dissent, respondent makes much of certain statements in *Heikkila v. Barber* (1953). . . . [*Heikkila*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1953117909&pubNum=0000780&originatingDoc=I0f78b09cb6f211eab1faf5a0aee61ce8&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) was not a habeas case, and the question before the Court was whether a deportation order was reviewable under the Administrative Procedure Act (APA). The Court held that the order was not subject to APA review because the Immigration Act of 1917 foreclosed “judicial review”—as opposed to review in habeas Nothing in [*Heikkila*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1953117909&pubNum=0000780&originatingDoc=I0f78b09cb6f211eab1faf5a0aee61ce8&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) suggested that the 1891 Act had been found to be partly unconstitutional, and [*Heikkila*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1953117909&pubNum=0000780&originatingDoc=I0f78b09cb6f211eab1faf5a0aee61ce8&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) certainly did not address the scope of the writ of habeas corpus in 1789.

In sum, the Court exercised habeas jurisdiction in the finality era cases because the habeas statute conferred that authority, not because it was required by the Suspension Clause. As a result, these cases cannot support respondent's argument that the writ of habeas corpus as it was understood when the Constitution was adopted would have allowed him to claim the right to administrative and judicial review while still in custody.

. . . . [*Boumediene*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2016293010&pubNum=0000780&originatingDoc=I0f78b09cb6f211eab1faf5a0aee61ce8&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), is not about immigration at all. It held that suspected foreign terrorists could challenge their detention at the naval base in Guantanamo Bay, Cuba. They had been “apprehended on the battlefield in Afghanistan” and elsewhere, not while crossing the border. They sought only to be released from Guantanamo, not to enter this country. And nothing in the Court's discussion of the Suspension Clause suggested that they could have used habeas as a means of gaining entry. . . .

Respondent's other recent case is [*St. Cyr*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2001536099&pubNum=0000780&originatingDoc=I0f78b09cb6f211eab1faf5a0aee61ce8&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)). . . . [T]he Court observed: “Because of [the Suspension] Clause, some ‘judicial intervention in deportation cases’ is unquestionably ‘required by the Constitution.’ Respondent pounces on this statement, but like the [*Heikkila*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1953117909&pubNum=0000780&originatingDoc=I0f78b09cb6f211eab1faf5a0aee61ce8&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))statement on which it relies, it does nothing for him. The writ of habeas corpus as it existed at common law provided a vehicle to challenge all manner of detention by government officials, and the Court had held long before that the writ could be invoked by aliens already in the country who were held in custody pending deportation. [*St. Cyr*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2001536099&pubNum=0000780&originatingDoc=I0f78b09cb6f211eab1faf5a0aee61ce8&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) reaffirmed these propositions, and this statement in [*St. Cyr*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2001536099&pubNum=0000780&originatingDoc=I0f78b09cb6f211eab1faf5a0aee61ce8&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) does not signify approval of respondent's very different attempted use of the writ, which the Court did not consider.

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In 1892, the Court wrote that as to “foreigners who have never been naturalized, nor acquired any domicil or residence within the United States, nor even been admitted into the country pursuant to law,” “the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law.” . . . That rule rests on fundamental propositions: “[T]he power to admit or exclude aliens is a sovereign prerogative;” the Constitution gives “the political department of the government” plenary authority to decide which aliens to admit and a concomitant of that power is the power to set the procedures to be followed in determining whether an alien should be admitted.

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Justice [THOMAS](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0216654601&originatingDoc=I0f78b09cb6f211eab1faf5a0aee61ce8&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I0f78b09cb6f211eab1faf5a0aee61ce8), concurring.

. . . .The Founders appear to have understood “[t]he Privilege of the Writ of Habeas Corpus” to guarantee freedom from discretionary detention, and a “[suspen](https://1.next.westlaw.com/Link/Document/FullText?entityType=bdrug&entityId=I38cc7c9d475111db9765f9243f53508a&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))[sion]” of that privilege likely meant a statute granting the executive the power to detain without bail or trial based on mere suspicion of a crime or dangerousness. Thus, the expedited removal procedure in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 is not a suspension.

The writ of habeas corpus began as a prerogative writ in the Court of King's Bench in the 16th century. Over time, however, it came to be understood both as a right to be free from arbitrary detention and as a procedural writ. By the end of the 16th century, the English connected the common-law writ of habeas corpus to liberty. Specifically, it was associated with the guarantee in Magna Carta that “[n]o free person (*Nullus liber homo*) shall be taken or imprisoned, or disseised or outlawed or exiled, or in any way destroyed ... except by the lawful judgment of his peers or by the law of the land.” Perhaps most prominently, Edward Coke wrote in his Institutes that “if a man be taken, or committed to prison *contra legem terrae*, against the Law of the land,” then “[h]e may have an *habeas corpus*.” . . .

. . . .

The language of the Suspension Clause evinces this understanding. The Clause itself does not authorize courts to issue writs of habeas corpus. Nor does it refer simply to the writ of habeas corpus. Rather, it protects the *privilege of* the writ of habeas corpus. The word “privilege” was “used interchangeably with the words ‘rights,’ ‘liberties,’ and ‘freedoms,’ and had been since the time of Blackstone.” By using this term, the Framers appear to have had a substantive right in mind.. . . . In sum, it seems that the founding generation viewed the privilege of the writ of habeas corpus as a freedom from arbitrary detention.

The remaining question is what it means for “[t]he Privilege of the Writ of Habeas Corpus” to “be suspended.” [U. S. Const., Art. I, § 9, cl. 2](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000583&cite=USCOARTIS9CL2&originatingDoc=I0f78b09cb6f211eab1faf5a0aee61ce8&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)). At the founding, suspension was a well-known term that meant “a [t]emporal [s]top of a [m]an's [r]ight.” In the context of habeas corpus, it appears to have specifically meant a grant of authority to the executive to detain without bail or trial based on suspicion of a crime or dangerousness.

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Under this interpretation, [federal immigration law] likely does not suspend the writ of habeas corpus. . . . . This statute bears little resemblance to a suspension as that term was understood at the founding. It does not allow the executive to detain based on mere suspicion of a crime or dangerousness. Rather, it requires a finding that the detainee lacks valid documentation and is not eligible for asylum. It even expressly permits habeas relief for a detainee who does not meet certain criteria for expedited removal.

Justice [BREYER](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0254766801&originatingDoc=I0f78b09cb6f211eab1faf5a0aee61ce8&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I0f78b09cb6f211eab1faf5a0aee61ce8), with whom Justice [GINSBURG](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0224420501&originatingDoc=I0f78b09cb6f211eab1faf5a0aee61ce8&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I0f78b09cb6f211eab1faf5a0aee61ce8) joins, concurring in the judgment.

I agree that enforcing those limits *in this particular case* does not violate the Suspension Clause's constitutional command: “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.”  But we need not, and should not, go further. . . . . Addressing more broadly whether the Suspension Clause protects people challenging removal decisions may raise a host of difficult questions in the immigration context. What review might the Suspension Clause assure, say, a person apprehended years after she crossed our borders clandestinely and started a life in this country? Under current law, noncitizens who have lived in the United States for up to two years may be placed in expedited-removal proceedings, but Congress might decide to raise that 2-year cap (or remove it altogether). Does the Suspension Clause let Congress close the courthouse doors to a long-term permanent resident facing removal? . . .

. . . .

As for the resolution of the dispute before us, Congress, in my view, had the constitutional power to foreclose habeas review of the claims that respondent has pressed in this case. . . . Two features of this case persuade me.

*First*, respondent's status suggests that the constitutional floor set by the Suspension Clause here cannot be high. . . . . Respondent has never lived in, or been lawfully admitted to, the United States. . . . He is thus in a materially different position for Suspension Clause purposes than the noncitizens [who] . . . had all lived in this country for years. The scope of whatever habeas review the Suspension Clause assures respondent need not be as extensive as it might for someone in that position.

*Second*, our precedents demonstrate that respondent's claims are of the kind that Congress may, consistent with the Suspension Clause, make unreviewable in habeas proceedings. . . . Respondent concedes that Congress may eliminate habeas review of factual questions in cases like this one. . . . But even though respondent has framed his two primary claims as asserting legal error, substance belies that label. Both claims are, at their core, challenges to factual findings. . . . At the heart of both purportedly legal contentions . . . lies a disagreement with immigration officials’ findings about the two brute facts underlying their credible-fear determination—. . . the identity of respondent's attackers and their motive for attacking him. Other than his own testimony describing the attack, respondent has pointed to nothing in the administrative record to support either of these claims.

. . . .

Respondent's procedural claims . . . concern not the outright denial (or constructive denial) of a process, but the precise way in which the relevant procedures were administered. They raise fine-grained questions of degree—*i.e.*, whether the asylum officer made *sufficiently thorough* efforts to elicit all “relevant and useful information” and whether he took *sufficiently thorough* precautions to ensure that respondent was “[a]ble to participate effectively” in the interview.

Reviewing claims hinging on procedural details of this kind would go beyond the traditionally “limited role” that habeas has played in immigration cases similar to this one—even during the finality era.  To interpret the Suspension Clause as insisting upon habeas review of these claims would require, by constitutional command, that the habeas court make indeterminate and highly record-intensive judgments on matters of degree. Respondent has not cited, and I have not found, any case of ours suggesting that the Suspension Clause demands parsing procedural compliance at so granular a level. . . .

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Justice [SOTOMAYOR](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0145172701&originatingDoc=I0f78b09cb6f211eab1faf5a0aee61ce8&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I0f78b09cb6f211eab1faf5a0aee61ce8), with whom Justice [KAGAN](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0301239401&originatingDoc=I0f78b09cb6f211eab1faf5a0aee61ce8&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I0f78b09cb6f211eab1faf5a0aee61ce8) joins, dissenting.

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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. It will leave significant exercises of executive discretion unchecked in the very circumstance where the writ's protections “have been strongestAnd it increases the risk of erroneous immigration decisions that contravene governing statutes and treaties.

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Respondent first advances a straightforward legal question that courts have heard in habeas corpus proceedings in “case after case.”  His habeas petition claimed that an asylum officer and Immigration Judge “appl[ied] an incorrect legal standard” by ordering him removed despite a showing of a significant possibility of credible fear to establish “eligibility for asylum, withholding of removal, and [Convention Against Torture] claims.” The Government itself has characterized that claim as a challenge to the “ ‘application of a legal standard to factual determinations ... underlying the Executive's negative credible-fear findings.’”

. . . .

In papering over the true nature of respondent's claims, the Court transforms his assertions of legal error in the exercise of executive discretion into a naked demand for executive action. . . . The law has long permitted habeas petitioners to challenge the legality of the exercise of executive power, even if the executive action ultimately sought is discretionary. . . . [T]he essence of respondent's petition is that the facts as presented (that he, a Tamil minority in Sri Lanka, was abducted by unidentified men in a van and severely beaten), when considered in light of known country conditions (as required by statute), amount at least to a “significant possibility” that he could show a well-founded fear of persecution. So viewed, respondent's challenge does not quibble with historic facts, but rather claims that those “settled facts satisfy a legal standard,” which this Court has held amounts to a “legal inquiry.” . . .

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. . . . Respondent claimed that officials violated governing asylum regulations and deprived him of due process by conducting an inadequate interview and providing incomplete translation services. It is difficult to see the difference between those claims and the ones that the concurring opinion upholds as cognizable.

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. . . . Respondent asks merely to be freed from wrongful executive custody. He asserts that he has a credible fear of persecution, and asylum statutes authorize him to remain in the country if he does. That request is indistinguishable from, and no less “traditional” than, those long made by noncitizens challenging restraints that prevented them from otherwise entering or remaining in a country not their own. . . .

Fairly characterized, respondent's claims allege legal error (for violations of governing asylum law and for violations of procedural due process) and an open-ended request for habeas relief. It is “uncontroversial” that the writ encompasses such claims.

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The critical inquiry, the Court contends, is whether respondent's specific requests for relief (namely, admission into the United States or additional asylum procedures allowing for admission into the United States) fall within the scope of the kind of release afforded by the writ as it existed in 1789. . . . The inquiry . . . runs headlong into precedent, which has never demanded the kind of precise factual match with pre-1789 case law that today's Court demands.

To start, the Court recognizes the pitfalls of relying on pre-1789 cases to establish principles relevant to immigration and asylum: “At the time, England had nothing like modern immigration restrictions.”  The Court nevertheless seems to require respondent to engage in an exercise in futility. It demands that respondent unearth cases predating comprehensive federal immigration regulation showing that noncitizens obtained release from federal custody onto national soil. But no federal statutes at that time spoke to the permissibility of their entry in the first instance; the United States lacked a comprehensive asylum regime until the latter half of the 20th century. . . .

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[T]his Court has never rigidly demanded a one-to-one match between a habeas petition and a common-law habeas analog. In [*St. Cyr*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2001536099&pubNum=0000780&originatingDoc=I0f78b09cb6f211eab1faf5a0aee61ce8&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), for example, the Court considered whether a noncitizen with a controlled substance conviction could challenge on habeas the denial of a discretionary waiver of his deportation order. In doing so, the Court did not search high and low for founding-era parallels to waivers of deportation for criminal noncitizens. It simply asked, at a far more general level, whether habeas jurisdiction was historically “invoked on behalf of noncitizens ... in the immigration context” to “challenge Executive ... detention in civil cases.” That included determining whether “[h]abeas courts ... answered questions of law that arose in the context of discretionary relief ” (including questions regarding the allegedly “erroneous application or interpretation of statutes”).

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Applying the correct (and commonsense) approach to defining the Great Writ's historic scope reveals that respondent's claims have long been recognized in habeas.

Respondent cites *Somerset* v. *Stewart* (K. B. 1772), as an example on point. There, Lord Mansfield issued a writ ordering release of a slave bound for Jamaica, holding that there was no basis in English law for “sending ... him over” to another country.  Thus, the writ issued even though it “did not free [the] slave so much as it protected him from deportation.” *Somerset* establishes the longstanding availability of the writ to challenge the legality of removal and to secure release into a country in which a petitioner sought shelter. . . . The reasoning of *Somerset* . . . carried over to the Colonies, where colonial governments presumed habeas available to noncitizens to secure their residence in a territory. . . .

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. . . . At least two other classes of cases demonstrate that the writ was available from around the founding onward to noncitizens who were detained, and wanted to remain, including those who were prevented from entering the United States at all. First, common-law courts historically granted the writ to discharge deserting foreign sailors found and imprisoned in the United States. . . . . Next, courts routinely granted the writ to release wrongfully detained noncitizens into Territories other than the detainees’ “own.” Many involved the release of fugitive or former slaves outside their home State. In these cases, courts decided legal questions as to the status of these petitioners. . . . .

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. . . . [T]he Immigration Act of 1891 . . . stripped federal courts of their power to review immigration denials: “All decisions made by the inspection officers or their assistants touching the right of any alien to land, when adverse to such right, shall be final unless appeal be taken to the superintendent of immigration, whose action shall be subject to review by the Secretary of the Treasury.” By its terms, that restriction on federal judicial power was not limited to review of some undefined subset of issues, such as questions of law or fact; it made executive immigration decisions final in all respects. . . . .[T]he *[Ekiu](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1892180185&pubNum=0000780&originatingDoc=I0f78b09cb6f211eab1faf5a0aee61ce8&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))*Court confronted whether construing the 1891 Act as precluding all judicial review of immigration decisions like the exclusion order at issue would violate the constitutional guarantee to habeas. The Court answered that question by construing the 1891 Act as precluding judicial review only of questions of fact. “An alien immigrant,” the Court first held, who is “prevented from landing [in the United States] by any [executive] officer ... and thereby restrained of his liberty, is doubtless entitled to a writ of *habeas corpus* to ascertain whether the restraint is lawful.” The Court then explained that it had authority to hear the case (despite Congress’ clear elimination of judicial review) because it interpreted the 1891 Act as meaning only that an immigration official's determination of “facts” was final and unreviewable.

. . . .

[T]he 1891 Act was enacted for the purpose of limiting all judicial review of immigration decisions, not just a subset of factual issues that may arise in those decisions. Further, the plain terms of the statute did not cabin the limitation on judicial review to historical facts found by an immigration officer.  [*Ekiu*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1892180185&pubNum=0000780&originatingDoc=I0f78b09cb6f211eab1faf5a0aee61ce8&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), moreover, evaluated the Act's constitutionality in view of the petitioner's argument that the limitation on judicial review violated the constitutional “right to the writ of *habeas corpus*.”  These considerations all point in one direction: Even if the *[Ekiu](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1892180185&pubNum=0000780&originatingDoc=I0f78b09cb6f211eab1faf5a0aee61ce8&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))* Court did not explicitly hold that the Suspension Clause prohibits Congress from broadly limiting all judicial review in immigration proceedings, it certainly decided the case in a manner that avoided raising this constitutional question. Indeed, faced with a jurisdiction-stripping statute, the only review left for the *[Ekiu](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1892180185&pubNum=0000780&originatingDoc=I0f78b09cb6f211eab1faf5a0aee61ce8&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))* Court was that required by the Constitution and, by extension, protected by the guarantee of habeas corpus.

The Court also maintains that *[Ekiu](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1892180185&pubNum=0000780&originatingDoc=I0f78b09cb6f211eab1faf5a0aee61ce8&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))* concluded that “ ‘the act of 1891 is constitutional’ ” in full, not “only in part.” Yet as the Court acknowledges, it was only “after interpreting the 1891 Act” as precluding judicial review of questions of fact alone that the *[Ekiu](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1892180185&pubNum=0000780&originatingDoc=I0f78b09cb6f211eab1faf5a0aee61ce8&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))* Court deemed it constitutional. . . .

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. . . . In *Heikkila v. Barber* (1953), the Court explained that *[Ekiu](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1892180185&pubNum=0000780&originatingDoc=I0f78b09cb6f211eab1faf5a0aee61ce8&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))*and its progeny had, in fact, construed the finality statutes to avoid serious constitutional questions about Congress’ ability to strip federal courts of their habeas power. As [*Heikkila*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1953117909&pubNum=0000780&originatingDoc=I0f78b09cb6f211eab1faf5a0aee61ce8&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))reiterated, the key question in *[Ekiu](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1892180185&pubNum=0000780&originatingDoc=I0f78b09cb6f211eab1faf5a0aee61ce8&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))* (and in later cases analyzing finality statutes) was the extent to which the Constitution allowed Congress to make administrative decisions unreviewable. . And it concluded that the jurisdiction-stripping immigration statute in that case, a successor to the 1891 Act, “preclud[ed] judicial intervention in deportation cases except insofar as it was required by the Constitution.”

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. . . . [*St. Cyr*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2001536099&pubNum=0000780&originatingDoc=I0f78b09cb6f211eab1faf5a0aee61ce8&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) concluded that “ ‘[b]ecause of [the Suspension] Clause some “judicial intervention in deportation cases” is unquestionably “required by the Constitution.” ’ ”  This statement affirms what the finality-era cases long suggested: that the Suspension Clause limits Congress’ power to restrict judicial review in immigration cases. . . . The Court spoke of deeper historical principles, affirming repeatedly that “[a]t its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest.” . . . . Based on that history, the Court also concluded that “a serious Suspension Clause issue would be presented” by precluding habeas review in the removal context, even where there was “no dispute” that the Government had the legal authority to detain a noncitizen like St. Cyr. Thus based on the same principles that the Court purports to apply in this case, the [*St. Cyr*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2001536099&pubNum=0000780&originatingDoc=I0f78b09cb6f211eab1faf5a0aee61ce8&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) Court reached the opposite conclusion: The Suspension Clause likely prevents Congress from eliminating judicial review of discretionary executive action in the deportation context, even when the writ is used to challenge more than the fact of detention itself.

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. . . . To be sure, our cases have long held that foreigners who had never come into the United States—those “on the threshold of initial entry”—are not entitled to any due process with respect to their admission. That follows from this Courts’ holdings that the political branches of Government have “plenary” sovereign power over regulating the admission of noncitizens to the United States. Noncitizens in this country, however, undeniably have due process rights. In *Yick Wo v. Hopkins* (1886), the Court explained that “[t]he Fourteenth Amendment to the Constitution is not confined to the protection of citizens” but rather applies “to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality.” . . . [T]he Court has . . . determined that presence in the country is the touchstone for at least some level of due process protections. As a noncitizen within the territory of the United States, respondent is entitled to invoke the protections of the Due Process Clause.

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. . . . [B]y 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. . . .

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In some ways, this country's asylum laws have represented the best of our Nation. Unrestricted migration at the founding and later, formal asylum statutes, have served as a beacon to the world, broadcasting the vitality of our institutions and our collective potential. For many who come here fleeing religious, political, or ideological persecution, and for many more who have preceded them, asylum has provided both a form of shelter and a start to a better life. . . . It is universally acknowledged that the asylum regime is under strain. . . .But the political branches have numerous tools at their disposal to reform the asylum system, and debates over the best methods of doing so are legion in the Government, in the academy, and in the public sphere. Congress and the Executive are thus well equipped to enact a range of measures to reform asylum in a number of ways and routinely do so.. . . 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. This may accommodate congressional policy concerns by easing the burdens under which the immigration system currently labors. But it is nothing short of a self-imposed injury to the Judiciary, to the separation of powers, and to the values embodied in the promise of the Great Writ.