Hastings Constitutional Law Quarterly

Volume 49 | Number 3 Article 3

12-2022

A Candle in the Labyrinth: A Guide for Immigration Attorneys to Assert Habeas Corpus after DHS v. Thuraissigiam

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A Candle in the Labyrinth: A Guide for Immigration Attorneys to Assert Habeas Corpus after *DHS v. Thuraissigiam*

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Abstract††

In the summer of 2020, immigration law seemed to become the gravitational center of presidential power. After the Supreme Court decided several immigration cases in favor of the executive department, former President Trump cited "the DACA case" to support a new constitutional theory that "[t]he Supreme Court gave the president of the United States powers that nobody thought the president had." Accordingly, Trump began to issue presidential legislation including "an immigration plan, a health care plan, and various other plans."

Trump also began to occupy cities that were politically opposed to his presidency with ICE and CBP agents, including BORTAC ("Border Patrol Tactical Unit"), citing a pretext of defending federal buildings from protesters. Finally on January 6, 2021, Trump attempted to force Congress to decide the election in his favor by inciting a violent insurrection of pro-Trump protesters. The desecration of the U.S. Capitol Building that followed made the Trump administration's former pretext of defending federal buildings from protesters appear as nothing more than a ruse.

The U.S. legal community had reason to hope that habeas corpus might have blocked Trump's extraconstitutional exertions of power, because *Boumediene v. Bush* assured us that "the writ of habeas corpus is itself an

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†† The abstract quotes and refers to sources cited *infra* at notes 11, 88, 242–43.

indispensable mechanism for monitoring the separation of powers." However, in the summer of 2020 the U.S. Supreme Court decided *DHS v. Thuraissigiam*, which seemed to imply that the processes of ICE and CBP were beyond the reach of habeas corpus just as Trump used those agencies to occupy Portland, Oregon and other localities across the nation.

In response, this article asserts six approaches inspired by *Boumediene v. Bush* to distinguish *Thuraissigiam* and to help the Court reassert itself as a check in the balance of power. The analysis below is geared toward drafting immigrant habeas petitions, but its principles may be applied to habeas writs generally. For immigration law is not a proper exception to habeas corpus, which, to quote Thomas Jefferson, exists in a grand manner to ensure that "[t]he military shall be subordinate to the civil power."

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Introduction: Rising Up in the Shadow of *DHS v. Thuraissigiam*

In 1807, President Jefferson issued deportation orders that imprisoned a famous German immigrant named Eric Bollman.[1] When the court issued a writ of habeas corpus to release Bollman, he was released *into* the United States.[2] Given the existence of several cases like *Ex parte Bollman* around the founding era, it is unsettling that *Thuraissigiam* dismissed an immigrant habeas petition on a 12(b)(1) motion, before even reaching the merits of the writ.[3]

Thuraissigiam dismissed a habeas writ expressly because the habeas petition was drafted incorrectly.[4] In *Thuraissigiam*, failure to request the common law remedy of habeas release in the petition itself was fatal to the habeas petition.[5] Furthermore, *Thuraissigiam* attached a panoply of complex dicta to a simple 12(b) dismissal, including a strong statement of plenary power doctrine,[6] and a rationale for why immigrants potentially have no constitutional rights.[7]

Thus, even if future habeas petitions satisfy *Thuraissigiam*'s new drafting forms, they may still fail along the lines of *Thuraissigiam*'s dicta.[8] For example, even though *Thuraissigiam* was asserted in a case of an immigrant seeking legal entry into the United States, it was the sole decision cited to vacate *Ragbir v. Homan*, a case involving a lawful permanent resident ("LPR," i.e., an immigrant already granted legal entry into the United States).[9] Nevertheless, as demonstrated by *Ragbir*, when *Boumediene*'s

1. Letter from Thomas Jefferson to James Wilkinson (Feb. 3, 1807); Letter from Thomas Jefferson to William C.C. Claiborne (Feb. 3, 1807). *Cf.* Paul Sweet, *Erich Bollmann at Vienna in 1815*, 46 AM. HIST. REV. 580, 582, 586 (1941) (explaining how and why "Bollmann cut loose from the United States," and did not return after defeating Jefferson in court).

2. *Ex parte* Bollman, 8 U.S. 75, 136 (1807).

3. DHS v. Thuraissigiam, 140 S. Ct. 1959, 1973 (2020).

4. *Id.* at 1969–75.

5. *Id.* at 1969.

6. *Id.* at 1982.

7. *Id.* at 1982–83.

8. *Id.*; *see id.* at 2013 (Sotomayor, J., dissenting) (noting that while the majority's opinion may be limited to its facts: "[w]here its logic must stop, however, is hard to say."). *But see* Al Otro Lado v. Mayorkas, No. 17-cv-02366, 2021 U.S. Dist. LEXIS 167128, at *42 (S.D. Cal. 2021) ("the language in *Thuraissigiam* is mere dicta"); *id.* at *62–63, *72 (showing how *Thuraissigiam*'s dicta about due process, though disappointing and limiting, need not actually stand in the way of judicial review).

9. Ragbir v. Homan, 923 F.3d 53, 78 (2d Cir. 2019), *vac'd sub nom.* Pham v. Ragbir, 141 S. Ct. 227 (2020) (exclusively citing *DHS v. Thuraissigiam* to vacate *Ragbir* on a writ of certiorari). *Cf.* Matter of N-V-G-, 28 I.&N. Dec. 380, 384 (B.I.A. Sept. 17, 2021); *Al Otro Lado*, 2021 U.S. Dist. LEXIS 167128, at *42 (S.D. Cal. 2021) (citing *Thuraissigiam*, 140 S. Ct. at 1982–83).

holdings are followed the chances that an immigrant habeas petition will succeed sharply increase.[10]

Boumediene expressly recognized that "foreign nationals who have the privilege of litigating in our courts can seek to enforce separation-of-powers principles."[11] *Boumediene* extended the privilege of seeking the enforcement of the separation of powers through habeas corpus to foreign nationals suspected of terrorism and held in a black site in Cuba, making the bar for this privilege exceedingly low.[12] *Boumediene* crystalized the outer limits of the privilege of habeas corpus into six common law holdings, which are:

> (1) 28 U.S.C. § 2241(e) is completely overruled as a Suspension of the Writ; (2) noncitizen aliens suspected by the Government of committing war crimes have the privilege of the Writ of Habeas Corpus [and thereby hold an inherent, explicit, and fundamental privilege of litigating the separation of powers in federal court]; (3) the Writ does not have a geographic limitation and may be asserted against any custodian the U.S. Courts have jurisdiction over including U.S. military officers that run black sites in foreign countries; (4) prudential bases for dismissing the Writ like exhaustion and federalism are not relevant; (5) the Court has the power to issue orders directing the conditional or unqualified release of prisoners unlawfully detained; and (6) the Court has power to hear exculpatory evidence not presented in the hearing below.[13]

10. *Ragbir*, 923 F.3d at 73–74 (citing Boumediene v. Bush, 553 U.S. 723, 745–46 (2008)), *vac'd sub nom.* Pham v. Ragbir, 141 S. Ct. 227 (2020). *Cf.* Daniel E. Simon, *Immigration, Retaliation, and Jurisdiction*, 2020 U. CHIC. L. FORUM 477, 482.

11. *Boumediene*, 553 U.S. at 743 (citing Yick Wo v. Hopkins, 118 U.S. 356, 374 (1886)).

12. *Id.* at 732–34 ("We hold these petitioners do have the habeas corpus privilege.").

13. Joshua J. Schroeder, *Conservative Progressivism in Immigrant Habeas Court: Why* Boumediene v. Bush *is the Baseline Constitutional Minimum*, 45 THE HARBINGER 46, 47–49 (2020) [hereinafter Schroeder, *Conservative*] (citing *Boumediene*, 553 U.S. at 732–33, 751, 762–64, 779, 786–87, 792–94) (expounding these six holdings); *Boumediene*, 553 U.S. at 743, 746, 765 (repeatedly confirming that foreign nationals have the explicit, inherent, and fundamental right to litigate about the separation of powers in federal court under the Suspension Clause by stating: "the writ of habeas corpus is itself an indispensable mechanism for monitoring the separation of powers"). *Boumediene* overruled a jurisdiction stripping provision that is strikingly similar to several jurisdiction stripping provisions Congress sprinkled throughout immigration law. 28 U.S.C. § 2241(e), *overruled by Boumediene*, 553 U.S. at 733 ("28 U.S.C. § 2241(e), operates as an unconstitutional suspension of the writ"). Prior to *Boumediene* several cases interpreted congressional attempts to strip habeas jurisdiction from immigrant suits as narrow or inapplicable, in order to avoid overruling the statutes as unconstitutional suspensions of the writ: *see, e.g.,* INS v. St. Cyr, 533 U.S. 289, 298 (2001) (rejecting the government's argument "that four sections of the 1996 statutes—specifically, § 401(e) of AEDPA and three sections of IIRIRA (8 U.S.C. §§ 1252(a)(1), 1252(a)(2)(C), and 1252(b)(9) . . .— stripped the courts of jurisdiction to decide the question of law presented by respondent's habeas corpus application"); Zadvydas v. Davis, 533 U.S. 678, 687 (2001) (interpreting previous alleged jurisdiction stripping provisions narrowly, writing: "the primary federal habeas corpus statute, 28 U.S.C. § 2241, confers jurisdiction upon the federal courts

Prior to arriving at the merits of any such challenge, *Thuraissigiam* dismissed an immigrant's petition for not requesting the relief indicated in *Boumediene*'s fifth holding above.[14] In light of *Thuraissigiam*, a habeas petition should probably include a reference to each of *Boumediene*'s holdings to avoid a similar dismissal.[15] The purpose of this article is to discuss ways to improve immigrant habeas petition writing in order to avoid a pre-merits dismissal like *Thuraissigiam* and to increase an immigrant's ultimate chances of success.[16]

This article provides a guide to improve immigrant habeas petition writing in six parts as follows: (I) never refer to Immigration Court as a "civil" court in habeas filings; (II) state that prudential barriers (like exhaustion) do not legitimately exist in habeas cases; (III) assert the habeas corpus standard of *de novo* review of law and fact; (IV) ask the federal court to administer the common law habeas remedy; (V) explain how the Executive Office for Immigration Review ("EOIR" or "Immigration Court") structurally fails to secure common law due process; and (VI) flip the script of the so-called plenary power doctrine.

I. Never Refer to Immigration Court as "Civil" Court in Habeas Filings

In habeas corpus review a "civil court" is synonymous with a common law court presided over by an independent Article III judge or equivalent state level court.[17] The opposite of "civil" in the habeas context is military

to hear these cases"); *but see* Thoung v. United States, 913 F.3d 999, 1002 (10th Cir. 2019) (deciding that the REAL ID Act stripped the court's habeas jurisdiction at 8 U.S.C. § 1252(a)(5), without considering the requirements of *Boumediene* under the Suspension Clause).

14. *Thuraissigiam*, 140 S. Ct. at 1975.

15. *See* Schroeder, *Conservative*, *supra* note 13, at 47–49. *See also* Simon, *supra* note 10, at 482.

16. This article reiterates and extends the six holdings of *Boumediene* in several ways, including at the following footnotes: *see infra* notes 214–22 (asserting and extending holding 1); *infra* notes 33, 43–44 (asserting and extending holding 2); *infra* note 72 (asserting and extending holding 3); *infra* notes 54–111 (asserting and extending holding 4); *infra* notes 166–222 (asserting and extending holding 5); *infra* notes 83–87 (asserting and extending holding 6). *Cf.* Ragbir v. Homan, 923 F.3d 53, 53 (2d Cir. 2019), *vac'd sub nom.* Pham v. Ragbir, 141 S. Ct. 227 (2020).

17. United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 23 (1955) ("We hold that Congress cannot subject civilians like Toth to trial by court-martial. They, like other civilians, are entitled to have the benefit of safeguards afforded those tried in the regular courts authorized by Article III of the Constitution."). *See* Reid v. Covert, 354 U.S. 1, 40 (1957); Duncan v. Kahanamoku, 327 U.S. 304, 317, 322–23 (1946) (citing *Ex parte* Milligan, 71 U.S. 2 (1866); Chambers v. Florida, 309 U.S. 227 (1940)); *Chambers*, 309 U.S. at 237, 237 n.10 (quoting U.S. CONST. pmbl. & art. I, § 9, cl. 2—*footnote 10 in* Chambers *cites to several sources that trace to the beginning of habeas corpus in England that are omitted here*); *Milligan*, 71 U.S. at 124–25 (quoting THE DECLARATION OF

or martial court; in the habeas context *civil* refers to *civilian* court, and it includes both state and federal criminal courts.[18] Habeas review is strongest when reviewing federal non-civil incarceration, i.e., habeas is most powerful when it reviews non-civil federal entities,[19] like Immigration & Customs Enforcement ("ICE"), Customs & Border Protection ("CBP"), or EOIR,[20] for detaining or incarcerating a person without being accountable to the checks and balances required under the U.S. Constitution.[21]

Executive tribunals and agencies, while the legal community is presently accustomed to interacting with them, are *not* civil tribunals in the habeas sense.[22] The existence of a "civil" enabling law does not make EOIR, or Judge Advocates General's Corp ("JAG") for that matter, *civil* in the habeas sense.[23] The idea of civil or civilian courts in habeas corpus law is synonymous with what England called common law courts, such that the absence of common law due process in a court collaterally reviewed by a habeas writ can render it subject to reversal as illegitimate *coram non judice*.[24]

INDEPENDENCE para. 14 (U.S. 1776) ("He [the king of England] has affected to render the Military independent and superior to the Civil Power.")).

18. *Boumediene*, 553 U.S. at 786 ("Military courts are not courts of record."), *citing and extending Ex parte* Watkins, 28 U.S. 193, 209 (1830) ("[A] court martial had no jurisdiction over a person not belonging to the militia, and its sentence in such a case being *coram non judice*, furnishes no protection to the officer who executes it").

19. *Boumediene*, 553 U.S. at 783 ("Where a person is detained by executive order, rather than, say, after being tried and convicted in a court, the need for collateral review is most pressing."). *See* Simon, *supra* note 10, at 482.

20. Deborah E. Anker, *Determining Asylum Claims in the United States: A Case Study on the Implementation of Legal Norms in an Unstructured Adjudicatory Environment*, 19 N.Y.U. REV. L. & SOC. CHANGE 433, 488–503 (1992) (explaining the non-adversarial, inquisitorial structure of EOIR, ICE, and CBP). *Cf.* Daniel L. Vande Zande, *Coercive Power and the Demise of the Star Chamber*, 50 AM. J. L. HIST. 326, 335 (2008–2010) (showing how the Star Chamber of England was eventually disbanded for using "a secretive, inquisitorial method"); Habeas Corpus Act 1640, 16 Car. 1 c. 10 [Eng.] (abolishing the Star Chamber and confirming that the common law writ of habeas corpus prefers the adversarial process to inquisitions).

21. *Boumediene*, 553 U.S. at 743 ("the Framers deemed the writ to be an essential mechanism in the separation-of-powers scheme"). *Cf. Milligan*, 71 U.S. at 69.

22. *Boumediene*, 553 U.S. at 783, 786; *id.* at 829 (Scalia, J., dissenting); *Duncan*, 327 U.S. at 317, 322–23; *In re* Yamashita, 327 U.S. 1, 67 (1946) (Rutledge, J., dissenting). *See* 8 C.F.R. § 1003.10(a) ("The immigration judges are attorneys whom the Attorney General appoints as administrative judges . . . . Immigration judges shall act as the Attorney General's delegates in the cases that come before them."); Simon, *supra* note 10, at 482.

23. Rasul v. Bush, 542 U.S. 466, 474 (2004) (quoting Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 218–19 (1953) (Jackson, J., dissenting)) ("'Executive imprisonment has been considered oppressive and lawless since John, at Runnymede, pledged that no free man should be imprisoned, dispossessed, outlawed, or exiled save by the judgment of his peers or by the law of the land. The judges of England developed the writ of habeas corpus largely to preserve these immunities from executive restraint.'"). *Cf. Yamashita*, 327 U.S. at 67 (Rutledge, J., dissenting).

24. *See* cases cited *supra* note 18.

Some immigration experts understandably prefer to reduce their day-to-day level of secondary trauma by characterizing Immigration Court as a proper common law court.[25] Building up Immigration Court as a legitimate tribunal may be a good strategy for litigating within Immigration Court.[26] However, referring to Immigration Court as a legitimate common law court in a habeas corpus petition can justify summary dismissal.[27]

When reviewing a fellow civil court, many federal judges feel strong inclinations to defer to a fellow judge who is also tasked with applying the common law requirements in our constitutions.[28] EOIR is *not* one of these courts; Immigration Judges ("IJs") are *not* equals with common law judges, in part, because the president can treat IJs as direct subordinates such that removal and other punishments may be applied to any IJs that disobey presidential orders.[29] Their jobs, unlike Article III judges, are retained only by obeying executive orders, which may force IJs to keep immigrants detained or to deport them in an attempt to deter legal immigration.[30]

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25. *See* Hannah C. Cartwright et al., *Vicarious Trauma and Ethical Obligations for Attorneys Representing Immigrant Clients: A Call to Build Resilience Among the Immigration Bar*, 2 AILA L.J. 1, 28 (2020).

26. *See, e.g.*, Shoba Sivaprasad Wadhia, *Sharing Secrets: Examining Deferred Action and Transparency in Immigration Law*, 10 U. N.H. L. REV. 1, 5, 52 (2012).

27. *See, e.g.*, Hamdan v. Rumsfeld, 548 U.S. 557, 676–77 (2006) (Scalia, J., dissenting) (Scalia unsuccessfully pushed for this ground of dismissal in the military context saying: "Though military commissions likewise do not implicate 'the peculiar demands of federalism,' considerations of *interbranch* comity at the federal level weigh heavily against our exercise of equity jurisdiction in this case."). *See also* Coleman v. Thompson, 501 U.S. 722, 730 (1991). *Cf.* Cartwright et al., *supra* note 25, at 28.

28. McGirt v. Oklahoma, 140 S. Ct. 2452, 2503 (2020) (Thomas, J., dissenting) (quoting Michigan v. Long, 463 U.S. 1032, 1040 (1983)) (citing Coleman v. Thompson, 501 U.S. at 738–39 (overruling Fay v. Noia, 372 U.S. 391 (1963)) ("such second-guessing disrespects 'the independence of state courts,' and the State itself"); *Fay*, 372 U.S. at 449 n.1, 451 n.4 & n.6, 457 n.12 (Harlan, J., dissenting) (citing Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 448 n. 12, 451 (1963)). *See* DHS v. Thuraissigiam, 140 S. Ct. 1959, 1965 (2021) (quoting 8 C.F.R. §§ 1003.42(c), (d)(1)) (deferring to EOIR and ICE based on the implied presumption that these are civil courts that "'shall make a de novo determination'" when they are obviously not).

29. National Association of Immigration Judges, 71 F.L.R.A. 1046 (2020) ("we . . . find that IJs are management officials, and, therefore, exclude them from the bargaining unit"); *see* Schneiderman v. United States, 320 U.S. 118, 160 (1943) ("A denaturalization suit is not a criminal proceeding. But neither is it an ordinary civil action, since it involves an important adjudication of status."); *cf.* Seila Law LLC v. CFPB, 140 S. Ct. 2183, 2203 (2020) (deciding that the separation of powers applies "everywhere except the Presidency"); *Death Penalty Cases in Traffic Court Setting*, IMMIGRANT L. CTR. MINN. (Mar. 31, 202), https://www.ilcm.org/latest-news/death-penalty-cases-in-traffic-court-setting/; Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 334–36 (2007) (observing the random way asylum grants are doled out by IJs).

30. 8 C.F.R. § 1003.10(a); *Ex parte* Milligan, 71 U.S. 2, 69 (1866). IJs and ICE Officials are "minions that skulk about under the pay of an executive." *Id.*; U.S. CONST. art. III, § 1 (federal judges "hold their offices during good behavior, and shall, at stated times, receive for their services,

EOIR is therefore akin to a military tribunal over which habeas review should be applied at the height of its potency.[31] Immigration advocates should argue that *Thuraissigiam* is distinguished for falsely presuming that immigrants are treated better than the petitioners in *Boumediene*.[32] They should quote to *Boumediene*'s holdings, including "that at common law a petitioner's status as an alien was not a categorical bar to habeas corpus relief," and furthermore that non-civil, military courts like EOIR are illegitimate *coram non judice*.[33]

Some non-immigration legal professionals strongly resist arguments that could overturn administrative agency law.[34] They may see the costs paid by immigrants in EOIR as a worthwhile tradeoff for the opportunity of other agencies to solve problems like environmental issues.[35] But this perspective gets the cart before the horse by deemphasizing cases like *Ng Fung Ho v. White* and *Liu Hop Fong v. United States* that inspired federal jurists to expand administrative law in *Crowell v. Benson*.[36]

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a compensation, which shall not be diminished during their continuance in office"). *See, e.g.*, Joel Rose, *Justice Department Rolls Out Quotas For Immigration Judges*, NPR (Apr. 3, 2018, 1:09 PM), https://www.npr.org/2018/04/03/599158232/justice-department-rolls-out-quotas-for-immigration-judges.

31. *Boumediene*, 553 U.S. at 783 ("Where a person is detained by executive order, rather than, say, after being tried and convicted in a court, the need for collateral review is most pressing."); Greg Jaffe, Missy Ryan, & Nick Miroff, *Pentagon Set To Expand Military Role Along Southern Border*, WASH. POST (Apr. 26, 2019, 4:27 PM), https://www.washingtonpost.com/world/national-security/pentagon-set-to-expand-military-role-along-southern-border/2019/04/26/f2b04666-682a-11e9-82ba-fcfeff232e8f_story.html; Christine Lockhart Poarch, *Immigration Court Reform: Congress, Heed the Call*, THE FED. LAWYER, (Oct./Nov. 2016), https://www.fedbar.org/wp-content/uploads/2016/10/Imm-Law-pdf-1.pdf (noting the irony of immigration lawyers continuing to bill EOIR as "civil" when everyone knows "immigration court proceedings are not really civil at all"); Tess Hellgren et al., *The Attorney General's Judges: How the U.S. Immigration Courts Became a Deportation Tool*, SPLC & INNOVATION LAW LAB, June 25, 2019, at 19, https://www.splcenter.org/sites/default/files/com_policyreport_the_attorney_generals_judges_final.pdf (quoting IJ Hon. Dana Leigh Marks: "'The 'deployment' of judges to the border . . . does imply a military force . . . .'").

32. *Thuraissigiam*, 140 S. Ct. at 1965.

33. *Boumediene*, 553 U.S. at 747, 786, 792.

34. Jill E. Family, *Immigration Law Allies and Administrative Law Adversaries*, 32 GEO. IMMIGR. L.J. 99, 101 (2018) [hereinafter Family, *Immigration*]; CASS R. SUNSTEIN & ADRIAN VERMEULE, LAW AND LEVIATHAN 7–8, 42 (2020) (citing Wong Sung Yang v. McGrath, 339 U.S. 33 (1950)) (upstaging *Ng Fung Ho* and *Liu Hop Fong* with the Administrative Procedures Act (APA) according to the derivative immigrant habeas case *Wong Yang Sung v. McGrath*).

35. *See* Jill E. Family, *Administrative Law Through the Lens of Immigration Law*, 64 ADMIN. L. REV. 565, 615 (2012) [hereinafter Family, *Administrative*]; SUNSTEIN & VERMEULE, *supra* note 34, at 50 (emphasizing hard environmental issues).

36. *Compare* SUNSTEIN & VERMEULE, *supra* note 34, at 42, Family, *Administrative*, *supra* note 35, at 615, *and* Family, *Immigration*, *supra* note 34, at 101, *with* James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 643, 659–62, n.62 (2004), *and* Crowell v. Benson, 285 U.S. 22, 60–61 (1932) (citing Ng Fung Ho v. White, 259 U.S. 276, 284–85 (1922) (citing Liu Hop Fong v. United States, 209 U.S. 453, 461

It is not helpful to distinguish *Boumediene* and the other 9/11 habeas cases from ordinary, run of the mill immigrant detentions as "core" versus "non-core" habeas.[37] As emphasized by *Thuraissigiam*, if a habeas petition does not request core relief it may be dismissed,[38] but as noted by *Rumsfeld v. Padilla*, emphasizing a "core" claim can create a rationale to dismiss as well.[39] *Thuraissigiam* and *Padilla* stand out as exceptions for using a distinction between "core" and "non-core" as the central basis of their holdings and dismissals.[40]

It is not problematic to use a "core" metaphor to describe what habeas corpus is "at its core,"[41] but this metaphor becomes ironic when it is used to make rigid categories for formal dismissal.[42] Going forward, no distinction should be made between aliens held in military prisons like Guantanamo Bay and those held in immigrant detention facilities.[43] For "at its core," the writ "is not 'a static, narrow, formalistic remedy,'"

(1908) ("the law contemplates that he shall be given the right of a hearing *de novo* before the district judge before he is ordered to be deported"))). As Professor Kelly Lytle Hernández recently explained "the federal government deported fewer than 1,000 immigrants annually until the 1920s, amounting to just .01 percent of the one million immigrants who entered the country every year," and thus several cases like *Liu Hop Fong* and *Ng Fung Ho* arose to contest the rights of naturalized Asian American citizens to resist deportation when the narrow bases for deportation at the time went wide of their target, as the earliest immigration laws "rarely prevented Mexicans from crossing the border." KELLY LYTLE HERNÁNDEZ, BAD MEXICANS 77, 163–65 (2022). These cases included claims of U.S. citizenship, some might have been those referred to as paper sons, and they might have also featured evidence of non-Chinese heritage as "Chinese immigrants often tried to pass for Mexican, cutting their hair, donning serapes, and learning a few words of Spanish. '*Yo soy Mexicano*,' they would say when stopped by an immigration inspector." *Id.* at 77; *see* Lisa See, *'Paper Sons,' Hidden Pasts*, L.A. TIMES (Aug. 2, 2009, 12:00 AM), https://www.latimes.com/archives/la-xpm-2009-aug-02-oe-see2-story.html; *see, e.g.*, Sibray v. United States *ex rel.* Yee Yok Yee, 227 F. 1, 4–5 (3d Cir. 1915) (noting a certificate of identity that read that Yee Kong was the "son of [an] official").

37. *See, e.g.*, *Thuraissigiam*, 140 S. Ct. at 1971. Core versus non-core metaphors are used in other areas as well, and may have a broader role in facilitating confusion in the law by making chaotic systems appear to be ordered and methodical when they are not. *See, e.g.*, Joshua J. Schroeder, *Choosing an Internet Shaped by Freedom: A Legal Rationale to Rein in Copyright Gate Keeping*, 2 BERKELEY J. ENT. & SPORTS L. 48, 50 (2013) [hereinafter Schroeder, *Choosing*] (repeating the FCC's use of "core" heavy regulation for "internet service providers" versus "non-core" lighter regulation on "online service providers," when perhaps the distinction between internet and online service providers is illusory).

38. *Thuraissigiam*, 140 S. Ct. at 1971.

39. Rumsfeld v. Padilla, 542 U.S. 426, 443 (2004).

40. *Thuraissigiam*, 140 S. Ct. at 1971 (deciding that if the petitioner asserted a core claim in his petition, then his petition would not have been dismissed); *Padilla*, 542 U.S. at 443 (deciding that if the petitioner asserted a non-core claim, his petition would not have been dismissed).

41. Boumediene v. Bush, 553 U.S. 723, 779–80 (2008) (quoting Schlup v. Delo, 513 U.S. 298, 319 (1995)).

42. *Thuraissigiam*, 140 S. Ct. at 1971; *Padilla*, 542 U.S. at 443.

43. *See Thuraissigiam*, 140 S. Ct. at 1971. *Cf.* Eric M. Freedman, *Milestones in Habeas Corpus: Part I, Just Because John Marshall Said It, Doesn't Make It So*, 51 ALA. L. REV. 531, 573

> Indeed, common-law habeas corpus was, above all, an adaptable remedy. Its precise application and scope changed depending upon the circumstances. . . . Habeas 'is, at its core, an equitable remedy' . . . . Habeas is not 'a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose' . . . . [T]he common-law habeas court's role was most extensive in cases of pretrial and noncriminal detention, where there had been little or no previous judicial review of the cause for detention.[44]

In *Rasul v. Bush*, the Court quoted to *INS v. St. Cyr* to say: "'[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.'"[45] Furthermore, in *Reno v. Flores*, Justice O'Connor asserted that immigrant children have a "core" constitutional "interest in freedom from institutional confinement."[46] Even the conservative majority in *Flores* took for granted the capacity for immigrant children to file habeas petitions to enforce the Flores Settlement in their favor.[47]

Thuraissigiam cited to several "core" habeas cases where immigrants were released into the country,[48] and it used a core/non-core distinction to dismiss the writ.[49] *Thuraissigiam* emphasized, however, that it is still the immigrant's choice of whether or not to assert appropriate habeas relief.[50] *Thuraissigiam* did not unsettle *Boumediene*'s statement that the actual *core*

(2000) [hereinafter Freedman, *Milestones*] (explaining why habeas attorneys should not be fooled by "Cheshire cat[s] guarding the jailhouse door," that leave "a lingering grin that survives to disorient today's travelers in the woods of doctrine").

44. *Boumediene*, 553 U.S. at 779–80 (quoting *Schlup*, 513 U.S. at 319; Jones v. Cunningham, 371 U.S. 236, 243 (1963)).

45. Rasul v. Bush, 542 U.S. 466, 474 (2004) (quoting INS v. St. Cyr, 533 U.S. 289, 301 (2001)).

46. Reno v. Flores, 507 U.S. 292, 315–16 (1993) (O'Connor, J., concurring); *id.* at 340, 346 (Stevens, J., dissenting) (maintaining that any incarceration of a child, even under the settlement, was an unconstitutional "deprivation of core constitutional rights").

47. *Id.* at 314. *But see* Exec. Order No. 13,841, 83 Fed. Reg. 29435 (June 20, 2018), *revoked by* Exec. Order No. 14,011, 86 Fed. Reg. 8273 (Feb. 2, 2021).

48. *Thuraissigiam*, 140 S. Ct. at 1973.

49. *Id.* at 1971 (dismissing a non-core request for relief for lack of subject matter jurisdiction); *see* Rumsfeld v. Padilla, 542 U.S. 426, 443 (2004) (dismissing a core request for relief for lack of jurisdiction), *abrogated by Boumediene*, 553 U.S. at 796 (citing Braden v. 30th Jud. Cir. Ct. Ky., 410 U.S. 484, 499 n.15 (1973)) (refusing to dismiss on similar grounds, and rather, providing direction to the government to "move for change of venue"); *cf.* Joshua J. Schroeder, *The Dark Side of Due Process: Part I, A Hard Look at Penumbral Rights and Cost/Benefit Balancing Tests*, 53 ST. MARY'S L.J. 323, 339 (2022) [hereinafter Schroeder, *The Dark*] (explaining how "Justice Holmes put cognitive dissonance to work by focusing on extremes to define what Holmes called the penumbra between them—law versus fact, procedure versus substance, day versus night").

50. *Thuraissigiam*, 140 S. Ct. at 1973.

of habeas is flexibility.[51] However, as the "core" metaphor can be twisted to make a rigid and inflexible dismissal, it may be a risk with no upside to keep using the words "core" or "non-core" in habeas petitions.[52]

II. State that Prudential Barriers do not Legitimately Exist in Habeas Corpus Cases

Thuraissigiam denied subject matter jurisdiction in a similar procedural ruling to *Rumsfeld v. Padilla*.[53] Both *Thuraissigiam* and *Padilla* cited to the core of habeas to note a formality that should be followed when writing habeas petitions.[54] Both cases relied upon prudential bases for denying jurisdiction, such as "serv[ing] the important purpose of preventing forum shopping by habeas petitioners."[55]

Immigrant habeas courts tend to revert to prudential grounds in habeas cases, sometimes dismissing the writ on bases routine in other branches of law.[56] However, as noted by *Boumediene*, prudential dismissal for incorrectly drafted habeas petitions is not necessary or required.[57] Not only was Federal Rule of Civil Procedure 2 supposed to preclude dismissals for such

51. *Boumediene*, 553 U.S. at 779–80, *distinguished by Thuraissigiam*, 140 S. Ct. at 1981; *id.* at 1963 (quoting *Boumediene*, 553 U.S. at 746) (preserving and extending Boumediene's flexible interpretation derived from the time 'when the Constitution was drafted and ratified'").

52. *See* cases cited *supra* note 40.

53. *Thuraissigiam*, 140 S. Ct. at 1971 (dismissing for lack of subject matter jurisdiction for not naming the correct form of relief in the original petition); *Padilla*, 542 U.S. at 443 (dismissing for lack of jurisdiction for not naming the correct custodian in the original petition).

54. *Thuraissigiam*, 140 S. Ct. at 1971 (noting that failure to assert core habeas relief can result in dismissal); *Padilla*, 542 U.S. at 443–44 (noting that after *Braden*, a formal basis for dismissal discussed in the case only applies "to core habeas challenges").

55. *Padilla*, 542 U.S. at 447; *see Thuraissigiam*, 140 S. Ct. at 1982–83 (dismissing a writ that might upset the system "Congress provided by statute" using plenary power doctrine as a sort of nonjusticiable political question rationale); *id.* at 1992 (Thomas, J., concurring) (defending the "efficacy of process prescribed by law").

56. *See, e.g.*, Hernandez v. Sessions, 872 F.3d 976, 988 (9th Cir. 2017) (requiring exhaustion to file habeas corpus); *cf.* Shinn v. Martinez, No. 20–1009, slip op. at 9–10 (2022) (citing federalism concerns as the basis of prudential dismissal under bases like exhaustion doctrine).

57. *Padilla*, 542 U.S. at 443, *abrogated by Boumediene*, 553 U.S. at 796 (citing Braden v. 30th Jud. Cir. Ct. Ky., 410 U.S. 484, 499 n.15 (1973) (stating that the principle *Padilla* applied was non-controlling)) (refusing to dismiss on similar grounds, and rather, providing direction to the government to "move for change of venue").

formalisms generally,[58] but the writ itself is resistant to rigid formalism for two main reasons.[59]

First, centuries of English common law defined the writ as inherently flexible and not held in by rigid forms.[60] Second, the founders purposely included the flexible common law writ into their system of government with a mandate that Congress enact it in such a way that it is never suspended except in cases of invasion or rebellion.[61] Thus, not only the common law, but the positive law must include a non-formalistic open door to the courts to hear habeas writs.[62]

Padilla was abrogated by *Boumediene* presumably for this reason, directing the government to move for a change of venue rather than moving for dismissal.[63] The abrogation was obviously not clear enough to stop *Thuraissigiam* and several lower courts from moving forward on similar grounds.[64] Thus, when faced with judges who may be overly concerned with prudentially preserving judicial resources, restricting the practice of forum shopping, and strictly adhering to habeas petition formalities, it may be worthwhile to remind the court of its prudential "virtually unflagging obligation" to assert jurisdiction.[65]

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58. FED. R. CIV. P. 2 ("There is one form of action—the civil action."); *see* Dioguardi v. Durning, 139 F.2d 774, 775 (2d Cir. 1944) ("here is another instance of judicial haste which in the long run makes waste"); *see also* Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 6 (2010) ("Perhaps the case that best represents the access-minded and merit-oriented ethos at the heart of the original Federal Rules is *Dioguardi v. Durning*."); Joshua J. Schroeder, *Leviathan Goes to Washington: How to Assert the Separation of Powers in Defense of Future Generations*, 15 FLA. A&M U.L. REV. 1, 86, 197–98 (2021) [hereinafter Schroeder, *Leviathan*].

59. *See Boumediene*, 553 U.S. at 779–80 (quoting Schlup v. Delo, 513 U.S. 298, 319 (1995); Jones v. Cunningham, 371 U.S. 236, 243 (1963)).

60. *Id.*; *see* 1 WILLIAM BLACKSTONE, COMMENTARIES *131–33; ERIC M. FREEDMAN, MAKING HABEAS WORK 3 (2018) ("The constitutional importance of the writ of habeas corpus is in its function, not its name."); *see also* DHS v. Thuraissigiam, 140 S. Ct. 1959, 1971–72 (2021) (citing several such cases that arose from English common law).

61. U.S. CONST. art. I, § 9, cl. 2; *see Boumediene*, 553 U.S. at 779–80.

62. Rasul v. Bush, 542 U.S. 466, 481 (2004) (applying "the habeas statute to persons detained at the base" in Guantanamo Bay). *See Ex parte* Milligan, 71 U.S. 2, 64 (1866) (noting the duty of the judiciary to "sit with open doors"); *id.* at 121 (giving what is known as the open court ruling, that "laws and usages of war . . . can never be applied [to suspend habeas corpus] . . . where the courts are open and their process unobstructed"); *see also* Estep v. United States, 327 U.S. 114, 132 (1946) (Murphy, J., concurring) ("As long as courts are open and functioning, judicial review is not expendable.").

63. *See* cases cited *supra* note 57.

64. *Boumediene*, 553 U.S. at 796, *distinguished by Thuraissigiam*, 140 S. Ct. at 1981 ("*Boumediene*, is not about immigration at all").

65. *See* Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976) (asserting that the federal courts have a "virtually unflagging obligation . . . to exercise the jurisdiction given them").

Strictly speaking, prudence cannot properly preclude habeas review.[66] Even staunch legalists who maintain an expansive concept of prudential self-restraint to respect the laws, must also respect the Suspension Clause, which is itself a law.[67] As such, the *Boumediene* Court decided that the U.S. Judiciary's power extends to foreign lands all around the world to vindicate the fundamental human rights of non-citizen aliens, to extend to them release pending legitimate process.[68]

The *Boumediene* Court remarked not once, but numerous times, that "prudential concerns . . . are not relevant here."[69] Specifically, *Boumediene* denied the legitimacy of *Rex v. Cowle*'s feudalism on prudential grounds.[70] *Cowle* was a pre-Revolutionary War decision by Lord Mansfield that blocked English habeas from running to Scotland (and America) based upon a pretended geographic limitation to the English common law and the Rights of Englishmen embodied by the Magna Carta.[71] In fact, John Adams lambasted *Cowle* prior to the American Revolution as an illegitimate, feudal denial of civil rights to any British citizen living (or imprisoned) outside the borders of England, including in America.[72]

It was, therefore, disheartening that in 2021 the American Samoan citizenship case *Fitisemanu v. United States* was reversed on a bare prudential ground similar to *Cowle*.[73] Judge Tymkovich decided in a short concurrence,

66. *Boumediene*, 553 U.S. at 751 ("prudential barriers . . . are not relevant here"); *id.* at 793 ("federalism concerns . . . are not relevant here"); *id.* at 795 ("[habeas petitioners] need not exhaust the review procedures in the Court of Appeals before proceeding with their habeas actions in the District Court"—"Our holding with regard to exhaustion should not be read to imply that a habeas court should intervene the moment an enemy combatant steps foot in a territory where the writ runs. The Executive is entitled to a reasonable period of time to determine a detainee's status before a court entertains that detainee's habeas corpus petition.").

67. *Id.*; *Colo. River Water Conservation Dist.*, 424 U.S. at 817; *see, e.g.,* Moore v. Dempsey, 261 U.S. 86, 92 (1923), *extended by* Wright v. West, 505 U.S. 277, 299–303 (1992) (O'Connor, J., concurring in the judgment) (listing around 36 habeas cases that applied *de novo* review beginning with *Moore v. Dempsey*, which was written by Justice Holmes who was a strict majoritarian legalist).

68. *Boumediene*, 553 U.S. at 751 ("The prudential barriers that may have prevented the English courts from issuing the writ to Scotland and Hanover are not relevant here."), *distinguishing* Rex v. Cowle (1759) 2 Burr. 834, 854–56 (Eng.).

69. *Boumediene*, 553 U.S. at 751, 793–95.

70. *Id.* at 751 (distinguishing *Cowle*, 2 Burr. at 854–56 (Eng.)).

71. *Id. Cowle* was reaffirmed on the brink of the American Revolution in *Campbell v. Hall* (1774) 1 Cowp. 206, 208, 211–12 (Eng.) to deny all civil rights to the American Colonists.

72. Letter from Novanglus to the Inhabitants of the Colony of Massachusetts Bay (Apr. 10, 1775) (citing *Cowle*, 2 Burr. at 835 (Eng.)) (exposing *Cowle* as illegitimate feudal law, according to which the king of England established the union of Scotland, Ireland, and Wales by holding them to the "imperial crown" while not respecting their independent systems of law, and while not annexing them to "the realm" for the purpose of securing their independent rights).

73. Fitisemanu v. United States, 1 F.4th 862, 883 (10th Cir. 2021) (Tymkovich, J., concurring).

"either party's reading of the Citizenship Clause is plausible, so I resolve the tie in favor of the historical practice."[74] Judge Tymkovich appeared to think it would be prudent that a long, historical practice of ignoring the U.S. Constitution in U.S. territories should continue even though the historical practice he extended was premised on *Downes v. Bidwell*, a 1901 decision that expressly stated its rationale was strictly temporary.[75]

Usually, prudence requires the Court to follow the jurisdictional limitations given by Congress, but in our tradition symbolized by *Marbury v. Madison*, wherever a law of Congress conflicts with the U.S. Constitution, the statute must be overruled.[76] The *Marbury* Court thus overruled a part of the Judiciary Act with the iconic statement, "It is emphatically the province and duty of the judicial department to say what the law is."[77] Therefore, whenever a jurisdiction-stripping provision violates the Suspension Clause (or any other part of the U.S. Constitution) the court *must* declare it unconstitutional as *Boumediene* demonstrated (citing to *Marbury*).[78]

The *Boumediene* Court also considered applying the prudential doctrine of exhaustion and stated, "These qualifications no longer pertain here."[79] Despite *Boumediene*'s firm prohibition on prudential barriers like exhaustion, the Ninth Circuit continued developing exhaustion doctrine tests for habeas review in the context of immigration law.[80] A good immigration attorney in habeas court will look for ways to effectively reveal the irony of the Ninth Circuit continuing to apply prudential rules to suspend habeas corpus after *Boumediene*—for prudence would *not* counsel a judge to defy the U.S. Constitution or *stare decisis*.[81]

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74. *Id.*; *cf.* R. v. Secretary of State for Foreign and Commonwealth Affairs, *Ex parte* Bancoult [2008] UKHL 61, ¶¶ 32, 36, 81–84, 87, 125, 146–49 (Eng.), *aff'g*, Campbell v. Hall (1774) 1 Cowp. 206, 208, 211–12 (Eng.) (citing to *Cowle* and denying the rights of the Englishman to any person outside the borders of England, including the colonists in America).

75. *Fitisemanu*, 1 F.4th at 883 (Tymkovich, J., concurring), *extending* Downes v. Bidwell, 182 U.S. 244, 287 (1901) (explaining that Congress would only hold territories as territories "for a time, that ultimately our own theories may be carried out and the blessings of a free government under the Constitution extended to them"). *Cf. U.S. Territories: Last Week Tonight with John Oliver* (HBO broadcast Mar. 8, 2015) (emphasizing the irony of extending *Downes* today, when *Downes* was decided over a century ago and emphasized that its holding would be temporary).

76. *Boumediene*, 553 U.S. at 765 (quoting Marbury v. Madison, 5 U.S. 137, 177 (1803)) (overruling 28 U.S.C. § 2241(e) and stating that to do otherwise would allow "a regime in which Congress and the President, not this Court, say 'what the law is'").

77. *Marbury*, 5 U.S. at 177.

78. *Boumediene*, 553 U.S. at 765 (quoting *Marbury*, 5 U.S. at 177).

79. *Id.* at 794–95.

80. *See, e.g.*, Hernandez v. Sessions, 872 F.3d 976, 988 (9th Cir. 2017); *cf.* Shinn v. Martinez, No. 20–1009, slip op. at 9–10 (2022) (citing federalism concerns as the basis of prudential dismissal under exhaustion doctrine).

81. *Boumediene*, 553 U.S. at 751, 793–95. *See* June Med. Servs. v. Russo, 140 S. Ct. 2103, 2134 (2020) (Roberts, C.J., concurring in judgment); Planned Parenthood of Se. Pa. v. Casey, 505

The Immigration and Nationality Act's ("INA") final order rule cannot apply to writs of habeas corpus, because writs of habeas corpus are not appeals under the law.[82] Any law that requires judges reviewing habeas writs to presume the legitimacy of the government as a mere appellate court unconstitutionally defeats the purpose of habeas and would be a suspension of the writ on its face.[83] The *Boumediene* holding strongly confirmed that habeas corpus cannot be replaced by mere appellate review,

> [A habeas court] must have the authority to admit and consider relevant exculpatory evidence that was not introduced during the earlier proceeding. . . . Here that opportunity is constitutionally required.[84]

Habeas corpus is, thus, *collateral* rather than appellate, meaning that it comes in from outside the law to confirm the legitimacy of government detentions, and its scope is sweeping.[85] It does not presume the legitimacy of any part of the government proceedings it opens review upon—anything less than a healthy suspicion of the government proceedings collaterally reviewed (characterized by a full *de novo* review) is an unconstitutional suspension of the writ.[86]

U.S. 833, 853 (1992). *But see* Whole Woman's Health v. Jackson, 141 S. Ct. 2494, 2495 (2021) (calling *Ex parte Young*, 209 U.S. 123, 163 (1908) into question); *id.* at 2498 (Sotomayor, J., dissenting) (noting that the court did not "enjoin a flagrantly unconstitutional law"); Second Amendment Preservation Act, 2021 Mo. HB 85, § 1.430 (enacted) (challenging the enforceability of federal gun laws).

82. *Boumediene*, 553 U.S. at 751, 786 (noting that prudential limitations need not apply, and that unlike in appeals, exculpatory evidence not presented previously may be reviewed to determine the legality of the detention); *see* Guerrero-Lasprilla v. Barr, 140 S. Ct. 1062, 1070–71 (2020) (discussing the final order rule). *But see* Castro v. USDHS, 835 F.3d 422, 450 (3d Cir. 2016).

83. *See, e.g.,* 8 U.S.C. § 1252(a)(5).

84. *Boumediene*, 553 U.S. at 786. *But see Shinn*, No. 20–1009, slip op. at 9–10.

85. Estep v. United States, 327 U.S. 114, 141 (1946) (Frankfurter, J., concurring) (quoting Frank v. Mangum, 237 U.S. 309, 346 (1915) (Holmes, J., dissenting)) ("Habeas corpus 'comes in from the outside,' after regular proceedings formally defined by law have ended, 'not in subordination to the proceedings, and although every form may have been preserved, opens the inquiry whether they have been more than an empty shell.'").

86. *Boumediene*, 553 U.S. at 771; Cone v. Bell, 556 U.S. 449, 472 (2009) ("the claim is reviewed *de novo*"); Moore v. Dempsey, 261 U.S. 86, 92 (1923) ("We shall not say more concerning the corrective process afforded to the petitioners than that it does not seem to us sufficient to allow a Judge of the United States to escape the duty of examining the facts for himself when, if true as alleged, they make the trial absolutely void."). *Cf.* Wright v. West, 505 U.S. 277, 299–303 (1992) (O'Connor, J., concurring in the judgment) ("To this list of cases cited by Justice Thomas, one could add the following, all of which applied a standard of *de novo* review." Listing around 36 cases given by Justices Thomas and O'Connor that applied *de novo* review beginning with *Moore v. Dempsey*.).

Habeas jurisdiction depends solely upon the fact of detention of a person by or under the color of the United States.[87] It is issued on the custodian according to the jurisdiction of the government over the custodian (not the petitioner), so it is jurisdictionally irrelevant if the government tries to detain an immigrant outside the borders of the United States.[88] Habeas corpus is not necessarily a review of the petitioner's underlying case, but it *must* review the government's legitimate authority to detain or imprison the petitioner *de novo*.[89]

The lack of a final ruling from EOIR or the Board of Immigration Appeals ("BIA") cannot preclude habeas corpus review of the legitimacy of immigrant detention.[90] In recent federal history, the courts have decided that the finality of criminal verdicts in state court is enough to *deny* habeas review.[91] Unless the court *wants* to delegitimize itself as entirely absurd, it should not dismiss habeas review for *lack of exhaustion* in one case and *because of exhaustion* in another.[92]

The *Boumediene* Court's prohibition of prudential barriers to review ultimately comes from *Ex parte Milligan*, a Civil War era ruling.[93] The *Milligan* Court emphasized the narrow scope of the only two valid exceptions

87. Judiciary Act of 1789, 1 Stat. 73, § 14 (enacting broad language so that habeas corpus may be issued to inquire the legitimacy of detaining any person "in custody, under or by colour of the authority of the United States").

88. *Boumediene*, 553 U.S. at 745–46 (quoting *In re* Jackson, 15 Mich. 417, 439–40 (Cooley, J., concurring)) ("'The important fact to be observed in regard to the mode of procedure upon this [habeas] writ is, that it is directed to, and served upon, not the person confined, but his jailer.'"); Braden v. 30th Jud. Cir. Ct. of Ky., 410 U.S. 484, 395 (1973) ("the language of § 2241(a) requires nothing more than the court issuing the writ have jurisdiction over the custodian"), *overruling* Ahrens v. Clark, 335 U.S. 188 (1948) (using geography to deny habeas corpus to German immigrants disappeared onto Ellis Island); *Ex parte* Endo, 323 U.S. 283, 304–07 (1944) (stating that habeas corpus jurisdiction is served and "made effective, if a respondent who has custody of the prisoner is within reach of the court's process, even though the prisoner has been removed from the district since the suit was begun").

89. *See* United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 21–23 (1955); *Moore*, 261 U.S. at 92 (requiring *de novo* review).

90. *See Boumediene*, 553 U.S. at 793–95 (prohibiting exhaustion doctrine in the habeas context). *Cf.* Dimitri D. Portnoi, *Resorting to Extraordinary Writs: How the All Writs Act Rises to Fill the Gaps in the Rights of Enemy Combatants*, 83 N.Y.U. L. REV. 293, 294–95 (2008).

91. *See, e.g.*, Davis v. Ayala, 576 U.S. 257, 267 (2015); Lockyer v. Andrade, 538 U.S. 63, 75 (2003); McCleskey v. Zant, 499 U.S. 467, 478 (1991); Stone v. Powell, 428 U.S. 465, 475–76 n.7, 491 n.31 (1976).

92. *Compare Stone*, 428 U.S. at 475–76 n.7, 491 n.31 (citing Bator, *supra* note 28, at 473, and n.75) (emphasizing "the necessity of finality in criminal trials" to deny federal habeas review of state court convictions), *and Castro*, 835 F.3d, at 450 (emphasizing the finality of EOIR for a certain class of immigrants through plenary power doctrine), *with* Hernandez v. Sessions, 872 F.3d 976, 988 (9th Cir. 2017) (requiring exhaustion in EOIR to file habeas corpus); *but see* Shinn v. Martinez, No. 20–1009, slip op. at 9–10 (2022) (seamlessly emphasizing the court's purported interests in finality and exhaustion as if they were not a complete and total contradiction in terms).

93. *Boumediene*, 553 U.S. at 751, 793–95 (citing *Ex parte* Milligan, 71 U.S. 2, 127 (1866)).

to the Suspension Clause expressly included within the Clause itself, rebellions and invasions.[94] The *Milligan* Court found, and the *Boumediene* Court reiterated, that standing for habeas review *must* be granted unless an actual rebellion or invasion physically overwhelms the court.[95]

Habeas standing can only be revoked by the court if there is a rebellion or invasion involving *actual* violence that temporarily shutters the *actual* doors of the court.[96] The Legislative and Executive branches are unable to legitimately suspend federal standing to hear writs of habeas corpus when the courts remain unimpeded by actual violence created by rebels or foreign enemy soldiers.[97] The Suspension Clause stands for the idea that no amount of jurisdiction-stripping legislation can stop the courts from properly hearing the Great Writ on behalf of immigrants—even after *Thuraissigiam*.[98]

Therefore, the U.S. Supreme Court's decision in *Thuraissigiam* was a breathtaking abuse of the Court's doctrines of judicial prudence.[99] *Thuraissigiam*'s dismissal was primarily premised on the grounds of an erroneously drafted habeas petition.[100] Thus, the Court may have prudently implied a properly drafted petition under the Civil Rules as in *Dioguardi v. Durning*, where an Italian immigrant's nearly illegible complaint sufficed to maintain federal jurisdiction.[101]

Thuraissigiam was secondarily premised upon the political branches' plenary power.[102] *Thuraissigiam* named plenary powers for prudential support in the way the Court sometimes cites to non-justiciable political question

94. *Milligan*, 71 U.S. at 127 ("The necessity must be actual and present; the invasion real, such as effectually closes the courts and deposes the civil administration.").

95. *Boumediene*, 553 U.S. at 751, 793–95 (citing *Milligan*, 71 U.S. at 127).

96. *Id. Cf. Milligan*, 71 U.S. at 121.

97. *Boumediene*, 553 U.S. at 751, 793–95 (citing *Milligan*, 71 U.S. at 127).

98. U.S. CONST. art. I, § 9, cl. 2. *See* DHS. v. Thuraissigiam, 140 S. Ct. 1959, 1963, 1968 (2020) (noting that the reason habeas was denied was not a narrow interpretation of *Boumediene*, but the erroneous way the petition was written, meaning that if it was written correctly the case may have proceeded); *id.* at 1993, 2015 (Sotomayor, J., dissenting) (noting that the Court's decision not to hear habeas corpus writs for an entire class of immigrants in this case was "a self-imposed injury on the Judiciary," implying that it was not imposed or imposable on the court by congressional law). *See* Nasrallah v. Barr, 140 S. Ct. 1683, 1690 (2020); Al Otro Lado v. Mayorkas, No. 17-cv-02366, 2021 U.S. Dist. LEXIS 167128, at *62–63, *72 (S.D. Cal. 2021). *Cf.* Worcester v. Georgia, 31 U.S. 515, 541 (1832) (quoting Judiciary Act of 1789, 1 Stat. 73, § 25) (setting a man free who was put in jail for opposing Georgia's theft of the Cherokee Nation's land), *extended by* McGirt v. Oklahoma, 140 S. Ct. 2452, 2477 (2020). *But see* Thoung v. United States, 913 F.3d 999, 1003–04 (10th Cir. 2019) (citing The Real ID Act, 119 Stat. 302–323, § 106).

99. *Thuraissigiam*, 140 S. Ct. at 1963, 1968; *id.* at 1993, 2015 (Sotomayor, J., dissenting).

100. *Id.* at 1968 ("His petition made no mention of release from custody.").

101. Dioguardi v. Durning, 139 F.2d 774, 775 (2d Cir. 1944).

102. *Thuraissigiam*, 140 S. Ct. at 1982–83.

doctrine.[103] The general prudential nature of plenary power doctrine may be demonstrated by comparing *Miller v. Albright* and *District of Columbia v. Heller*, where Justice Scalia first espoused and then rejected "the plenary power of Congress."[104]

The divergence of *Miller* and *Heller*, especially highlighted by Scalia's opinions, suggests that the application of plenary power ideology is a matter of each judge's conscience, i.e., a doctrine of judicial prudence.[105] It may, therefore, be helpful to note that *Thuraissigiam*'s pretext of plenary powers was imprudent for two reasons: (1) plenary powers were used as a pretext to answer a question not answered by the courts below;[106] and (2) the Court did not name a law from the political branches that suspended the writ, nor did it consider whether there was an invasion or rebellion to justify a suspension, even though this was the central issue briefed to the court.[107]

For where an area of the United States is actually attacked, as happened in Hawaii after Pearl Harbor was bombed, a temporary suspension may lie—but only while actual violence still exists.[108] Thus, wherever a civil court remains open, even amidst the current COVID-19 crisis or a president's threats to institute martial law in response to the untimely death of George Floyd and other police murders around the country, <u>*no*</u> suspension of the writ

103. *Id.* at 1981 n.26 (citing Fong Yue Ting v. United States, 149 U.S. 698, 713 (1893)); *Fong Yue Ting*, 149 U.S. at 708 (following "the rules that prudence dictates" to assert plenary power doctrine) (internal quotation marks omitted); *see* Cornelia T. Pillard & T. Alexander Aleinikoff, *Skeptical Scrutiny Of Plenary Power: Judicial and Executive Branch Decision Making in Miller v. Albright*, 1 SUP. CT. REV. 1, 12, 34–35 (1998).

104. *Compare* Miller v. Albright, 523 U.S. 420, 441 (1998) (Stevens, J.) (plurality opinion), *id.* at 445 (O'Connor, J., concurring in the judgment) (naming prudential reasons to dismiss the for lack of jurisdiction), *and id.* at 457 (Scalia, J., concurring in the judgment) (naming "the plenary power of Congress" as a further reason to defer to Congress rather than draw its laws under constitutional scrutiny), *with* District of Columbia v. Heller, 554 U.S. 570, 600 (2008) (Scalia, J.) (denying Congress' "plenary authority to exclude" gun rights), *id.* at 619 (quoting to "'prudent self-defense'" as reason to overrule a federal law under the U.S. Constitution), *and id.* at 669–70 (Stevens, J., dissenting) (citing Houston v. Moore, 18 U.S. 1, 24 (1820) (Story, J., dissenting)) (naming Congress' "plenary" power over state militias).

105. *See* cases cited *supra* note 104.

106. *Compare Thuraissigiam*, 140 S. Ct. at 1983 (purporting to decide the extent of the Due Process Clause in immigration suits), *with* Thuraissigiam v. USDHS, 917 F.3d 1097, 1111–12 (9th Cir. 2019) (distinguishing and not addressing due process claims), *and id.* at 1119 ("we do not profess to decide in this opinion what right or rights Thuraissigiam may vindicate via use of the writ").

107. *See Thuraissigiam*, 140 S. Ct. at 1972, 1982–83 ("the legality of his detention is not in question," because petitioner did not request release in his petition). *Cf.* Pillard & Aleinikoff, *supra* note 103, at 34–35.

108. *See* Duncan v. Kahanamoku, 327 U.S. 304, 324, 324–35 (1946) (Murphy, J., concurring) (citing *Ex parte* Milligan, 71 U.S. 2, 127 (1866)).

is valid.[109] Habeas corpus standing ***must*** remain, including for the purpose of reviewing whether detaining people in prisons is constitutional during health crises and over the previous president's threats of martial law.[110]

III. Assert the Habeas Corpus Standard of *De Novo* Review of Law and Fact

Despite the reasons given in Part I above that EOIR is not a civil court, federal judges may treat EOIR, or even the expedited deportation process of ICE and CBP, as a civil court to disregard and dismiss immigrant habeas petitions.[111] For example, in *Thuraissigiam* the U.S. Supreme Court decided that the process given in a credible fear interview at a stage prior to even entering EOIR is enough process to satisfy the Due Process Clause.[112] The Supreme Court reversed the Ninth Circuit's use of the *Castro* Court's so-called two-step inquiry, and stated that "*Boumediene* [was] taken entirely out of context."[113]

As disagreeable as the decision in *Thuraissigiam* may be, its reversal of the Ninth Circuit application of the *Castro* two-step inquiry offers a useful reset for *Boumediene*-based review.[114] The *Thuraissigiam* Court distinguished *Boumediene*, requiring cases like *Castro* to dismiss prior to rendering an interpretation on *Boumediene*, as *Castro* attempted.[115] This presents

109. Boumediene v. Bush, 553 U.S. 723,751, 793–95 (2008) (citing *Milligan*, 71 U.S. at 127); *Duncan*, 327 U.S. at 324 (quoting *Milligan*, 71 U.S. at 124–25); *id.* at 324–35 (Murphy, J., concurring) (citing *Milligan*, 71 U.S. at 127). *Cf.* Jorge Loweree et al., *The Impact of COVID-19 on Noncitizens and Across the U.S. Immigration System*, AM. IMMIGR. COUNCIL (May 27, 2020), https://www.americanimmigrationcouncil.org/research/impact-covid-19-us-immigration-system.

110. *Boumediene*, 553 U.S. at 751, 793–95 (citing *Milligan*, 71 U.S. at 127); *Duncan*, 327 U.S. at 324 (quoting *Milligan*, 71 U.S. at 124–25); *id.* at 324–35 (Murphy, J., concurring) (citing *Milligan*, 71 U.S. at 127).

111. *Thuraissigiam*, 140 S. Ct. at 1964 (treating DHS officers in ICE, CBP, and USCIS that conduct credible fear interviews as a civil court, by holding that this is satisfactory "due" process).

112. *Id.*

113. *Id.* at 1975–83 (distinguishing the plenary power cases of the eugenics era and *Boumediene*); *id.* at 2013 (Sotomayor, J., dissenting) (noting that the Court's ruling presumably "applies to—and only to—individuals found within 25 feet of the border who have entered within the past 24 hours of their apprehension"). *Compare Thuraissigiam*, 917 F.3d, at 1112, 1115 (citing Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 212–13 (1953)), *with* Castro v. USDHS, 835 F.3d 422, 438–43 (3d Cir. 2016) (citing *Mezei*, 345 U.S. at 212, 214). *But see* INS v. St. Cyr, 533 U.S. 289, 299–300 (2001).

114. *Thuraissigiam*, 917 F.3d at 1106–08, 1112 (citing *Boumediene*, 553 U.S. at 739) (applying *Castro*'s "two-step approach," stating "in accordance with *Boumediene*, we evaluate Thuraissigiam's Suspension Clause challenge in two steps"), *rev'd*, 140 S. Ct. at 1981 (distinguishing *Boumediene*). *See, e.g.*, Al Otro Lado v. Mayorkas, No. 17-cv-02366, 2021 U.S. Dist. LEXIS 167128, at *58 (S.D. Cal. 2021).

115. *Thuraissigiam*, 140 S. Ct. at 1981–82 (dismissing for deficient petition rather than interpreting *Boumediene*).

an opportunity to apply the holdings of *Boumediene* anew, without regard to *Castro*'s two-step inquiry.[116]

The main distinction between *Castro* and *Boumediene* was that *Boumediene* required habeas courts to focus on the status of the custodian to establish jurisdiction, instead of focusing on the status of the prisoner.[117] As emphasized in Part I above, several cases applied *Boumediene*'s jurisdictional focus on the custodian rather than the prisoner to find that in cases of executive detention habeas corpus review is at its strongest.[118] Furthermore, the standard of this review is *de novo*, meaning "fresh review" and is the strongest form of review available in federal court.[119]

In other words, habeas common law requires federal judges ***not*** to trust the reasonableness of lower courts or government agencies that they are called upon to collaterally review.[120] This is so because trusting these tribunals, as the U.S. Supreme Court recently did in *Thuraissigiam*, makes a farce out of habeas corpus.[121] This behavior, justified by plenary power in the immigration context, creates an opportunity to "elevate[] 'might makes

116. *See* Schroeder, *Conservative*, *supra* note 13, at 47–49 (presenting *Boumediene*'s six key holdings).

117. *Compare Boumediene*, 553 U.S. at 745–46 (applying the ordinary custodian rule for jurisdiction), *with Castro*, 835 F.3d at 446 (*not* applying the ordinary custodian rule, and rather focusing on petitioner's immigration status to decide jurisdiction).

118. *Boumediene*, 553 U.S. at 783; Hensley v. Mun. Ct., San Jose-Milpitas Jud. Dist. Santa Clara Cnty., 411 U.S. 345, 345, 351 (1973); Jones v. Cunningham, 371 U.S. 236, 238–39, 243–44 (1963), *extending Ex parte* Endo, 323 U.S. 283, 304–07 (1944) (speaking of the end of habeas corpus: "That end may be served, and the decree of the court made effective, if a respondent who has custody of the prisoner is within reach of the court's process, even though the prisoner has been removed from the district since the suit was begun."); Simon, *supra* note 10, at 482; *see supra* note 88 and accompanying text; *cf.* Rumsfeld v. Padilla, 542 U.S. 426, 434–35 (2004). *But see Castro*, 835 F.3d at 444–45.

119. *What is DE NOVO?*, THE LAW DICTIONARY, https://thelawdictionary.org/de-novo/ (last visited Aug. 25, 2021); *see* Cone v. Bell, 556 U.S. 449, 472 (2009) (not applying the "deferential standard that applies" under statutory language, but rather "the claim is reviewed *de novo*"); *see also* Wright v. West, 505 U.S. 277, 299–303 (1992) (O'Connor, J., concurring in the judgment).

120. *Boumediene*, 553 U.S. at 780–81, 786; *supra* note 85. *See, e.g.*, *Cone*, 556 U.S. at 472 (habeas corpus "is reviewed *de novo*"). *Cf.* Nasrallah v. Barr, 140 S. Ct. 1683, 1690 (2020).

121. *supra* note 86; DHS v. Thuraissigiam, 140 S. Ct. 1959, 2015 (2021) (Sotomayor, J., dissenting) ("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."). *See, e.g.*, Thoung v. United States, 913 F.3d 999, 1003–04 (10th Cir. 2019). *Cf.* Fay v. Noia, 372 U.S. 391, 404–05 (1963) (quoting Bushell's Case (1670) 124 Eng. Rep. 1006 (Eng.)); Strickland v. Washington, 466 U.S. 668, 696 (1984) (citing Trapnell v. United States, 725 F2d 149, 153 (2d Cir. 1983)) (making a "farce and mockery" out of a court case is a reversible structural error).

right' to the status of judicial doctrine,"[122] while falsely maintaining that immigrants still potentially have access to habeas review.[123]

It is not hyperbole to acknowledge that *de novo* review traditionally marks out the line between feudalism and common law.[124] The conflict between the common law writ and its old adversary feudalism loomed large, as Prince Andrew boldly asked a U.S. district court to withhold *de novo* review of Virginia Giuffre's federal tort claims.[125] The impious prince implicitly asserted the feudal case *Rex v. Cowle* to suggest that national borders must limit Giuffre's common law rights in America,[126] which is the same qualitative claim King George III made regarding American rights before he lost England's oldest crown colonies in the revolution of 1776.[127]

122. Natsu Taylor Saito, *The Plenary Power Doctrine: Subverting Human Rights in the Name of Sovereignty*, 51 CATH. U. L. REV. 1115, 1135–36, 1175 (2002); *cf.* Joshua J. Schroeder, *The Body Snatchers: How the Writ of Habeas Corpus was Taken from the People of the United States*, 35 QUINNIPIAC L. REV. 1, 18–26 (2016) [hereinafter Schroeder, *The Body*] (noting the development of feudal law maxim "the King can do no wrong" in America and its effect on habeas cases).

123. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 575 (2004) (Scalia, J., dissenting) (calling the plurality opinion a "sham," which is a synonym for farce); *see also* Dahlia Lithwick, *Nevermind: Hamdi Wasn't So Bad after All*, SLATE (Sept. 23, 2004, 5:37 PM), https://slate.com/news-and-politics/2004/09/hamdi-wasn-t-so-bad-after-all.html [hereinafter Lithwick, *Nevermind*] (explaining how *Hamdi* appeared to be one thing, but then became "precisely the opposite").

124. *Cone*, 556 U.S. at 472 (habeas corpus "is reviewed *de novo*"); *see* Chambers v. Florida, 309 U.S. 227, 237 n.10 (1940) (citing the proper authorities from English common law); United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 16–17 n.9 (1955) (citing THE DECLARATION OF INDEPENDENCE para. 14 (U.S. 1776)). *Compare Boumediene*, 553 U.S. at 748 (asserting *de novo* review rather than the English feudal case *Rex v. Cowle*, which would have required deference), *with* R. v. Secretary of State for Foreign and Commonwealth Affairs, *Ex parte* Bancoult [2008] UKHL 61, ¶¶ 32, 36, 81–84, 87, 125, 146–49 (Eng.) (affirming Campbell v. Hall (1774) 1 Cowp. 206, 208, 211–12 (Eng.)).

125. Memorandum of Law in Support of Defendant's Motion to Dismiss Pursuant to FRCP 12(b)(6) or, in the alternative, for a More Definite Statement Pursuant to FRCP 12(e) at 20, Giuffre v. Prince Andrew, No. 1:21-cv-6702 (2021) (Doc. 34) ("Giuffre's salacious allegations regarding abuse that purportedly occurred outside the State of New York and/or outside the United States altogether are wholly irrelevant and may not be considered by this Court"); Giuffre v. Andrew, No. 21-cv-6702, 2022 U.S. Dist. LEXIS 6659, at *50 (S.D.N.Y. 2022) (denying Prince Andrew's motion to dismiss "in all respects").

126. *See* sources cited *supra* note 125; Letter from Novanglus to the Inhabitants of the Colony of Massachusetts Bay (Apr. 10, 1775) (citing Rex v. Cowle (1759) 2 Burr. 834, 835 (Eng.)) (explaining that limiting rights at national borders as was done in *Cowle* is an application of feudalism inappropriate for American legal practice); *cf.* Johnson v. Eisentrager, 339 U.S. 763, 769 (1950); Calvin's Case [1608] 7 Co. Rep. 1a, 18a, 27a (Eng.) (the idea that a natural born citizen could disclaim their right to protection in the courts of their own nation just by residing in a foreign country should be considered as Lord Coke decided "less than a Dream of a Shadow, or a Shadow of a Dream"); Lemmon v. New York, 20 N.Y. 562, 605–06 (1860) (citing Somerset v. Stewart [1772] 98 Eng. Rep. 499 (Eng.)). *But see* Schroeder, *Conservative*, *supra* note 13, at 67 (citing USAID v. Alliance for Open Society International, Inc., 140 S. Ct. 2082, 2086–87 (2020)).

127. Schroeder, *Conservative*, *supra* note 13, at 69–70 n.80; United States v. Wong Kim Ark, 169 U.S. 649, 654 (1898) (citing U.S. CONST. amend. XIV, § 1, cl. 1) (declaring jurisdiction over natural born citizens); *id.* at 658–59 (citing Calvin's Case [1608] 7 Co. Rep. 1a (Eng.)); JAMES

Rather than securing the rights of all immigrants, including American expatriates like Giuffre, through criminal extradition of their oppressors under the compact of 1776,[128] President Biden is focused on tamping down on the immigration of innocent asylum seekers.[129] So far, in support of his agenda, President Biden: (1) re-operationalized Trump's Migrant Protection

OTIS, COLLECTED POLITICAL WRITINGS OF JAMES OTIS 16 (Richard Samuelson ed., 2015) (quoting Jeremiah Dummer, *A Defence of New-England Charters* 23 [1765] ("[T]o complete the oppression, when they [the Americans] upon their trial claimed the privileges of Englishmen, they were scoffingly told, *those things would not follow them to the ends of the earth*. Unnatural insult; must the brave adventurer who with the hazard of his life and fortune, seeks out new climates to enrich his mother country be denied those common rights, which his countrymen enjoy at home in ease and indolence? . . . Monstrous absurdity! Horrid inverted order!")); *see, e.g.*, Murray v. The Charming Betsey, 6 U.S. 64, 120 (1804) ("The American citizen who goes into a foreign country . . . is yet . . . entitled to the protection of our government, and if . . . he should be oppressed unjustly, he would have a right to claim that protection, and the interposition of the American government in his favor would be considered a justifiable interposition.").

128. Lee Brown, *Prince Andrew Faces 'Disaster' No matter How He Responds to Sex Accuser's Suit, Experts Say*, N.Y. POST (Aug. 10, 2021, 4:28 PM), https://nypost.com/2021/08/10/prince-andrew-faces-disaster-no-matter-how-he-responds-to-sex-accusers-lawsuit/ (explaining that "Prince Andrew cannot be extradited to answer sex accuser Virginia Roberts Giuffre's damning lawsuit"); Schroeder, *Conservative*, *supra* note 13, at 58 n.36, 63 n.51 (addressing extradition law as the earliest version of immigration law in America). *Cf. Ex parte* Holmes, 12 Vt. 631, 641–42 (1840), *extending* Holmes v. Jennison, 39 U.S. 540, 561 (1840) (Opinion of Taney, C.J.).

129. *See, e.g.*, Philip Marcelo & Gerald Hebert, *Immigrant Detentions Soar Despite Biden's Campaign Promises*, AP NEWS (Aug. 5, 2021), https://apnews.com/article/joe-biden-health-immigration-coronavirus-pandemic-4d7427ff67d586a77487b7efec58e74d; Uriel J. García, *The Number of Undocumented Immigrants in Detention Centers has Increased by More than 50% Since Biden Took Office*, TEX. TRIBUNE (Dec. 2, 2021, 5:00 AM), https://www.texastribune.org/2021/12/02/joe-biden-ice-immigration-detention/.

Protocols ("MPP"),[130] (2) extended Trump's Title 42 immigrant expulsions,[131] (3) rejected making appropriate settlements with migrant children

130. Texas v. Biden, 554 F. Supp. 3d 818, 857–58 (N.D. Tex. 2021), *application for stay denied*, 142 S. Ct. 926 (2021) (citing DHS v. Regents of the Univ. of Cal., 140 S Ct. 1891 (2020)); Press Release, *RAICES Condemns Biden Administration's Plan to Re-Operationalize MPP*, RAICES (Sept. 16, 2021), https://www.raicestexas.org/2021/09/16/raices-condemns-biden-admin-plan-mpp/; Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring) (emphasizing that a president has the power to choose his own policies even if they exist in "a zone of twilight" where "the President acts in absence of either a congressional grant or denial of authority," or even when "his power is at its lowest ebb" where "the President takes measures incompatible with the expressed or implied will of Congress"); *id.* at 614 (emphasizing judicial restraint by citing to the Jay Court's rejection of President Washington's request for an advisory statement that allowed Washington to maintain his Proclamation of Neutrality despite a heated political debate led by Hamilton for and Madison against regarding its legality); *see* Biden v. Texas, No. 21–954, slip op. at 5 (2022) (noting the U.S. Supreme Court's initial failure to stay the Fifth Circuit's injunction despite the law's extreme lack of clarity regarding its apparent support for the MPP, and the law's apparent conflicts with the MPP raised by the Ninth Circuit in *Innovation Law Lab v. Nielsen*); *id.* at 25 (allowing Biden to issue a rescission of the MPP, but only after Biden extended Title 42 and other complex administrative rules as alternate bases to force asylum seekers to stay in Mexico); *id.* at 3 n.2 (Alito, J., dissenting) (noting that the MPP was initially enjoined by the Ninth Circuit as unlawful, but the U.S. Supreme Court stayed that injunction, allowing the MPP to continue during the Trump years). *Cf.* William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J. L. & LIBERTY 1, 6–7 (2015) (discussing the moment the legal community became broadly aware of the shadow docket and coining the term "shadow docket"); Joshua J. Schroeder, *America's Written Constitution: Remembering the Judicial Duty to Say What the Law Is*, 43 CAP. U. L. REV. 833, 882–84 n.295 (2015) [hereinafter Schroeder, *America's*] (also responding to the *Wheaton College* injunction as an example of a misuse of equity, because the shadow docket is merely what the equity docket is called when equity is being misused, like the new "Chancellor's foot").

131. Andrea Castillo, *Appellate Court Allows Biden Administration to Keep Expelling Families Under Health Law for Now*, L.A. TIMES (Sept. 30, 2021), https://www.latimes.com/politics/story/2021-09-30/appellate-court-oks-biden-administration-to-keep-expelling-families-under-health-law; Huisha-Huisha v. Mayorkas, No. 21-100, 2021 U.S. Dist. LEXIS 175980, at *60–62 (D.D.C. 2021) (granting preliminary injunction), *stay granted* slip op. No. 21-5200, at 1 (D.C. Cir. Sept. 30, 2021) (granting a stay at the request of the Biden administration). When Biden attempted to phase out Title 42 with more nuanced rules that would also likely allow for DHS to keep people out of the country for similar reasons as Title 42, a federal court in Louisiana issued a nationwide temporary restraining order to keep the Trump Title 42 order in place while it decides whether to issue a preliminary injunction. Arizona v. CDC, No. 6:22-cv-00885, 2022 U.S. Dist. LEXIS 80434, at *23–26 (W.D. La. 2022).

separated by the Trump administration,[132] (4) failed to reform ICE's dangerous and inhumane flight policies,[133] (5) continued Trump's black site immigration courts,[134] and (6) adopted rules to allow DHS asylum officers to fully adjudicate asylum claims outside of EOIR.[135] The last of these developments may subject asylum seekers to a process every bit as unjust and inquisitorial as a royal Star Chamber to administer "deportation[s]—'the equivalent of banishment or exile.'"[136]

In a time when immigration enforcement was not the biggest controversy facing habeas corpus review, the Warren Court applied the ordinary *de novo* standard of review in *Fay v. Noia* to review state criminal incarceration.[137] After a conservative majority overruled *Fay* in piecemeal fashion,[138] the *de novo* standard was applied again in *Boumediene*,[139] and the apparent controversy over the proper habeas standard was expressly settled, again, in favor of *de novo* review in *Cone v. Bell*.[140] Nevertheless, the movement to overrule *Fay* by inventing alternative deferential, judge-made standards of

132. Zolan Kanno-Youngs, *Biden Rejects $450,000 Payments for Separated Migrants*, N.Y. TIMES (Nov. 3, 2021), https://www.nytimes.com/2021/11/03/us/politics/biden-rejects-payments-migrants.html.

133. Angelika Albaladejo, *A Drunk Mechanic, Shackled Immigrants, a Crash Landing: the Dangers of ICE Flights*, CAPITAL & MAIN (Nov. 4, 2021), https://capitalandmain.com/a-drunk-mechanic-shackled-immigrants-a-crash-landing-the-dangers-of-ice-flights, *featured on* Rose Aguilar, *Media Roundtable: The History of Dangerous Incidents on US Chartered Immigration Detention Flights*, KALW: YOUR CALL (Nov. 18, 2021, 11:27 PM), https://www.kalw.org/show/your-call/2021-11-18/media-roundtable-the-history-of-dangerous-incidents-on.

134. Arvind Dilawar, *The Trump Administration's Cruelty Haunts Our Virtual Immigration Courts*, IN THESE TIMES (Feb. 1, 2021), https://inthesetimes.com/article/virtual-courts-immigration-asylum-seekers-immigration-court; *see* Andrew Cohen, *Biden's New Immigration Judges Are More of the Same*, BRENNAN CTR. FOR JUST. (May 10, 2021), https://www.brennancenter.org/our-work/analysis-opinion/bidens-new-immigration-judges-are-more-same.

135. Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers, 87 Fed. Reg. 18078 (effective May 31, 2022).

136. *Id.*; Padilla v. Kentucky, 559 U.S. 356, 373 (2010) (quoting Delgadillo v. Carmichael, 332 U.S. 388, 390–91 (1947)). *See* Anker, *supra* note 20, 495–96 (noting the inquisitorial style of EOIR); Chambers v. Florida, 309 U.S. 227, 237 n.10 (1940) (noting that protection from an inquisitorial style Star Chamber was central to the purposes of the writ of habeas corpus embodied by the Suspension Clause). *Cf.* Nicole Narea, *Biden's Immigration Policy Isn't Trump's—But It's Still a Disappointment*, VOX (Aug. 4, 2021, 12:10 PM), https://www.vox.com/policy-and-politics/2021/8/4/22605595/biden-immigration-border-title-42-deportation-mexico.

137. Fay v. Noia, 372 U.S. 391, 404 (1963) (quoting Bushell's Case [1670] 124 ER 1006 (Eng.)) (opening *de novo* review of state criminal incarceration cases); *id.* at 423 (citing Frank v. Mangum, 237 U.S. 309, 348 (1915) (Holmes, J., dissenting)); *id.* at 427.

138. Coleman v. Thompson, 501 U.S. 722, 750 (1991); Wright v. West, 505 U.S. 277, 303 (1994) (O'Connor, J., concurring in the judgment).

139. Boumediene v. Bush, 553 U.S. 723, 785 (2008) (quoting Frank v. Mangum, 237 U.S. at 348 (Holmes, J., dissenting)).

140. Cone v. Bell, 556 U.S. 449, 472 (2009) ("Instead, the claim is reviewed *de novo*.").

review, left a trail of federalism jurisprudence through the last half of the Twentieth Century that applied something other than *de novo* review to federal habeas cases involving state criminal trials.[141]

Most attempts to judicially rejigger the ordinary *de novo* standard occurred prior to the first major jurisdiction-stripping enactment for immigrants since the eugenics era,[142] which was the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"),[143] a sister statute of the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA").[144] Not only is federalism irrelevant when considering whether to hear habeas writs to review federal executive detentions of foreign nationals,[145] but it is worthwhile to remember that *Crowell v. Benson*'s invocation of *de novo* review, which became the foundation of *all* administrative law in the United States as we know it,[146] was inspired by immigrant habeas suits that are now over a century old.[147] Now that immigration enforcement took center stage in the 2020 habeas court, attorneys should cite to *Crowell*'s strong invocation of *de novo* habeas corpus review of law and fact that was originally drawn by *Crowell* from *Ng Fung Ho* and *Liu Hop Fong* to resist deportation.[148]

141. *See., e.g.*, Shinn v. Martinez, No. 20–1009, slip op. at 9–10 (2022) (attempting to bridge this jurisprudence in the context of an AEDPA proceeding); Jackson v. Virginia, 443 U.S. 307, 327 (1979) (Stevens, J., concurring); Brecht v. Abrahamson, 507 U.S. 619, 643 (1993) (Stevens, J., concurring). *Cf.* Pennsylvania v. Union Gas Co., 491 U.S. 1, 27–28 (1989) (Stevens, J., concurring).

142. INS v. St. Cyr, 533 U.S. 289, 296–98 (2001) (noting that due to the law as it existed prior to IIRIRA, "in the period between 1989 and 1995 alone, § 212(c) relief was granted to over 10,000 aliens"). *See, e.g.*, Reno v. Flores, 507 U.S. 292, 314 (1993).

143. IIRIRA, 110 Stat. 3009.

144. AEDPA, 110 Stat. 1214.

145. *See* Boumediene v. Bush, 553 U.S. 723, 793 (2008) ("federalism concerns . . . are not relevant here").

146. *See* Pfander, *supra* note 36, at 659–62, n.62 (noting "the significance of *Crowell* to the modern administrative state" consisted in "the widespread reliance on *Crowell* in crafting rules to govern the judicial review of agency action"). *Cf.* Stern v. Marshall, 564 U.S. 462, 506 (2011) (Breyer, J., dissenting).

147. Crowell v. Benson, 285 U.S. 22, 60–61 (1932) (citing Ng Fung Ho v. White, 259 U.S. 276, 284–85 (1922) (citing Liu Hop Fong v. United States, 209 U.S. 453, 461 (1908) ("the law contemplates that he shall be given the right of a hearing *de novo* before the district judge before he is ordered to be deported"))). *Cf.* Lumen N. Mulligan, *Did the Madisonian Compromise Survive Detention at Guatánamo?*, 85 N.Y.U. L. Rev. 535, 580–82 n.277 (2010); Pfander, *supra* note 36, at 659–62, n.62.

148. *Crowell*, 285 U.S. at 60–61 (citing *Ng Fung Ho*, 259 U.S. at 283–84 ("[T]he proceeding for deportation is judicial in its nature. . . . [O]n appeal to the District Court additional evidence may be introduced and the trial is *de novo*. . . . The situation bears some resemblance to [military service cases.] . . . It is well settled that, in such a case, a writ of habeas corpus will issue to determine the status.") (citing *Liu Hop Fong*, 209 U.S. at 461 ("In our view, giving the Chinaman an appeal, the law contemplates that he shall be given the right of a hearing *de novo* before the district judge before he is ordered to be deported.")))) ("We are of the opinion that the District Court did not err in permitting a trial *de novo* on the issue of employment.").

The *Crowell* Court proceeded to require Article III *de novo* review wherever "fundamental rights depend" in the style of a habeas writ: "When proceedings are taken against a person under the military law, and enlistment is denied, the issue has been tried and determined *de novo* upon habeas corpus," and therefore, "the District Court did not err in permitting a trial *de novo* on the issue of employment."[149] This holding should be strongly cited by immigration attorneys to refute any attempt by the government to use *Chevron*,[150] *Brand X*,[151] or *Auer*[152] to ask the Court to dismiss habeas corpus without reviewing the facts, because doing so would amount to "the untenable assumption that the constitutional courts may be deprived in all cases of the determination of facts upon evidence even though a constitutional right may be involved."[153]

This liberal *de novo* review of fact and law, as it related to administrative adjudication, was required by *Crowell* as a caveat to the legitimacy of *all* administrative adjudications thereafter.[154] Without it, *Crowell* may require the delegitimization of the entire administrative state.[155] For *Crowell* implied a right of final *de novo* review into all congressional enabling acts in order to avoid litigating difficult, politically controversial questions of constitutionality.[156]

Unfortunately, the *Crowell* decision was recently undermined in the immigration context by *Jennings v. Rodriguez*.[157] The *Jennings* Court cited to *Crowell's* invocation of constitutional avoidance doctrine, but then failed to

149. *Crowell*, 285 U.S. at 58. *Cf.* Moore v. Dempsey, 261 U.S. 86, 92 (1923).

150. Chevron U.S.A., Inc., NRDC, 467 U.S. 837, 843 (1984) (prescribing judicial deference to agency constructions of the law where Congress was "silent or ambiguous with respect to the specific issue").

151. Nat'l Cable & Telecoms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 980 (2005) ("*Chevron* requires a federal court to accept the agency's construction of the statute").

152. Auer v. Robbins, 519 U.S. 452, 462–63 (1997) (deferring to agency interpretations of their own regulations where they are ambiguous, and noting that the executive department "is free to write the regulations as broadly as [it] wishes, subject only to the limits imposed by the statute").

153. *Crowell*, 285 U.S. at 60–61. *But see* Jennings v. Rodriguez, 138 S. Ct. 830, 842 (2018) (citing to *Crowell* for constitutional avoidance doctrine, but not actually taking care to avoid a statutory construction that may directly conflict with the Suspension Clause).

154. *Crowell*, 285 U.S. at 57–59; *Stern*, 564 U.S. at 506 (Breyer, J., dissenting). *See* Mulligan, *supra* note 147, at 580–82.

155. *Crowell*, 285 U.S. at 57–59; *Stern*, 564 U.S. at 506 (Breyer, J., dissenting); *Moore*, 261 U.S. at 92. *See* Mulligan, *supra* note 147, at 580–82.

156. *Crowell*, 285 U.S. at 57–59 ("fundamental rights depend, as not infrequently they do depend, upon the facts, and finality as to facts becomes in effect finality in law"). *See* Mulligan, *supra* note 147, at 580–82.

157. *Jennings*, 138 S. Ct. at 842 (citing *Crowell*, 285 U.S. at 62) (citing to constitutional avoidance doctrine, and explicitly not adopting a statutory construction designed to avoid direct conflict with the constitution).

adopt a statutory construction that avoids direct conflicts with the constitution.[158] *Jennings* expressly refused to decide whether the statute violated due process even after it was briefed on the issue (a violation of *Marbury*'s requirement to say what the law is),[159] but it did not modify *Crowell*'s *de novo* review requirement in any way.[160] Thus, several district courts across the United States ignored *Jennings*' statutory treatment to keep extending habeas corpus to unjustly incarcerated immigrants.[161]

IV. Ask the Federal Court to Administer the Common Law Habeas Remedy

The ancient, common law remedy of habeas corpus is release pending a legitimate trial.[162] The first significant habeas corpus case decided by the U.S. Supreme Court granted this remedy to benefit an immigrant named Erick Bollman to resist a deportation ordered by then President Thomas Jefferson.[163] Bollman was released *into* the United States (not deported back to his native Germany), a representation of *Boumediene*'s 1789 minimum of

158. *Id. Cf.* INS v. St. Cyr, 533 U.S. 289, 299–300 (2001) (citing *Crowell*, 285 U.S. at 62; Ashwander v. TVA, 297 U.S. 288, 341, 345–48 (1936)); Boumediene v. Bush, 553 U.S. 723, 727 (2008) (quoting Marbury v. Madison, 5 U.S. 137, 177 (1803)) (requiring the Court to "say 'what the law is'").

159. *Jennings*, 138 S. Ct. at 852 (refusing to "resolve respondents' Due Process Clause claims"); *Marbury*, 5 U.S. at 177. *See* Rodriguez v. Marin, 909 F.3d 252, 255 (9th Cir. 2018); *cf.* Johnson v. Arteaga-Martinez, No. 19–896, slip op. at 9 (2022) (taken to its logical end, *Jennings* only delayed the Court's eventual constitutional decision, which may go against Justice Alito's intentions for *Jennings*); Biden v. Texas, No. 21–954, slip op. at 9 (2022) (Alito, J., dissenting) (noting that Alito does not see *Jennings* the same way as the rest of the court).

160. *Jennings*, 138 S. Ct. at 842 (only citing to *Crowell* for constitutional avoidance doctrine, a federal constitutional principle that originated long before *Crowell*); *cf.* Murray v. The Charming Betsey, 6 U.S. 64, 118 (1804) (expressing a similar kind of avoidance doctrine that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains" in order to imply international rights into a statute).

161. *See, e.g.*, Jamal A. v. Whitaker, 358 F. Supp. 3d 853, 858–59 (D. Minn. 2019) (applying a six factor test to decide whether due process was violated); Banda v. McAleenan, 385 F. Supp. 3d 1099, 1106 (W.D. Wash. 2019) (adopting the *Jamal* test); Djelassi v. ICE Field Office Director, 434 F. Supp. 3d 917, 929 (W.D. Wash. 2019) (adopting the *Jamal* test). *But see* DHS v. Thuraissigiam, 140 S. Ct. 1959, 1983 (2020) (possibly foreclosing *Jamal* tests when it decided "the Due Process Clause provides nothing more [than the rights Congress' statutes grant], it does not require review" of asylum applications in the habeas context).

162. *Thuraissigiam*, 140 S. Ct. at 1969–70. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 575 (2004) (Scalia, J., dissenting).

163. *Boumediene*, 553 U.S. at 779 (quoting *Ex parte* Bollman, 8 U.S. 75, 136 (1807) (discharging an immigrant named Erick Bollman)) ("where imprisonment is unlawful, the court 'can only direct [the prisoner] to be discharged'").

habeas release that belied *Thuraissigiam*'s conflation of habeas release with its opposite—incarceration.[164]

The habeas common law remedy is the best-case scenario and should almost always be requested, because if it is granted its beneficiary will need no bond or any other process prior to release.[165] In an apparent attempt to ward immigration attorneys away from ever requesting this type of basic habeas relief, *Thuraissigiam* suggested that requesting common law habeas release may be the same as asking to be deported by the government.[166] Specifically, the *Thuraissigiam* Court wrote:

> 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.[167]

Here, the Court seemed to forget *Hamdi v. Rumsfeld*, where the Court's remand under *Mathews v. Eldridge*, rather than ordering Hamdi's release, allowed the government to strip him of his U.S. citizenship, deport him, and put him on a no fly list.[168] If *not* seeking release can result in what happened in *Hamdi*, then there is nothing more to fear from seeking release.[169] Like

164. *Thuraissigiam*, 140 S. Ct. at 1973 (implying that it would not be a complete oxymoron to grant a habeas writ to order a petitioner's "release into the custody" of a foreign captor); *id.* at 20–21 n.6 (Sotomayor, J., dissenting).

165. *Boumediene*, 553 U.S. at 779 (quoting *Bollman*, 8 U.S. at 136). *See* Fay v. Noia, 372 U.S. 391, 404–05 (1963) (quoting Bushell's Case [1670] 124 ER 1006 (Eng.)). *See also Ex parte* Holmes, 12 Vt. 631, 641–42 (1840), *extending* Holmes v. Jennison, 39 U.S. 540, 561 (1840) (Opinion of Taney, C.J.).

166. *Thuraissigiam*, 140 S. Ct. at 1973. The strange fiction that the Court used to draw a connection between deportation and release was the idea that immigrants who enter into the United States never actually entered into the United States, i.e., the Court believes it is dealing with people "detained prior to entry," or "detained at entry," and that their physical presence within the United States is not real and that using habeas corpus to release immigrants into the country would somehow make their entry real in some sense, even though the government already forcefully detained them within the United States, sometimes for indefinite periods of time. *Id.* at 1979–81. The reality of immigrant presence and its legal relevance for constitutional purposes is and has always been separate from the issue of legal entry, as commemorated by the census. *See* DOC v. New York, 139 S. Ct. 2551, 2561–62 (2019) (noting that the constitution requires the census to count the "total population" of the states, including all immigrants whether or not they have a legal status and regardless of how they entered the United States).

167. *Thuraissigiam*, 140 S. Ct. at 1973.

168. *Id.*; *Hamdi*, 542 U.S. at 529 (plurality opinion) (citing Mathews v. Eldridge, 424 U.S. 319, 335 (1976)); Lithwick, *Nevermind*, *supra* note 123.

169. Lithwick, *Nevermind*, *supra* note 123; *Hamdi*, 542 U.S. at 539 (plurality opinion) ("the case is remanded for further proceedings").

the plurality opinion in *Hamdi*, *Thuraissigiam* relied upon a *Mathews v. Eldridge* balancing case to suggest that such a deportation might occur.[170] Then, similar to the ultimate end of *Hamdi*, a deportation did occur that may cause "almost certain death for Thuraissigiam and others like him."[171]

Thuraissigiam misrepresented Justice Story's opinion in *Ex parte D'Olivera*,[172] a case that arose during the War of 1812—a war that was waged against England's extradition system so that immigrants could freely move to the United States.[173] The Court does not want immigration attorneys looking back into the history it misrepresented in *Thuraissigiam*, especially into the works of Joseph Story, because Story supported the fundamental legitimacy of immigrant habeas corpus petitions as summarized in his *Commentaries* here,

> [T]he writ of habeas corpus . . . is, therefore, justly esteemed the great bulwark of personal liberty; since it is the appropriate remedy to ascertain, whether any person is rightfully in confinement or not, and the cause of his confinement; and if no sufficient ground of detention appears, the party is entitled to his immediate discharge. The writ is most beneficially construed; and is applied to every case of illegal restraint, whatever it may be; for every restraint upon a man's liberty is, in the eye of the law, an imprisonment, wherever may be the place, or whatever may be the manner, in which the restraint is effected.[174]

The Court attempted to manifest its own bias under the name of Joseph Story, assuming nobody would fact-check what Justice Story actually thought.[175]

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170. *Compare Thuraissigiam*, 140 S. Ct. at 1982 (citing Landon v. Plasencia, 459 U.S. 21, 32 (1982) (citing *Mathews*, 424 U.S. at 334–35)), *with Hamdi*, 542 U.S. at 529 (plurality opinion) (citing *Mathews*, 424 U.S. at 335).

171. Dahlia Lithwick & Mark Joseph Stern, *The Supreme Court Doesn't See Asylum-Seekers as People*, SLATE (June 25, 2020, 3:35 PM), https://slate.com/news-and-politics/2020/06/supreme-court-asylum-deportations-thuraissigiam.html; Lithwick, *Nevermind*, *supra* note 123. *See* Sarah Stillman, *When Deportation is a Death Sentence*, THE NEW YORKER (Jan. 8, 2018), https://www.newyorker.com/magazine/2018/01/15/when-deportation-is-a-death-sentence [hereinafter Stillman, *When*].

172. *Compare Thuraissigiam*, 140 S. Ct. at 1970 (citing *Ex parte* D'Olivera, 7 F. Cas. 853, 854 (C.C.D. Mass. 1813) (No. 3,967) (Opinion of Story, J.)), *with* Rasul v. Bush, 542 U.S. 466, 480 n.11 (2004) (citing *D'Olivera*, 7 F. Cas. at 854 (Opinion of Story, J.)).

173. *See* THEODORE ROOSEVELT, THE NAVAL WAR OF 1812, PART I, at 32–33 (1900) (explaining the pro-immigration purposes of the War of 1812). *Cf.* United States v. Wong Kim Ark, 169 U.S. 649, 711 (1898) (Fuller, C.J., dissenting).

174. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1333. *See also* Holmes v. Jennison, 39 U.S. 540, 561 (1840) (Opinion of Taney, C.J.) (Story concurred in this opinion that resulted in release of an immigrant into the United States), *extended in Ex parte* Holmes, 12 Vt. 631, 641–42 (1840).

175. *Compare Thuraissigiam*, 140 S. Ct. at 1970 (citing *Ex parte* D'Olivera, 7 F. Cas. 853, 854 (C.C.D. Mass. 1813) (No. 3,967) (Opinion of Story, J.)), *with* JOSEPH STORY, COMMENTARIES ON

The Court's strained use of *D'Olivera* was especially confusing, because it could have easily cited Story's anti-common law denial of habeas jurisdiction in *Prigg v. Pennsylvania*, a pro-slavery decision.[176] If the common law remedy of *Somerset*'s *Case*, *Bollman*, *Holmes v. Jennison*, and *The Amistad* was roundly affirmed today, then immigrants granted habeas corpus would be immediately released *into* the United States and the burden of justifying a new detention (if any) would be borne by the government.[177]

The common law at work in *Bollman* and *The Amistad* was fully expounded in *Holmes v. Jennison*, where a murder suspect by the name of George Holmes escaped from Canada to Vermont.[178] Canada had no extradition treaty with the United States, but the Governor of Vermont nevertheless arrested Holmes at the behest of Canadian authorities and ordered Holmes to be delivered to "William Brown, the agent of Canada . . . to the end that he, the said George Holmes, may be thence conveyed to the said District of Quebec and be there dealt with . . . ."[179]

Holmes filed a writ of habeas corpus, which ping-ponged between the Vermont and U.S. Supreme Courts and was ultimately decided in Holmes's favor, because Vermont was powerless to make its own extradition treaty

THE CONSTITUTION OF THE UNITED STATES § 1333. *But see* Prigg v. Pennsylvania, 41 U.S. 539, 611–12 (1842) (distinguishing *Somerset's Case* and denying habeas corpus).

176. *Prigg*, 41 U.S. at 541 (repeating and extending the limitations established by *Somerset's Case* that "the state of slavery" does not arise from the common law, but must come from positive laws, or arise "as a matter of comity, and not as a matter of international right," i.e., "The state of slavery is deemed to be a mere municipal regulation, founded upon and limited to the range of the territorial laws."); *id.* at 619–20 (citing to "the ordinary exigencies of the National Government" under plenary power doctrine to set aside the common law protections of habeas corpus); Joshua J. Schroeder, *We Will All Be Free or None Will Be: Why Federal Power is Not Plenary, But Limited and Supreme*, 27 TEX. HISP. J.L. & POL'Y 1, 46 (2021) [hereinafter Schroeder, *We Will*] ("*Prigg v. Pennsylvania* was the first use of [plenary power] ideology to endorse the federal government's power to exclude immigrants and shut down immigration between the states.").

177. Boumediene v. Bush, 553 U.S. 723, 747 (2008) (citing Somerset's Case (1772) 20 How. St. Tr. 1, 80–82 (Eng.) (releasing an enslaved African individual into England as a free person under the common law, because he was imported into a free nation governed by the common law)) ("We know that at common law a petitioner's status as an alien was not a categorical bar to habeas corpus relief."); *id.* at 779 (quoting *Ex parte* Bollman, 8 U.S. 75, 136 (1807) (discharging an immigrant named Erick Bollman into the United States)); United States v. The Amistad, 40 U.S. 518, 596 (1841) (finding that "there does not seem to us to be any ground for doubt, that these negroes ought to be deemed free," but after they were freed into the United States, they had to raise money to pay for their own travel back to Africa); *Ex parte* Holmes, 12 Vt. 631, 641–42 (1840), *extending* Holmes v. Jennison, 39 U.S. 540, 561 (1840) (Opinion of Taney, C.J.); JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 1333, 1895; *but see Prigg*, 41 U.S. at 541 (using the Fugitive Slaves Clause as evidence of a plenary power exception from the ordinary common law practice of releasing prisoners unjustly detained including former slaves).

178. *Holmes*, 39 U.S. at 540–41.

179. *Id.* (internal quotation marks omitted).

with Canada.[180] In the absence of a valid extradition treaty, the common law habeas remedy exemplified by *Somerset*'s *Case* was applied to release Holmes, an immigrant suspected of murder, *into* the United States.[181] In *The Amistad* Justice Story extended the rationale in *Holmes* to deny a Spanish queen her human prey wherever the law of extradition did not support the royal enforcement of slavery.[182] Habeas release *into* the United States remains the underlying common law that counteracts claims of feudal slavery and imperialism that might otherwise threaten to supplant the U.S. constitutional system of separated and federal powers.[183]

Ignoring this, *Thuraissigiam* based its decision upon a historical misrepresentation when it stated: "As late as 1816, the word 'deportation' apparently 'was not to be found in any English dictionary.'"[184] But it appears that in the case of *Ex parte Bollman*, the word "deportation" was used synonymously with the term "extradition" by President Thomas Jefferson himself.[185] Privately, Jefferson admitted that his "military arrest and deportation" orders issued against Bollman were all illegal and that a wide door was opened to immigrants by both federal and state laws at the time.[186]

The *Boumediene* Court noted that unqualified release is the ordinary habeas remedy, but stressed that the writ of habeas corpus is an adaptable

180. *Id.* at 582 (Opinion of Thompson, J.) (noting that absent an inherent, constitutionally vested Article II power of extradition, the power "exists nowhere, there being no treaty or law on the subject"); *Ex parte* Holmes, 12 Vt. 631, 641–42 (1840).

181. *Holmes*, 39 U.S. at 561 (Opinion of Taney, C.J.) (interpreting the lack of an extradition treaty as reason for the State of Vermont to release an immigrant fleeing criminal prosecution into the United States through habeas corpus), *extended in Holmes*, 12 Vt. at 641–42.

182. *The Amistad*, 40 U.S. at 552–53, 596 ("We deny that Ruiz and Montez, Spanish subjects, had a right to call on any officer or Court of the United States to use the force of the government or the process of the law for the purpose of again enslaving those who have thus escaped from foreign slavery, and sought an asylum here." Agreeing with and extending *Holmes* by saying, "there does not seem to us to be any ground for doubt that these negroes ought to be deemed free, and that the Spanish treaty interposes no obstacle to the just assertion of their rights."), *quoting and extending Holmes*, 39 U.S. at 569 (Opinion of Taney, C.J.).

183. *The Amistad*, 40 U.S. at 552–53, 596. *See, e.g.*, Schroeder, *Leviathan*, *supra* note 58, at 214 (explaining a possible use of Chief Justice Taney's opinion in *Holmes* to resolve a contemporary issue of international law).

184. DHS v. Thuraissigiam, 140 S. Ct. 1959, 1973 (2021).

185. Letter from Thomas Jefferson to James Wilkinson (Feb. 3, 1807); Letter from Thomas Jefferson to William C.C. Claiborne (Feb. 3, 1807).

186. *See* sources cited *supra* note 185; Letter from Thomas Jefferson to George Flower (Sept. 12, 1817) (hoping "to consecrate a sanctuary for those whom the misrule of Europe may compel to seek happiness in other climes"); *cf.* Letter from George Washington to Francis Adrian Van der Kemp (May 28, 1788) ("I had always hoped that this land might become a safe & agreeable Asylum to the virtuous & persecuted part of mankind, to whatever nation they might belong . . . ."); Collet v. Collet, 2 U.S. 294, 296 (C.C.D. Pa. 1792).

writ and that federal courts can require something different.[187] This is reflected in the open-ended definition of "in custody" that was given by both English and American courts to extend habeas jurisdiction over matters involving, for example, African people claimed by white enslavers as property, Japanese American citizens held in internment camps, wives illegally constrained by their husbands, children left by their parents to Christian reformatories in the Dominican Republic, individuals awaiting trial but released on their own recognizance, state prisoners released on parole, immigrants held in detention facilities, and any person who is or may be wrongfully deported.[188] In such cases, the Court may issue the writ in order to apply something *more* than the basic common law remedy.[189]

However, habeas corpus would be "a sham" if its liberal adaptability was used to require something *less* than release pending legitimate government action.[190] Using the liberal nature of the Great Writ to make a habeas remedy more austere and inflexible than the ancient common law remedy would be a misuse of the writ that delegitimizes not only the legislative and executive branches, but the judiciary as well.[191] For the U.S. government's actual interest lies in the protection of human rights, according to the Declaration of Independence.[192]

187. Boumediene v. Bush, 553 U.S. 723,779 (2008) (quoting *Ex parte* Bollman, 8 U.S. 75, 136 (1807) (immediately discharging an immigrant named Erick Bollman)).

188. *Id.* at 747 (citing Somerset v. Stewart [1772] 98 Eng. Rep. 499 (Eng.)); *Ex parte* Endo, 323 U.S. 283, 304–07 (1944); Rex v. Clarkson [1722] 93 Eng. Rep. 625 (KB); KIDNAPPED FOR CHRIST (Red Thorn Productions 2014); Hensley v. Mun. Ct., San Jose-Milpitas Jud. Dist. Santa Clara Cnty., 411 U.S. 345, 345, 351 (1973); Jones v. Cunningham, 371 U.S. 236, 238–39, 243–44 (1963) (citing *Endo*, 323 U.S. at 304–07); Padilla v. Kentucky, 559 U.S. 356, 374 (2010); Rivera v. Ashcroft, 394 F.3d 1129, 1140 (9th Cir. 2005); Zadvydas v. Davis, 533 U.S. 678, 693 (2001). *But see Thuraissigiam*, 140 S. Ct. at 1979.

189. *Boumediene*, 553 U.S. at 779 ("Indeed, common-law habeas corpus was, above all, an adaptable remedy. Its precise application and scope changed depending upon the circumstance."). *See* FREEDMAN, *supra* note 60, at 14, 16–17, 23–24, 31.

190. Hamdi v. Rumsfeld, 542 U.S. 507, 575 (2004) (Scalia, J., dissenting). *See Thuraissigiam*, 140 S. Ct. at 1970; Holmes v. Jennison, 39 U.S. 540, 561 (1840) (Opinion of Taney, C.J.) (interpreting the lack of an extradition treaty as reason for the State of Vermont to release an immigrant fleeing criminal prosecution into the United States through habeas corpus), *extended in Ex parte* Holmes, 12 Vt. 631, 641–42 (1840).

191. *Cf*. Thuraissigiam v. USDHS, 917 F.3d 1097, 1106 (9th Cir. 2019) (quoting *Boumediene*, 553 U.S. at 779) (noting that habeas corpus is "'an adaptable remedy'" in order to grant something far less than what habeas corpus under *Boumediene* requires), *rev'd*, 140 S. Ct. 1959 (2020). The reversed Ninth Circuit decision applied an era of eugenics-based case law that fell short of the scope of power granted under the writ as it was applied in 1789 as *Castro* (not *Boumediene*) suggested it should. *See id.*

192. THE DECLARATION OF INDEPENDENCE paras. 2, 9, 14, 31 (U.S. 1776) (blaming the king of England for "obstructing the Laws for Naturalization of Foreigners" and for "render[ing] the Military independent and superior to the Civil Power"); *see* ARGUMENT OF JOHN QUINCY ADAMS, BEFORE THE SUPREME COURT OF THE UNITED STATES: IN THE CASE OF THE UNITED STATES, APPELLANTS, VS. CINQUE, AND OTHERS, AFRICANS, CAPTURED IN THE SCHOONER AMISTAD BY

Despite the recent development of U.S. government black sites across the world and an unchecked torture program, the feudal punishment of infidels and aliens continues to be precluded by the Title of Nobility Clause (a.k.a. the Emoluments Clause), as well as the First Amendment.[193] The Declaration of Independence requires our Courts to bow to the majesty of every human being in the world—for every person is a citizen of the place they were born and rightly holds a share of sovereignty in the place that they came from, as the people of the United States do in America.[194] It is thus upon the government's respect for human rights as a matter of the sovereign dignity of people (rather than borders or military defense) that its legitimacy rests.[195]

Nevertheless, it is commonplace for immigration lawyers to ask for *less* than the habeas remedy of release pending legitimate due process.[196] Immigration attorneys tend to make deals with ICE and EOIR on behalf of their

LIEUT. GEDNEY 82 (1841). *Cf.* THOMAS JEFFERSON, *Draught of a Fundamental Constitution for the Commonwealth of Virginia*, *in* NOTES ON THE STATE OF VIRGINIA 220 (William Peden ed., 1996) ("The benefits of the writ of Habeas Corpus shall be extended, by the legislature, to *every person within this state*, and without fee, ... The military shall be subordinate to the civil power."); *Ex parte* Milligan, 71 U.S. 2, 124–25, 127–28 (1866) (quoting paragraph 14 of the Declaration of Independence as reason to find that "[m]artial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction").

193. U.S. CONST. art. I, § 9, cls. 2, 8; *id.* amend. I; *see supra* note 183 and accompanying text; Jamie Raskin, *What's Trump's idea of 'America First'? G-7 cash flowing to his golf resort.*, WASH. POST (Aug. 28, 2019), https://www.washingtonpost.com/outlook/2019/08/28/whats-trumps-idea-america-first-g-cash-flowing-his-golf-resort/ (discussing how the Emoluments Clause was intended to "sweep away the corruption inherent in monarchy and feudalism"). *Cf.* JOHN ADAMS, THE REVOLUTIONARY WRITINGS OF JOHN ADAMS 22 (2000) (emphasizing the American rejection of "the canon and feudal law," and noting that the separation of church and state depended upon this rejection); *id.* at 94; Zande, *supra* note 20, at 335 ("the Star Chamber was subject to direct rule by" the king); United States v. The Amistad, 40 U.S. 518, 524 (1841) (denying the queen of Spain's petition for the return of her slaves).

194. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776); Chisholm v. Georgia, 2 U.S. 419, 454 (1793) (Opinion of Wilson, J.) (citing U.S. CONST. pmbl); *id.* at 470–71 (Opinion of Jay, C.J.) (quoting U.S. CONST. pmbl). *Cf.* HANNAH ARENDT, ON REVOLUTION 93 (1990); Amy H. Kastely, *Cicero's De Legibus: Law and Talking Justly Toward a Just Community*, 3 YALE J.L. & HUMAN. 1, 15 (1991) (citing Cicero, *De Legibus* 2.2.5) (discussing the contributions Cicero made to our legal thought regarding natural citizenship versus legal citizenship); *Acts* 25:1–22.

195. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 157 ("The whole structure of our present jurisprudence stands upon the original foundations of the common law."); U.S. CONST. pmbl; THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776); OTIS, *supra* note 127, at 126 ("[I]t is left to every man as he comes of age to chuse [sic] *what society* he will continue to belong to."); Cicero, *De Legibus* 2.2.5 (noting that every person has natural citizenship wherever they were born).

196. *See, e.g.*, Castro v. USDHS, 835 F.3d 422, 437 (3d Cir. 2016) ("Petitioners contend that the finality-era [i.e., eugenics era] cases 'establishe[d] a constitutional floor for judicial review' Pet'rs' Br. 26 . . . ."); Brief for Respondent at 29, 45, DHS v. Thuraissigiam, 140 S. Ct. 427 (2019) (mem.) (No. 19-161).

clients, navigating a system known for granting "shadow wins."[197] A 2021 study by Tulane University Law School's Immigration Rights Clinic indicated that these shadow wins are actually part of a wider government strategy to maximize immigrant detention, and minimize the chances an immigrant will succeed in habeas court.[198]

However, post-*Thuraissigiam* there are even stronger reasons to reconsider applying for habeas relief under post-*Jennings* balancing tests to pressure an agency for a shadow win.[199] Asking for more process in EOIR rather than release is now apparently prohibited by *Thuraissigiam*, which cited to Justice Scalia's dissent in *Hamdi* as an example of a case that attempted to remand a remedy *less* than release.[200] Justice Scalia's dissent aptly characterized the absurdity of the resulting system in terms that could be applied to EOIR,

> Having found a congressional authorization for detention of citizens where none clearly exists; and having discarded the categorical procedural protection of the Suspension Clause; the plurality then proceeds, under the guise of the Due Process Clause, to prescribe what procedural protections it thinks appropriate. It 'weigh[s] the private interest . . . against the Government's asserted interest,' . . . and—just as though writing a new Constitution—comes up with an unheard-of system in which the citizen rather than the Government bears the burden

197. *See* Dara Lind, *"Shadow Wins": How ICE Avoids Judicial Accountability by Quietly Releasing Immigrants Who Challenge Being Detained*, PROPUBLICA (May 25, 2021, 11:50 AM), https://www.propublica.org/article/shadow-wins-how-ice-avoids-judicial-accountability-by-quietly-releasing-immigrants-who-challenge-being-detained.

198. *Id.*; TULANE IMMIGRATION RIGHTS CLINIC, NO END IN SIGHT: PROLONGED AND PUNITIVE IMMIGRATION DETENTION IN LOUISIANA 13–15, 24–27 (2021) ("a shadow win . . . ends the litigation without a formal ruling on the legality of the detention"). Granting shadow wins is seen by illiberal immigration reformers as a necessary stop-gap until the United States can perfect the immigration system by presumably replacing IJs with computer algorithms and investing in more beds at detention facilities to host potentially every immigrant that crosses into the United States. *See, e.g.*, CASS R. SUNSTEIN & ADRIAN VERMEULE, LAW AND LEVIATHAN 7–10, 131 (2020) (drawing their central principle of administrative law from *Wong Yang Sung*, an immigrant habeas case); Jason Blakely, *Cass Sunstein and Adrian Vermeule's Technocractic Despotism*, THE CHRONICLE (Feb. 1, 2021), https://www.chronicle.com/article/cass-sunstein-and-adrian-vermeules-technocratic-despotism?cid2=gen_login_refresh&cid=gen_sign_in (issuing a warning about Sunstein & Vermeule); DANIEL KAHNEMAN ET AL., NOISE 6–7, 334, 377 (2021) (citing to a study entitled *Refugee Roulette* about the arbitrariness of American immigration adjudication in order to justify arguments about perfecting the system with computer algorithms "either to replace human judgment or to supplement it" instead of dismantling the immigration system as arbitrary and capricious); *id.* at 340–41 (prescribing of system of fairness without mercy, because "mercy is noisy").

199. DHS v. Thuraissigiam, 140 S. Ct. 1959, 1970 (2020); *id.* at 1978 (citing Hamdi v. Rumsfeld, 542 U.S. 507, 563 (2004) (Scalia, J., dissenting)). *See Hamdi*, 542 U.S. at 529 (plurality opinion) (citing Mathews v. Eldridge, 424 U.S. 319, 335 (1976)) (remanding a balancing test to a military tribunal).

200. *Thuraissigiam*, 140 S. Ct. at 1978; *Hamdi*, 542 U.S. at 576 (Scalia, J., dissenting).

> of proof, testimony is by hearsay rather than live witnesses, and the presiding officer may well be a 'neutral' military officer rather than a judge and jury. . . . It claims authority to engage in this sort of 'judicious balancing' from Mathews v. Eldridge, 424 U.S. 319 (1976), a case involving . . . the withdrawal of disability benefits! Whatever the merits of this technique when newly recognized property rights are at issue (and even there they are questionable), it has no place where the Constitution and the common law already supply an answer.[201]

According to the *Hamdi* plurality opinion, a military tribunal could theoretically apply common law due process, and thus instead of releasing Hamdi pending a public treason trial the Court remanded a novel balancing test for the military tribunal to apply.[202] The *Hamdi* test was ironically hailed by Justices Ginsburg and Breyer as the more liberal and therefore better approach.[203] It was venerated by most liberals at that time as their most favored of the three original 9/11 sister cases.[204]

But it was not to be, because the *Hamdi* balancing test was never administered by a military tribunal.[205] The military ignored the U.S. Supreme Court, stripped Hamdi of his U.S. citizenship, deported him to Saudi Arabia, and put him on a no-fly list.[206] The decision hailed as most liberal was revealed as the most draconian, and "[w]ith a yawn and a shrug, the [Bush] administration . . . eras[ed] the episode from our national memory."[207]

201. *Hamdi*, 542 U.S. at 575–76 (Scalia, J., dissenting) (citations omitted) (emphasis and ellipses in original).

202. *Id.* at 529 (plurality opinion); *id.* at 575–76 (Scalia, J., dissenting).

203. *Id.* at 529 (plurality opinion joined by Justice Breyer); *id.* at 553–54 (Souter, J., concurring in part, joined by Ginsburg, J.) (joining "the plurality in a judgment of the Court vacating the Fourth Circuit's judgment and remanding the case" with "qualifications," because "the plurality . . . order[ed] remand on terms closest to those I would impose" and listing the liberal rights that Hamdi should be given including right to counsel, notice of charges, and "a fair chance to rebut it before a neutral decisionmaker").

204. *See, e.g.,* Lithwick, *Nevermind*, *supra* note 123 (noting the general feeling in America in 2004 was that "Hamdi's case . . . was supposed to represent a high-water mark for American freedoms during wartime"); Mark Joseph Stern, *Stephen Breyer Is Worried About the Forever War's Permanent Prisoners. He's 15 Years Too Late.*, SLATE (June 10, 2019, 4:31 PM), https://slate.com/news-and-politics/2019/06/stephen-breyer-aumf-dissent-gitmo-scotus.html ("In 2004, Justice Stephen Breyer cast the decisive vote in Hamdi v. Rumsfeld, allowing the government to detain alleged terrorists indefinitely without trial.").

205. Lithwick, *Nevermind*, *supra* note 123. *Cf.* Trop v. Dulles, 356 U.S. 86, 102 (1958) (to subject a U.S. citizen "to banishment, a fate universally decried by civilized people" is a cruel and unusual punishment that violates the Eighth Amendment).

206. Lithwick, *Nevermind*, *supra* note 123.

207. *Id.*

Hamdi was gutted by *Boumediene* only a few years after its creation.[208] *Boumediene* expressly overruled the jurisdiction-stripping provision that replaced and superseded a provision that the *Hamdi* decision arose directly under.[209] If *Hamdi* is raised by the Government, an immigration attorney should note that its decision rested upon a law superseded by Congress and finally overruled by *Boumediene*.[210]

Post-*Jennings* balancing tests that may require bond hearings to be administered by IJs are similar to *Hamdi* and therefore suspect.[211] Another possibility left open by *Jennings* that immigration attorneys should explore is overruling INA for violating due process by being void for vagueness.[212] It is possible to succeed in this way over the *Jennings* decision because that is how *Boumediene* dealt with *Hamdi* for misconstruing the underlying law that Congress later confirmed by amendment was intended to strip its jurisdiction.[213]

The argument for overruling INA as void for vagueness, rather than applying a balancing test, can be put another way: (1) nearly all federal district judges agree that a law that allows indefinite detention of immigrants without bond hearings violates due process of the law;[214] (2) *Jennings* expressly construed INA to allow the indefinite detention of immigrants without bond hearings;[215] and (3) the only logical conclusion to be made from premises (1)

208. *Hamdi*, 542 U.S. at 510 (arising under the Authorization for Use of Military Force (AUMF) of 2001, 115 Stat. 224), *superseded by statute*, Detainee Treatment Act (DTA) of 2005, 119 Stat. 3474; Military Commission Act (MCA) of 2006, 120 Stat. 2600, *as recognized in* Hamad v. Gates, 732 F.3d 990, 996–98 (9th Cir. 2013); Boumediene v. Bush, 553 U.S. 723, 770 (2008) ("We hold that Art. I, § 9, cl. 2, of the Constitution has full effect at Guantanamo Bay." (citing *Hamdi*, 542 U.S. at 564 (Scalia, J., dissenting))). *Cf.* Aamer v. Obama, 742 F.3d 1023, 1028–29 (D.C. Cir. 2014).

209. *See* sources cited *supra* note 208.

210. *See* sources cited *supra* note 208.

211. *Hamdi*, 542 U.S. at 575–76 (Scalia, J., dissenting); Lithwick, *Nevermind*, *supra* note 123.

212. *See, e.g.*, Sessions v. Dimaya, 138 S. Ct. 1204, 1213 (2018) (quoting Jordan v. De George, 341 U.S. 223, 229, 231 (1951) (quoting Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948))). *Cf.* United States v. Cortez-Ruiz, 225 F. Supp. 3d 1093, 1105 (2016).

213. *Boumediene*, 553 U.S. at 784 (distinguishing *Hamdi*, 542 U.S. at 538) ("Setting aside the fact that the relevant language in *Hamdi* did not garner a majority of the Court, it does not control the matter at hand. None of the parties in *Hamdi* argued there had been a suspension of the writ. Nor could they. The § 2241 habeas corpus process remained in place.").

214. Banda v. McAleenan, 385 F. Supp. 3d 1099, 1116 (W.D. Wash. 2019); Jennings v. Rodriguez, 138 S. Ct. 830, 874 (2018) (Breyer, J., dissenting) (quoting H.R. Rep. No. 104–469, pt. 1, p. 123, and n. 25 (1996)) ("Congress did not consider the problem of long-term detention. It wrote the statute with brief detention in mind." Congress cited that "the 'average stay [was] 28 days.'").

215. *Jennings*, 138 S. Ct. at 842 ("we hold that there is no justification for any procedural requirements that the Court of Appeals layered onto § 1226(a) without any arguable statutory foundation").

and (2) is that the entire law pertaining to the detention of immigrants violates due process and must be declared unconstitutional and void.[216]

V. Explain How EOIR Structurally Fails to Secure Common Law Due Process

Most immigration attorneys spend their days in the Executive Branch, appearing in administrative proceedings that style themselves as "courts."[217] An immigration attorney should not be afraid to describe these tribunals as *coram non judice* in habeas court by explaining each and every structural defect of EOIR, ICE, and CBP.[218] In the criminal context, structural errors (like failing to empanel a jury or letting in evidence that violates the Fourth Amendment) are grounds for a habeas court to set aside a guilty verdict and set the imprisoned individual free.[219]

Deportation (now called "removal") was considered on more than one occasion by the U.S. Supreme Court to be a drastic, medieval punishment known in previous eras as banishment.[220] It is absurd and grotesque that this punishment is doled out in the immigration context on a mass scale without adhering to basic due process requirements like empaneling a jury and holding a common law trial before an impartial decision maker.[221] It is a violation of the Due Process and Equal Protection Clause protections of "any person"

216. *Id.* at 852; Rodriguez v. Marin, 909 F.3d 252, 255 (9th Cir. 2018); Marbury v. Madison, 5 U.S. 137, 178 (1803); *Boumediene*, 553 U.S. at 727 (requiring the Court to "say 'what the law is'") (quoting *Marbury*, 5 U.S. at 177). *Cf.* Schroeder, *America's*, *supra* note 130, at 884.

217. Department of Justice, *EOIR: About the Office*, DOJ WEBSITE, https://www.justice.gov/eoir/about-office (last visited May 8, 2022) ("EOIR interprets and administers federal immigration laws by conducting immigration court proceedings."); 8 C.F.R. § 1003.10(a).

218. *Ex parte* Watkins, 28 U.S. 193, 209 (1830) (explaining how non-civil, executive branch administered tribunals can lose their "high ground" and become like "a court martial"), *extended by Boumediene*, 553 U.S. at 782; *see also* Crowell v. Benson, 285 U.S. 22, 57–59 (1932); DHS v. Thuraissigiam, 140 S. Ct. 1959, 1995 (2020) (Sotomayor, J., dissenting).

219. *See, e.g.*, Ramos v. Louisiana, 140 S. Ct. 1390, 1393–94 (2020); McGirt v. Oklahoma, 140 S. Ct. 2452, 2480 (2020); Williams v. Taylor, 529 U.S. 362, 378–79 (2000) (Opinion of Stevens, J.); *but see* Stone v. Powell, 428 U.S. 465, 481–82 (1976) (applying a cost/benefit balancing test to avoid structural error analysis).

220. *See* Trop v. Dulles, 356 U.S. 86, 102 (1958); Sessions v. Dimaya, 138 S. Ct. 1204, 1213 (2018) (quoting Jordan v. De George, 341 U.S. 223, 229, 231 (1951) (quoting Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948))); Padilla v. Kentucky, 559 U.S. 356, 373 (2010) (quoting Delgadillo v. Carmichael, 332 U.S. 388, 390–91 (1947) (citing Bridges v. Wixon, 326 U.S. 135, 147 (1945))).

221. Calder v. Bull, 3 U.S. 386, 388 (1789) (Opinion of Chase, J.) (holding that Congress does not have the power to enact "a law that makes a man a judge in his own cause"). *See* Anker, *supra* note 20, 495–96; *see also* Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers, 87 Fed. Reg. 18078 (effective May 31, 2022). *But see Thuraissigiam*, 140 S. Ct. at 1965 (deferring to EOIR, ICE, and CBP as if they were legitimate civil tribunals).

to hold immigration court for the singular purpose of treating immigrants different from U.S. citizens in the administration of due process.[222]

Immigration attorneys should, therefore, argue consistently and continually that EOIR fails to meet the structural requirements of a tribunal that administers due process.[223] The attributes that EOIR lacks are comparable to those described in the fiery Scalia dissent in *Hamdi* quoted above,[224] have other historical parallels in the now-abolished Star Chamber and Privy Council Courts of England (referred to in *Chambers v. Florida*),[225] and the illegitimate administrative tribunal declared unconstitutional and void by Lord Coke in *Dr. Bonham*'s *Case*.[226] Specifically, EOIR structurally fails to secure common law due process for the following reasons:

(1) its lack of a jury;
(2) its lack of adversarial process;
(3) its lack of an impartial decision maker;
(4) its lack of rules of evidence (prohibition of hearsay, etc.);
(5) its lack of warrant requirement;
(6) the fact that no independent judge decides who, where, how long, and in what manner immigrants are detained (things that the warrant requirement is supposed to ensure); and
(7) INA's allowance of the indefinite detention of immigrants.

This is a non-exhaustive list of structural errors that are part of EOIR's regular administration and more may be apparent.[227] Any *one* of these structural

222. U.S. CONST. amend. V ("nor shall <u>*any person*</u> . . . be deprived of life, liberty, or property, without due process of law") (emphasis added); *id.* amend. XIV; *Boumediene*, 553 U.S. at 743 ("the substantive guarantees of the Fifth and Fourteenth Amendments, *see Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886), protects persons as well as citizens"). *Cf.* DHS v. Regents of the Univ. of Cal., 140 S Ct. 1891, 1917 (2020) (Sotomayor, J., concurring in part, concurring in the judgement in part, and dissenting in part). *But see* Sunday v. Attorney General United States of America, 832 F.3d 211, 218 (3d Cir. 2016).

223. U.S. CONST. amends. V, XIV. *See Yick Wo*, 118 U.S. at 373; THE DECLARATION OF INDEPENDENCE paras. 2, 9, 31 (U.S. 1776); OTIS, *supra* note 127, at 126 ("it is left to every man as he comes of age to chuse [sic] *what society* he will continue to belong to") (emphasis in original); ROOSEVELT, *supra* note 173, at 32–33 (describing the pro-immigration reasons for the War of 1812). *Cf.* Al Otro Lado v. Mayorkas, No. 17-cv-02366, 2021 U.S. Dist. LEXIS 167128, at *62–63 (S.D. Cal. 2021) (hearing immigration due process claims even after *Thuraissigiam*).

224. Hamdi v. Rumsfeld, 542 U.S. 507, 575–76 (2004) (Scalia, J., dissenting).

225. Chambers v. Florida, 309 U.S. 227, 237 n.10 (1940) (citing the laws that form the basis of habeas corpus in England, that abolished the Star Chamber, and inspired the ratification of the Suspension Clause); Zande, *supra* note 20, at 335 (describing that the Star Chamber was directly controlled by the executive branch).

226. Dr. Bonham's Case [1610] 8 Co. Rep. 114a, 118a (Eng.) (Opinion of Lord Coke) (applying the maxim that no person shall be judge in their own cause (*nemo judex in sua causa*)); Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 876 (2009) (no man shall be "judge in his own cause").

227. James S. Liebman & Randy Hertz, *Brecht v. Abrahamson: Harmful Error in Habeas Corpus Law*, 84 J. CRIM. L. & CRIMINOLOGY 1109, 1130–35 (1994); *see* Weaver v. Massachusetts,

errors could be enough for a federal court to overturn the guilty verdict of a state court to set an incarcerated person free.[228] Immigration lawyers may still broadly push this argument; they do not need to let their clients be detained by judicial forums with these structural flaws without a strong argument against it.[229]

Structural error by definition is not a "harmless" error,[230] and was originally inspired by the heightened standard of evidence given in *Woodby v. INS* as extended in *Chapman v. California*.[231] The *Woodby* decision named the conceptual predecessors of structural error doctrine in denaturalization cases and expatriation cases like *Schneiderman v. United States*, stating "[n]o less a burden of proof is appropriate in deportation proceedings."[232] Nevertheless, *Woodby*, *Schneiderman*, and *Chapman* are all in danger of being overwrought by a strong feeling exacerbated during the Trump era that immigration law is inherently political.[233] This feeling essentially holds that politicians like Donald Trump and Joe Biden are the disease, rather than only a symptom of a bigger, structural problem.[234]

Throughout the Trump era and continuing into the Biden era, immigration attorneys generally hold out for political solutions and ask federal courts for more process in EOIR—a politically controlled tribunal—but these requests are often denied.[235] In *Jennings*, attorneys asked the Court to interpret INA to imply a requirement for EOIR bond hearings in cases of prolonged

137 S. Ct. 1899, 1907–08 (2017); *see also* Woodby v. INS, 385 U.S. 276, 286 (1966), *extended by* Chapman v. California, 386 U.S. 18, 24 n.10 (1967).

228. *Weaver*, 137 S. Ct. at 1907–08; Brecht v. Abrahamson, 507 U.S. 619, 629–30 (1993).

229. *See Woodby*, 385 U.S. at 286 ("We hold that no deportation order may be entered unless it is found by clear, unequivocal, and convincing evidence that the facts alleged as grounds for deportation are true."), *extended by Chapman*, 386 U.S. at 24 n.10 (establishing the structural error doctrine).

230. *See* Liebman & Hertz, *supra* note 227, at 1130–35 (noting that "structural" error is synonymous with "harmful" error).

231. *Woodby*, 385 U.S. at 285–86, *extended by Chapman*, 386 U.S. at 24 n.10.

232. *Woodby*, 385 U.S. at 285–86; *see, e.g.*, Schneiderman v. United States, 320 U.S. 118, 160 (1943).

233. *See, e.g.*, Sarah Stillman, *The Race to Dismantle Trump's Immigration Policies*, NEW YORKER (Feb. 1, 2021), https://www.newyorker.com/magazine/2021/02/08/the-race-to-dismantle-trumps-immigration-policies [hereinafter Stillman, *The Race*].

234. *See, e.g.*, Nafeez Mosaddeq Ahmed, *Donald Trump is Not the Problem – He's the Symptom*, OPENDEMOCRACY (Jan. 20, 2017), https://www.opendemocracy.net/en/donald-trump-is-not-problem-he-s-symptom/. *Cf.* Matter of A-B-, 28 I&N Dec. 307, 308 (A.G. 2021) ("I vacate *A-B- I* and *A-B- II*," which is a good politically driven result for immigration attorneys, however this result is temporary "pending rulemaking"); Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers, 87 Fed. Reg. 18078 (effective May 31, 2022) (potentially accomplishing the same thing as the *Matter of A-B-* opinions only through rulemaking procedures).

235. *See, e.g.*, DHS v. Thuraissigiam, 140 S. Ct. 1959, 1970 (2020); Jennings v. Rodriguez, 138 S. Ct. 830, 842 (2018); Castro v. USDHS, 835 F.3d 422, 450 (3d Cir. 2016).

detention—this request was denied.[236] Post-*Jennings* district courts around the country developed due process balancing tests to decide whether to remand to EOIR to require these bond hearings directly under the Fifth Amendment despite *Jennings*.[237]

In *Castro* and *Thuraissigiam*, attorneys asked for EOIR to pause the expedited removal of asylum seekers to reconsider credible fear decisions.[238] The *Castro* Court summarily denied the request and the Circuit Court decision in *Thuraissigiam* limited its grant of more EOIR review to the facts, before being reversed by the U.S. Supreme Court for the attorney's failure to ask for the common law remedy.[239] Neither of these cases ensured the release of immigrants from imprisonment and nobody involved in the litigation of either case characterized the inquisition administered by EOIR, ICE, and CBP as illegitimate *coram non judice*.[240]

Thuraissigiam interpreted a process conducted by biased enforcement officers as "due" process and this decision may be put to the test by recently adopted DHS and DOJ joint rules.[241] However, President Trump was the first to test out *Thuraissigiam*'s questionable due process analysis when he occupied Portland, Oregon with BORTAC—militarized ICE and CBP agents.[242] Under his idea of presidential power, apparently supplied to him

236. *Jennings*, 138 S. Ct. at 842.

237. *See, e.g.*, Jamal A. v. Whitaker, 358 F. Supp. 3d 853, 858–59 (D. Minn. 2019) (applying a six-factor test to decide whether due process was violated); Banda v. McAleenan, 385 F. Supp. 3d 1099, 1106 (W.D. Wash. 2019) (adopting the *Jamal* test); Djelassi v. ICE Field Office Director, 434 F. Supp. 3d 917, 929 (W.D. Wash. 2019) (adopting the *Jamal* test). *Cf.* Al Otro Lado v. Mayorkas, No. 17-cv-02366, 2021 U.S. Dist. LEXIS 167128, at *62–63 (S.D. Cal. 2021).

238. *Castro*, 835 F.3d, at 450; Thuraissigiam v. USDHS, 917 F.3d 1097, 1106 (9th Cir. 2019), *rev'd*, 140 S. Ct. 1959 (2020).

239. *Castro*, 835 F.3d, at 450; *Thuraissigiam*, 917 F.3d, at 1106, *rev'd*, 140 S. Ct. 1959 (2020).

240. *Castro*, 835 F.3d, at 450; *Thuraissigiam*, 917 F.3d, at 1106, *rev'd*, 140 S. Ct. 1959 (2020).

241. *Thuraissigiam*, 140 S. Ct. at 1983 (determining that the immigrant was given the right to a credible fear interview, and that "the Due Process Clause provides nothing more"); Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers, 87 Fed. Reg. 18078 (effective May 31, 2022).

242. Emily Green & Keegan Hamilton, *Border Patrol Snipers Were Authorized to Use Deadly Force at George Floyd's Burial*, VICE NEWS (Oct. 1, 2020, 8:34 AM), https://www.vice.com/en/article/5dz7zd/border-patrol-snipers-were-authorized-to-use-deadly-force-at-george-floyds-burial; Ed Pilkington, *'These are His People': Inside the Elite Border Patrol Unit Trump Sent to Portland*, THE GUARDIAN (July 27, 2020, 5:00 AM), https://www.theguardian.com/us-news/2020/jul/27/trump-border-patrol-troops-portland-bortac. *See* Jonathan Levinson et al., *Federal Officers Use Unmarked Vehicles to Grab People in Portland, DHS Confirms*, NPR (July 17, 2020, 1:04 PM), https://www.npr.org/2020/07/17/892277592/federal-officers-use-unmarked-vehicles-to-grab-protesters-in-portland; *see also* Associated Press, *Portland Protesters Clash with Agents Outside ICE Building*, KWQC (Aug. 20, 2020, 9:19 AM), https://www.kwqc.com/2020/08/20/portland-protesters-gather-at-federal-immigration-building. *Cf.* Index Newspapers LLC v. City of Portland, 480 F. Supp. 3d 1120 (D. Or., 2020) (quoting Leigh v. Salazar, 677 F.3d 892, 897, 900 (9th Cir. 2012)).

by the 2019 term's immigration decisions, Trump began signing orders on a variety of topics with the belief that they were then as binding as congressional law.[243]

A robust executive can cause the legal ground under an immigrant case to shift quickly, so it is pivotal to remember how simple edits to habeas petitions can preserve a foreign national's privilege to "seek to enforce separation-of-power principles" under *Boumediene*.[244] As Judge Hardiman stated in his *Castro* concurrence, which was quoted in *Thuraissigiam*, it was the immigration attorney's failure to request release pending legitimate process that doomed their habeas petitions,

> Unlike the petitioners in *Boumediene*—who sought their release in the face of indefinite detention—Petitioners here seek to alter their status in the United States in the hope of avoiding release to their homelands. That prayer for relief, in my view, dooms the merits of their Suspension Clause argument . . . .[245]

The *Thuraissigiam* Court endorsed this logic by authoring a new requirement of requesting "simple release," while also appearing to suggest that such "simple release" may include forcing a person to fly across the world in an unsafe, minimally regulated charter flight "while their hands and ankles are shackled"—an oxymoron of Orwellian proportions.[246] If the Court granted simple, immediate release into the United States by ruling ICE and EOIR processes unlawful, as habeas common law may require, the law of nonrefoulement ('*non-return*') should apply.[247]

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243. *Transcript: 'Fox News Sunday' Interview with President Trump*, FOX NEWS (July 19, 2020, 10:57 AM), https://www.foxnews.com/politics/transcript-fox-news-sunday-interview-with-president-trump [hereinafter *Transcript: 'Fox*] (citing DHS v. Regents of the Univ. of Cal., 140 S. Ct. 1891 (2020)) (statement of then President Trump: "The Supreme Court gave the president of the United States powers that nobody thought the president had . . . . But the decision by the Supreme Court on DACA allows me to do things on immigration, on health care, on other things that we've never done before."). *See, e.g.*, Building and Rebuilding Monuments to American Heroes, Exec. Order 13,934, 85 Fed. Reg. 41165 (July 3, 2020); Addressing the Threat Posed by TikTok, Exec. Order 13,942, 85 Fed. Reg. 48637 (Aug. 11, 2020); An America-First Healthcare Plan, Exec. Order 13,951, 85 Fed. Reg. 62179 (Oct. 1, 2020). *Cf.* Seila Law LLC v. CFPB, 140 S. Ct. 2183, 2203 (2020) (adopting unitary powers theory for the first time in a majority decision).

244. Boumediene v. Bush, 553 U.S. 723, 743 (2008). *See Thuraissigiam*, 140 S. Ct. at 1975 (distinguishing *Boumediene* as "out of context").

245. Castro v. USDHS, 835 F.3d 422, 450–51 (3d Cir. 2016) (Hardiman, C.J., concurring dubitante), *quoted by Thuraissigiam*, 140 S. Ct. at 1971. *See supra* notes 165–71 and accompanying text (discussing the problems with defining deportation as a form of "release" in habeas cases).

246. *Thuraissigiam*, 140 S. Ct. at 1971; Albaladejo, *supra* note 133.

247. U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, at pt. 1, art. 3 (Dec. 10, 1984), S. Treaty Doc. 100–20 (1988) ("No State Party shall expel, return ('refouler') or extradite a person to another State where there are

The United States is a signatory to the U.N. Convention Against Torture ("CAT"), a multilateral treaty that sets forth the principle of unconditional nonrefoulement.[248] Thus, a habeas court may apply CAT to preclude return, removal, extradition, or deportation in the absence of or pending legitimate process by the government to properly review asylum claims.[249] Moreover, under existing law an immigrant asylum seeker may adjust their status regardless of where or how they first entered into the country.[250]

Critics of immigrant rights, including supporters of Trump's draconian immigration policies, maintain that border inspection is paramount to all legal travel to the United States.[251] In other words, they are committed to denying the existence of the law of nonrefoulement even if the courts began to use it to invalidate EOIR and ICE processes to release immigrants into the United States.[252] Future presidents may seek to emulate Trump era policies

substantial grounds for believing that he would be in danger of being subjected to torture."), *implemented by* Foreign Affairs Reform and Restructuring Act of 1998 (FARRA), 112 Stat. 2681-761, 2681-822G, § 2242 ("It shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States.").

248. *See* sources cited *supra* note 247; *see* Trent Buatte, *The Convention Against Torture and* Non-refoulement *in U.S. Courts*, 35 GEO. IMMIGR. L.J. 701, 710 (2021) (noting that the "bare minimum to meet CAT Article 3" is unconditional regarding an immigrant's status, because unlike the Refugee Convention "CAT requires no such nexus and contains no exceptions").

249. U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, at pt. 1, art. 3 (Dec. 10, 1984), S. Treaty Doc. 100–20 (1988) (requiring the United States to determine all "substantial grounds" and "relevant considerations" before denying CAT relief). If the United States did not allow for a process that determined all substantial grounds and relevant conditions before deporting asylum seekers, it would be violating CAT. FARRA, 112 Stat. 2681-761, 2681-822G, § 2242(b) (requiring the executive branch to "prescribe regulations to implement the obligations of the United States under Article 3" of CAT); *cf.* Nasrallah v. Barr, 140 S. Ct. 1683, 1694 (2020) (deciding that provisions that would preclude the judicial review of a final order of removal in habeas court "do not preclude judicial review of a noncitizen's factual challenges to a CAT order").

250. *Thuraissigiam*, 140 S. Ct. at 1982; *see* Matter of N-V-G-, 28 I&N Dec. 380, 380–82 (BIA 2021) (noting how refugees, not yet admitted as lawful permanent residents, may adjust their status possibly regardless of crimes or infractions previously committed). *See also* Innovation Law Lab v. Wolf, 951 F.3d 986, 988 (9th Cir. 2020) (citing 8 U.S.C. § 1231(b)).

251. Al Otro Lado v. Mayorkas, No. 17-cv-02366, 2021 U.S. Dist. LEXIS 167128, at *41–44 (S.D. Cal. 2021). *See* Memorandum from Jefferson Beauregard Sessions, Attorney General, on Zero-Tolerance for Offenses Under 8 U.S.C. § 1325(a) (Apr. 6, 2018), https://www.justice.gov/opa/press-release/file/1049751/download; *see also* Excluding Illegal Aliens From the Apportionment Base Following the 2020 Census, 85 Fed. Reg. 44679 (July 21, 2020), *cited by* New York v. Trump, 141 S. Ct. 530, 538 (2020) (Breyer, J., dissenting) (per curiam). *Cf.* Sanchez v. Mayorkas, 141 S. Ct. 1809, 1811 (2021).

252. *Innovation Law Lab*, 951 F.3d at 988; *Al Otro Lado*, 2021 U.S. Dist. LEXIS 167128, at *70. *See* Jane Chong, *Donald Trump's Strange and Dangerous 'Absolute Rights' Idea*, THE ATLANTIC (Feb. 29, 2020), https://www.theatlantic.com/ideas/archive/2020/02/president-trump-absolute-rights/607168/ (noting that Trump "tweeted that he had 'the absolute right' to close the border"). *Cf.* Hobbs Act, 18 U.S.C. § 1951 (a president who closes the border in violation of the

that treated all undocumented immigrants as presumptively illegal, even though many of them may legally adjust their status and eventually naturalize as proper U.S. citizens.[253]

As stated above, the remedy of release pending a trial was first granted to an immigrant in *Ex parte Bollman*, i.e., release of an immigrant *into* the United States, and affirmed in *Boumediene* as the ordinary common law minimum for all persons.[254] Nevertheless, at the immigration attorneys' express requests in *Jennings*, *Castro*, and *Thuraissigiam* the Court only considered remanding to EOIR for more process.[255] These cases may, therefore, be considered distinguished from any case where an immigration attorney requests the common law remedy.[256]

VI. Flip the Script of the So-Called Plenary Power Doctrine

In the immigration context, plenary power doctrine is "the political branches' plenary authority to exclude aliens."[257] It is judge-made law that essentially grants the U.S. federal government sovereign immunity from suits in federal court for any policy or law that involves policing U.S. national borders.[258] It arose directly from the eugenic *Chinese Exclusion Case*, a.k.a. *Chae Chan Ping v. United States*, which opened the floodgates to the

Hobbs Act would be committing an impeachable offense); United States v. Staszcuk, 517 F.2d 53, 65 (7th Cir. 1975) (quoting United States v. Pranno, 385 F.2d 387, 389 (7th Cir. 1967)).

253. Monika Batra Kashyap, *"Illegal" vs. "Undocumented": A NWIRP Board Member's Perspective*, NW IMMIGRANT RIGHTS PROJECT, https://www.nwirp.org/illegal-vs-undocumented-a-nwirp-board-members-perspective/; *Al Otro Lado*, 2021 U.S. Dist. LEXIS 167128, at *42 (distinguishing *Thuraissigiam* and not treating all immigrants that cross without inspection as presumptively "illegal"); *see also* Lindsey Romain, *Why You Shouldn't Use the Term "Illegals"*, TEEN VOGUE (Mar. 6, 2017), https://www.teenvogue.com/story/why-you-shouldnt-use-the-term-illegals. *See, e.g.*, *Report: The Trump Zero Tolerance Policy: A Cruel Approach with Humane and Viable Alternatives*, REFUGEES INT'L (July 31, 2018), https://www.refugeesinternational.org/reports/2018/7/31/trump-zero-tolerance-policy ("The policy is in conflict with U.S. international obligations and U.S. policy . . . .").

254. Boumediene v. Bush, 553 U.S. 723, 779 (2008) (quoting *Ex parte* Bollman, 8 U.S. 75, 136 (1807) (citing Judiciary Act of 1789, 1 Stat. 73, § 14 (still good law))). *See also Thuraissigiam*, 140 S. Ct. at 2002–04 (Sotomayor, J., dissenting). *Cf.* Sandra Day O'Connor, *The Judiciary Act of 1789 and the American Judicial Tradition*, 59 U. CIN. L. REV. 1, 3 (1990); Thuraissigiam v. USDHS, 917 F.3d 1097, 1106 (9th Cir. 2019).

255. *Boumediene*, 553 U.S. at 747 (citing Somerset v. Stewart [1772] 98 ER 499 (Eng.)); Eric M. Freedman, *Dimension I: Habeas Corpus as a Common Law Writ*, 46 HARV. C.R.-C.L. L. REV. 591, 600–05 (2011) [hereinafter Freedman, *Dimension I*] (confirming that non-white slaves benefited from the writ of habeas corpus before and after the American Revolution); *Thuraissigiam*, 140 S. Ct. at 1999–2001 (Sotomayor, J., dissenting).

256. *Thuraissigiam*, 140 S. Ct. at 1973, *distinguishing* Somerset v. Stewart [1772] 98 ER 499 (Eng.).

257. Castro v. USDHS, 835 F.3d 422, 439–41 (3d Cir. 2016) (citing Chae Chan Ping v. United States, 130 U.S. 581, 581–82 (1889)).

258. *Id. Cf.* Texas v. Biden, 554 F. Supp. 3d 818, 857–58 (N.D. Tex. 2021).

federal government to police U.S. borders on a eugenic basis without limitation.[259]

This part is dedicated to the martialing of legal language to flip the script of plenary power doctrine in immigrant habeas court.[260] By flipping the script, I simply mean to adopt the popular meaning of the idiom,[261] i.e., of taking the usual script that plenary powers doctrine requires after *Chae Chan Ping* and flipping it on its head or otherwise revealing it as fallacious, absurd, or unworkable.[262] Flipping the script of plenary power doctrine is not a final, end-game strategy like arguing that the plenary power ideology should be overruled as anathema to *McCulloch v. Maryland*'s conception of federal powers as not plenary, but limited and supreme.[263] However, such an argument to overrule plenary power doctrine under *McCulloch* may be helped along by the following strategies of flipping the script of plenary powers.[264]

It is highly unlikely that plenary power doctrine will be brought down anytime soon by the direct attack of a single immigration attorney in habeas

259. *Castro*, 835 F.3d at 439–41 ("The case that first recognized the political branches' plenary authority to exclude aliens [was] *Chae Chan Ping* [a.k.a. *The Chinese Exclusion Case*].").

260. *See, e.g.*, *id.*

261. Flipping the script is a popular idiom in the United States that means: "To reverse a situation, especially by doing something unexpected." WIKTIONARY: THE FREE DICTIONARY, https://en.wiktionary.org/wiki/flip_the_script. *See* Karla V. Zelaya, *Sweat the Technique: Visibleizing Praxis Through Mimicry in Phillis Wheatley's "On Being Brought from Africa to America"* 106–08 (2015) (Ph.D. dissertation) https://scholarworks.umass.edu/dissertations_2/484/ (demonstrating how the strategy of "[f]ollowing the script" of an oppressor may be used in an argument against oppression).

262. For example, prior to the eugenic era there were several cases that made decisions premised on plenary powers; but the script they followed on this topic was oftentimes different from the script that emerged from *Chae Chan Ping*. *See, e.g.*, Gibbons v. Ogden, 22 U.S. 1, 197 (1824) (asserting federal plenary power to overrule a state steamboat patent that, among other things, would restrict immigration to New York); New York v. Miln, 36 U.S. 102, 139 (1837) (asserting the countervailing idea of state plenary powers or police powers to uphold a state immigration law under an early expression of the public charge doctrine), *overruled by* Edwards v. California, 314 U.S. 160, 177 (1941) (extending a fundamental right to immigrate between the states); *id.* at 177–78 (Douglas, J., concurring) (describing the bases of the fundamental right of emigration asserted in *Edwards*); *id.* at 184–85 (Jackson, J., concurring) ("The mere state of being without funds is a neutral fact—constitutionally an irrelevance, like race, creed, or color. I agree with what I understand to be the holding of the Court that cases which may indicate the contrary are overruled.").

263. Schroeder, *We Will*, *supra* note 176, at 54; McCulloch v. Maryland, 17 U.S. 316, 405 (1819); *Castro*, 835 F.3d at 439–41 (citing Chae Chan Ping v. United States, 130 U.S. 581, 581–82 (1889)); DHS v. Thuraissigiam, 140 S. Ct. 1959, 2004–05 (2020) (citing Chinese Exclusion Act of 1882, 22 Stat. 58; The Scott Act, 25 Stat. 504; Immigration Act of 1891, 26 Stat. 1085; Nishimura Ekiu v. United States, 142 U.S. 651 (1892)). *Cf. Gibbons*, 22 U.S. at 197.

264. *See, e.g.*, Blanche Bong Cook, *Johnny Appleseed: Citizenship Transmission Laws and a White Heteropatriarchal Property Right in Philandering, Sexual Exploitation, and Rape (the "WHP") or Johnny and the WHP*, 31 YALE J.L. & FEMINISM 57, 134 (2019); Saito, *supra* note 122, at 1135–36, 1175.

court.[265] Nevertheless, as Professor Blanche Bong Cook inspiringly concluded in her recent critique of plenary power doctrine, "'Power concedes nothing without a demand.' Power is neither natural nor inevitable. It is made. And it can be unmade."[266] For however long plenary power doctrine persists, habeas attorneys may learn such ways of talking about plenary powers that could one day lead to its undoing.[267]

For example, it appears that the simplest way to stop a federal court from deferring to the political branches' plenary power would be to emphasize a disagreement between the political branches.[268] Along these lines, *Boumediene* extended jurisdiction over the habeas petitions of foreign nationals specifically to resolve separation of powers controversies.[269] Plenary power doctrine does not provide a way to resolve disagreements between Congress, the president, and the courts, because it is a doctrine of prudential deference that depends upon the existence of an agreed upon political policy to which the court can defer.[270]

It likely would not hurt an immigrant habeas petition to name Congress' strong disagreement with former President Trump's assertions of plenary power over elections in a bid to overrule the results of the 2020 election through kraken lawsuits.[271] However, there is something far closer to home for immigration lawyers to discuss, which is Congress' disagreement with the executive branch over time, date, and location information on Notices to

265. Kleindienst v. Mandel, 408 U.S. 753, 765–66 n.6 (1972).

266. Cook, *supra* note 264, at 134 (quoting FREDERICK DOUGLASS, *Speech before the West Indian Emancipation Society*, *in* TWO SPEECHES BY FREDERICK DOUGLASS 22 (1857)).

267. *Id.* at 111–15 (showing us how to attack several versions of plenary power doctrine).

268. *See, e.g.*, Oral Argument at 00:10, Niz-Chavez v. Barr, 141 S. Ct. 84 (2020) (No. 19-863), https://www.courtlistener.com/audio/72822/niz-chavez-v-barr/; Niz-Chavez v. Garland, 141 S. Ct. 1474, 1478–79 (2021); Sierra Club v. Trump, 977 F.3d 853, 888–90 (9th Cir. 2020).

269. Boumediene v. Bush, 553 U.S. 723, 743 (2008).

270. *See, e.g.*, DHS v. Thuraissigiam, 140 S. Ct. 1959, 1982 (2021).

271. Motion of Donald J. Trump, President of the United States, to Intervene in his Personal Capacity as Candidate for Re-Election, Proposed Bill of Complaint in Intervention, and Brief in Support of Motion to Intervene at 8, 26, 32, Texas v. Pennsylvania, 141 S. Ct. 1230 (2020) (No. 22O155) (citing Bush v. Gore, 531 U.S. 98, 104 (2000); McPherson v. Blacker, 146 U.S. 1, 35 (1892)) (asserting a "direct violation of the plenary power that Article II of the U.S. Constitution confers on the Legislatures of the States"); U.S. House of Representatives Committee on Oversight and Reform, *Selected Documents: President Trump Pressure Campaign on Dept. of Justice* (June 2021) (quoting *McPherson*, 146 U.S. at 35 ("the practical construction of the clause has conceded plenary power to the state legislature in the matter of the appointment of electors")).

Appear ("NTAs").[272] The executive branch boldly disobeys IIRIRA's requirements of putting time, date, and location information on NTAs, which are cited for jurisdiction in most defensive removal cases.[273]

In *Pereira v. Sessions* and *Niz-Chavez v. Garland*, the Court sided with Congress over the executive branch on immigration policy.[274] A general principle that may be drawn from these cases is that the executive branch may not rely upon prudential deference standards to avoid statutory law; ergo the executive branch alone does not have *plenary* power to deport immigrants like Thuraissigiam.[275] The litigation over NTAs, which play a central role in most defensive immigration suits,[276] supports the idea that the court does not usually defer to the political branches' plenary powers when they are not in alignment.[277]

Furthermore, there are several pre-*Chae Chan Ping* cases that asserted early versions of plenary power doctrine to extend federal jurisdiction in order to encourage immigration to the United States, providing another basis to flip the script of plenary power doctrine.[278] These cases were recently extended powerfully in *NFIB v. Sebelius* to affirm Obamacare.[279] Health law

272. Oral Argument at 00:10, Niz-Chavez v. Barr, 141 S. Ct. 84 (2020) (No. 19-863), https://www.courtlistener.com/audio/72822/niz-chavez-v-barr/; Niz-Chavez v. Garland, 141 S. Ct. 1474, 1478–79 (2021), *extended by* Rodriguez v. Garland, 15 F. 4th 351, 355–56 (5th Cir. 2021); *see* Pereira v. Sessions, 138 S. Ct. 2105, 2113 (2018). The Board of Immigration Appeals, an executive department tribunal organized within the Department of Justice, distinguished *Niz-Chavez* and the Fifth Circuit decision *Rodriguez*. Matter of LaParra, 28 I&N Dec. 425, 435–36 (BIA 2022) (allowing removal proceedings to continue that are initiated by NTAs that clearly violate the statutory mandate as well as the clear meaning of the statutory mandate given by the U.S. Supreme Court in both *Niz-Chavez* and *Pereira*, ignoring *Rodriguez*).

273. *See* AILA, *Featured Issue: The Pereira Ruling and Resulting Fake NTAs*, AILA Doc. No. 19082210, (Aug. 13, 2020), https://www.aila.org/advo-media/issues/all/the-pereira-ruling.

274. *Compare Niz-Chavez*, 141 S. Ct. at 1478–79, *and Pereira*, 138 S. Ct. at 2113, *with Thuraissigiam*, 140 S. Ct. at 1982 (deciding that the non-EOIR "process" of a credible fear interview is sufficient to satisfy the Due Process Clause, even though no unbiased decision maker (not even an IJ) reviews these decisions to see whether they complied with the law or not).

275. *Niz-Chavez*, 141 S. Ct. at 1478–79; *Pereira*, 138 S. Ct. at 2113. In *Niz-Chavez* and *Pereira* the Court explained that it does actually matter if the executive branch follows the law when it is unambiguous. *Cf.* Featured Issue: The Pereira Ruling and Resulting Fake NTAs, AILA Doc. No. 19082210 (Aug. 13, 2020), https://www.aila.org/infonet/the-pereira-ruling.

276. 8 C.F.R. § 1003.14; 8 U.S.C. § 1229(a)(1)(G); Lopez v. Barr, 925 F.3d 396, 401 (9th Cir. 2019).

277. *See, e.g.*, *Niz-Chavez*, 141 S. Ct. at 1478–79; *Pereira*, 138 S. Ct. at 2113.

278. Gibbons v. Ogden, 22 U.S. 1, 197(1824); *In re* Kaine, 55 U.S. 103, 110–13 (1853); United States v. Jung Ah Lung, 124 U.S. 621, 626–32 (1888); *see* INS v. St. Cyr, 533 U.S. 289, 305–06 (2001). *See also* Brown v. Maryland, 25 U.S. 419, 446 (1827). *Cf.* McCulloch v. Maryland, 17 U.S. 316, 429 (1819).

279. NFIB v. Sebelius, 567 U.S. 519, 550 (2012) (quoting *Gibbons*, 22 U.S. at 197).

cases like *Sebelius* may be drawn upon in the immigration context, because historically they trace back to the same source of law.[280]

As *Sebelius* revealed, the federal court is still empowered to say what the law is.[281] *Boumediene* demonstrated even more acutely how saying what the law is can help the court flip the script of a problematic former opinion in order to keep what serves the court and discard that which is unhelpful.[282] In doing so, *Boumediene* was able to preserve what served the court from the *Hamdi* plurality opinion embodied by this statement,

> Likewise, we have made clear that, unless Congress acts to suspend it, the Great Writ of habeas corpus allows the Judicial Branch to play a necessary role in maintaining this delicate balance of governance, serving as an important judicial check on the Executive's discretion in the realm of detentions.[283]

Boumediene accepted and extended this statement, meaning if habeas is not suspended, then the Court must continue "to play a necessary role" by asserting jurisdiction over habeas corpus writs.[284] However, *Boumediene* also flipped the script of *Hamdi*, by justifying the lower courts' discharge of the prisoners instead of remanding a *Mathews* balancing test on a military tribunal.[285] This strategy may be repeated in the immigration context going forward, as *Thuraissigiam*'s citation of plenary power doctrine came from *Landon v. Plasencia*, a non-habeas case that remanded a *Mathews* balancing test.[286]

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280. *Id.* at 570–71 (citing to the Obamacare individual mandate as a "capitation (also known as a 'head tax' or a 'poll tax')"); Passenger Cases, 48 U.S. 283, 403 (1849) (Opinion of McLean, J.) ("The act of New York now under consideration is called a health law. It imposes a tax on the master and every cabin passenger of a vessel from a foreign port . . . ."). *See Miln*, 36 U.S. at 141–42, *overruled by Edwards*, 314 U.S. at 177; *see also* Wendy E. Parmet, *The Plenary Power Meets the Police Power: Federalism at the Intersection of Health & Immigration*, 45 AM J. L. & MED. 224, 239 (2019).

281. *Sebelius*, 567 U.S. at 538 (quoting Marbury v. Madison, 5 U.S. 137, 176 (1803)); *id.* at 550; *see* Boumediene v. Bush, 553 U.S. 723, 727 (2008) (quoting *Marbury*, 5 U.S. at 177–78).

282. *Boumediene*, 553 U.S. at 727 (quoting *Marbury*, 5 U.S. at 177–78); *id.* at 733–34 (citing Hamdi v. Rumsfeld, 542 U.S. 507, 518 (2004) (plurality opinion)). *Cf.* Lithwick, *Nevermind*, *supra* note 123.

283. *Hamdi*, 542 U.S. at 536 (plurality opinion), *quoted by Boumediene*, 553 U.S. at 745.

284. *Id.*

285. *Boumediene*, 553 U.S. at 784 ("Setting aside the fact that the relevant language in *Hamdi* did not garner a majority of the Court, it does not control the matter at hand."); *id.* at 792 (overruling MCA § 7 as an "unconstitutional suspension of the writ," which allowed the petitioners to advance their "request [for] an order of release"); *Hamdi*, 542 U.S. at 529 (plurality opinion) (citing Mathews v. Eldridge, 424 U.S. 319, 335 (1976)).

286. DHS v. Thuraissigiam, 140 S. Ct. 1959, 1982 (2020) (citing Landon v. Plasencia, 459 U.S. 21, 32 (1982) (citing *Mathews*, 424 U.S. at 334–35)) (denying jurisdiction, where *Landon*

Perhaps, as the majority in *Thuraissigiam* implied, a *Mathews* balancing test for potentially more administrative process was the incorrect habeas remedy in *Hamdi*,[287] but this in itself did not clearly justify *Thuraissigiam*'s denial of jurisdiction based on *Landon*.[288] For, as occurred in *Landon*, the recognition of plenary power doctrine was not sufficient to dismiss for lack of jurisdiction.[289] In another example, *Trump v. Hawaii* acknowledged plenary power doctrine but maintained jurisdiction, to "look behind the face of the Proclamation."[290]

Therefore, attorneys may likewise ask the court to look behind the face of the plenary power of exclusion itself.[291] What the court will find, if it looks, is sheer eugenic ideology shamelessly built upon antebellum slavery law.[292] The plenary power of exclusion, as encapsulated by Harry Laughlin's eugenics propaganda, envisioned the exclusion of *all* immigrants for the purpose of only admitting immigrants with "fit" genes.[293] The post-WWII amendments to immigration law attempted to remove unequal treatment in immigration exclusion, but did not repeal the 1924 policy of general exclusion as a fundamentally racist, misogynist, and ableist policy.[294]

Congress never gave another rationale, other than eugenic ideology, for asserting general exclusion at U.S. borders.[295] Two colorable arguments spring from this reality: (1) that the eugenic basis of immigration law is an

asserted it). *Cf. Boumediene*, 553 U.S. at 825 (Roberts, C.J., dissenting) (citing *Landon*, 459 U.S. at 34–35).

287. *Thuraissigiam*, 140 S. Ct. at 1978 (citing *Hamdi*, 542 U.S. at 563 (Scalia, J., dissenting)).

288. *Id.* at 1982 (quoting *Landon*, 459 U.S. at 32).

289. *Landon*, 459 U.S. at 32. *See Thuraissigiam*, 140 S. Ct. at 1978.

290. Trump v. Hawaii, 138 S. Ct. 2392, 2420 (2018).

291. *Id.*

292. Schroeder, *We Will*, *supra* note 176, at 47–48 (explaining how *Prigg* and *Dred Scott* led to *Chae Chan Ping* and noting: "The plenary power doctrine was adopted, directly from Joseph Story's dissent in *Houston v. Moore*, in *Prigg* and the *Passenger Cases'* interpretation of the Fugitive Slaves and Slave Trade Clauses as a source of unbounded power.").

293. HARRY HAMILTON LAUGHLIN, EUGENICAL STERILIZATION IN THE UNITED STATES 349–50, 360 (1922) (asserting federal plenary power to police immigration at U.S. national borders); Randall D. Bird & Garland Allen, *The J.H.B. Archive Report The Papers of Harry Hamilton Laughlin, Eugenicist*, 14 J. HIST. BIO. 339, 339–40 (1981); 65 CONG. REC. H4,570–75 (Mar. 20, 1924) (remarks of Rep. Samuel Dickstein); 65 CONG. REC. H5,677–81 (Apr. 5, 1924) (containing a portion of Harry Laughlin's testimony and report); 65 CONG. REC. H6,284–89 (Apr. 12, 1924) (remarks of Rep. John Kindred); *see* Immigration Act of 1924, 43 Stat. 153 (establishing the first system that excluded all immigrants from every nation as the general rule rather than the exception). *Cf.* Alex Nowrasteh, *Reflections on the Immigration Act of 1924*, CATO AT LIBERTY (June 1, 2016, 4:25 PM), https://www.cato.org/blog/reflections-immigration-act-1924.

294. Nowrasteh, *supra* note 293.

295. *Id.*; Immigration Act of 1924, 43 Stat. 153 (establishing general exclusion of immigrants pursuant to a visa system for the first time); Hart-Celler Act, 79 Stat. 911 (extending the general exclusion principle, without justifying it on another basis than eugenics even though eugenics was debunked by the time of this law's enactment).

illegitimate usurpation of state police powers as described in *NFIB v. Sebelius*;[296] and (2) that purifying the genes of the human race was not a legitimate end, and eugenics was not an appropriate means to that end as required under *McCulloch*.[297] Either of these arguments could eventually justify the overruling of INA as it presently exists.[298]

As Justice Ginsburg once quipped: "the Court should never be influenced by the weather of the day but inevitably they will be influenced by the climate of the era."[299] It may, therefore, be helpful to notice the anti-eugenics climate shift currently underway.[300] Britney Spears' highly publicized in-court statement that helped to put an end to her conservatorship provided important sidelights on the new reparation law for victims of eugenics in California that Kelli Dillon and Cynthia Chandler pushed through the legislature.[301] The new California law followed similar enactments shepherded through the legislatures of Virginia and North Carolina by Mark Bold.[302]

296. NFIB v. Sebelius, 567 U.S. 519, 550 (2012) (deciding the Affordable Care Act's individual mandate overstepped Congress' Commerce Clause power). *Cf.* Page Act of 1875, 18 Stat. 477 (excluding a class of immigrants for the first time in federal law and citing to classic police powers purposes; i.e., specifically, the avoidance of lewdness and immorality was its primary purpose).

297. McCulloch v. Maryland, 17 U.S. 316, 421 (1819) ("Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are Constitutional."), *quoted by Sebelius*, 567 U.S. at 537.

298. *See, e.g.*, *Sebelius*, 567 U.S. at 550.

299. *Transcript: Interview with Supreme Court Justice Ruth Bader Ginsburg*, THE TAKEAWAY (Sept. 15, 2013), https://www.wnycstudios.org/podcasts/takeaway/segments/transcript-interview-justice-ruth-bader-ginsburg (quoting Paul Freund) (internal quotation marks omitted).

300. *See* Sara Luterman, *For Women Under Conservatorship, Forced Birth Control Is Routine*, THE NATION (July 15, 2021), https://www.thenation.com/article/society/conservatorship-iud-britney-spears/; Mary Harris, *For the Disability Community, Britney Spears' Situation Is All Too Familiar*, SLATE (June 29, 2021, 12:04 PM), https://slate.com/human-interest/2021/06/britney-spears-conservatorship-guardianship-disability.html (explaining how *Buck v. Bell* remains good law and continues to justify state level nonconsensual sterilization); *cf.* Stump v. Sparkman, 435 U.S. 349, 364 (1978); Treatment of Certain Payments in Eugenics Compensation Act, 130 Stat. 976 (exempting payments made from state eugenics compensation programs from consideration in determining eligibility for, or the amount of, federal public benefits).

301. Cal. Health & Safety Code § 24210; BELLY OF THE BEAST (Erika Cohn dir., 2020) (explaining the activism of Kelli Dillon and Cynthia Chandler). *Cf.* Madrigal v. Quilligan, No. 75–2057, 1978 U.S. Dist. LEXIS 20423, at *1 (9th Cir. 1978) (directly affirming *Buck v. Bell* in California without an available opinion); *Stump*, 435 U.S. at 364. *See* Amanda Morris, *'You Just Feel Like Nothing': California to Pay Sterilization Victims*, N.Y. TIMES (July 11, 2021), https://www.nytimes.com/2021/07/11/us/california-reparations-eugenics.html.

302. Va. Admin. Code, 12 VAC 35-240-10; N.C. Gen. Stat. § 143B–426.50; *G: Unfit*, RADIOLAB (July 15, 2021), https://www.wnycstudios.org/podcasts/radiolab/articles/g-unfit [hereinafter *G: Unfit*]. *See also* Eric Eyre, *W.Va. House passes repeal of forced sterilization law*, CHARLESTON GAZETTE-MAIL (Mar. 25, 2013), https://www.wvgazettemail.com/news/politics/wva-house-passes-repeal-of-forced-sterilization-law/article_21dd1f3c-778c-5c34-828f-781451c44e52.html.

Scholarship is also surging forward into the topic of eugenics and its origin in the United States, with relevant connections to immigration law.[303] For example, after discussing Britney Spears' situation on the air, author Lulu Miller announced her forthcoming book *Why Fish Don't Exist* that explains the founding president of Stanford University David Starr Jordan's anti-immigration role in the eugenics movement.[304] Also, after studying how the American eugenics programs inspired Nazi Germany, Professor Whitman of Yale Law School wrote in summation,

> As one leading Nazi author summarized American immigration history in 1933, '[u]ntil the 1880s, a liberal freedom-oriented conception led the United States to regard itself as the refuge of all oppressed peoples, and consequently limitations on immigration, to say nothing of bans on immigration, were considered irreconcilable with the 'free' Constitution.' . . . [However, l]ate nineteenth-century American immigration legislation was directed in particular against Asians, beginning especially with the Chinese exclusion legislation in California in the 1870s, and on the national level in 1882.[305]

There is nothing about plenary power doctrine that requires the court to ignore an inquiry into the statutory means and ends of immigration law during the eugenics era, especially if remaining silent could implicitly endorse Nazism at the expense of *Boumediene*'s six clear holdings.[306] In fact, *Boumediene* already rejected plenary power doctrine with these words: "To hold the political branches have the power to switch the Constitution on or off at will . . . would permit a striking anomaly in our tripartite system of government, leading to a regime in which Congress and the President, not this Court, say 'what the law is.'"[307]

303. *See generally* LULU MILLER, WHY FISH DON'T EXIST (2021); JAMES Q. WHITMAN, HITLER'S AMERICAN MODEL: THE UNITED STATES AND THE MAKING OF NAZI RACE LAW (2017); ADAM COHEN, IMBECILES (2016); THOMAS C. LEONARD, ILLIBERAL REFORMERS (2016); PAMELA NEWKIRK, SPECTACLE: THE ASTONISHING LIFE OF OTA BENGA (2015); NANCY J. PAREZO & DON D. FOWLER, ANTHROPOLOGY GOES TO THE FAIR (2009); VICTORIA NOURSE, IN RECKLESS HANDS: SKINNER V. OKLAHOMA AND THE NEAR-TRIUMPH OF AMERICAN EUGENICS (2008); ALEXANDRA MINNA STERN, EUGENIC NATION (2005); WENDY KLINE, BUILDING A BETTER RACE (2001).

304. *G: Unfit*, *supra* note 302 (citing generally DAVID STARR JORDAN, THE HUMAN HARVEST (1907)), *referring to* MILLER, *supra* note 303, at 168 (David Starr Jordan "was a pacifist as a means of accomplishing his eugenicist ends"); *see* JORDAN, *supra* note 304, at 78 (proposing strict, unjust immigration policies as an alternative to war).

305. WHITMAN, *supra* note 303, at 34–37.

306. *See supra* notes 13, 265–68, 284 and accompanying text. *See also* WHITMAN, *supra* note 303, at 34–37.

307. Boumediene v. Bush, 553 U.S. 723, 765 (2008) (quoting Marbury v. Madison, 1 U.S. 137, 177 (1803)).

This sentiment was strongly affirmed after *Thuraissigiam* in *Al Otro Lado v. Mayorkas*, in which a federal district court ordered immigrant "turnbacks" unconstitutional according to *Boumediene*'s functional approach.[308] As part of its opinion, *Al Otro Lado* noted that the Alien Tort Statute ("ATS"), originally enacted in Section 9 of the Judiciary Act of 1789, is still viable in immigration suits under *Sosa v. Alvarez-Machain*.[309] As attorneys at Al Otro Lado ("AOL") demonstrated, this statute is a viable way to raise international law principles so that the court may uphold treaty obligations even if the court's ruling relies on grounds other than the ATS.[310]

Using the standards cited in *Al Otro Lado*, future suits looking to use ATS to raise the eugenic foundations of INA to the court's attention may argue that anti-Nazism is a "*jus cogens* norm" that universally exists.[311] This norm was strongly affirmed by the U.S. Supreme Court in the *Republic of Austria v. Altmann*, a case celebrated in the film *Woman in Gold* in which the U.S. Supreme Court's international power was asserted over a foreign republic to vindicate an immigrant's property rights.[312] Righting the wrongs of the Holocaust, and by extension its genocidal roots in U.S. eugenic policies, is a *jus cogens* norm actionable under the ATS; a court that says otherwise acts on mere prudential bases.[313]

It may be worth noting that eugenic systems were always premised on cost/benefit analyses to justify their existence.[314] In response, immigration

308. Al Otro Lado v. Mayorkas, No. 17-cv-02366, 2021 U.S. Dist. LEXIS 167128, at *58, *63 (S.D. Cal. 2021).

309. *Id.* at *63 (quoting ATS, 28 U.S.C. § 1350; Mujica v. AirScan Inc., 771 F.3d 580, 591 (9th Cir. 2014) (quoting Sosa v. Alvarez-Machain, 542 U.S. 692, 724 (2004))); *Sosa*, 542 U.S. at 729. *Cf.* Respublica v. De Longchamps, 1 U.S. 111, 116 (1784); *Boumediene*, 553 U.S. at 746 (quoting INS v. St. Cyr, 533 U.S. 289, 300–01 (2001)).

310. *See Al Otro Lado*, 2021 U.S. Dist. LEXIS 167128, at *66 (noting that under current ATS precedent the Court needs a "specific, universal, and obligatory" principle to move forward under ATS that was not made apparent for the Court at the time of its decision).

311. *Id.* at *71 (quoting *Sosa*, 542 U.S. at 725); *In re* Nazi Era Cases Against German Defendants Litig., 198 F.R.D. 429, 431 n.5 (D.N.J. 2000); *see* Darcie L. Christopher, *Jus Cogens, Reparation Agreements, and Holocaust Slave Labor Litigation*, 31 L. & POL'Y INT'L BUS. 1227, 1227–28 (2000). *Cf.* Scott Simon, *Explaining, Again, The Nazis' True Evil*, NPR (Aug. 19, 2017, 7:53 AM), https://www.npr.org/2017/08/19/544641070/explaining-again-thenazis-true-evil.

312. Republic of Austria v. Altmann, 541 U.S. 677, 690–91 (2004); WOMAN IN GOLD (BBC Films 2015). *Cf.* Republic of Argentina v. NML Capital Ltd., 573 U.S. 134, 144 (2014).

313. *See* Nur Iqbal Kara, *Screening Syndromes Out: Updating the International "Genocide" Vernacular for a Changing Technological Age*, 45 N.C. J. INT'L L. 163, 178–79 (2020); Frumkin v. JA Jones, Inc., 129 F. Supp. 2d 370, 374 (D. N.J. 2001) (dismissing under political question doctrine); *id.* at 386 (also citing international comity); *but see id.* at 389–90.

314. BELLY OF THE BEAST 48:05 (Erika Cohn dir., 2020) (eugenics propagandists "had always used cost/benefit as the justifier for why they were doing what they were doing" – statement of investigative reporter Corey Johnson); *id.* at 1:15:41. *See* LAUGHLIN, *supra* note 293, at 454; Buck v. Bell, 274 U.S. 200, 207 (1927) (citing Jacobson v. Massachusetts, 197 U.S. 11, 25 (1905)). The

attorneys are using the Federal Tort Claims Act ("FTCA") to flip the script of eugenics cost/benefit rationales by shifting the costs of the worst of Trump's immigration policies to the government.[315] Like the recent reparation statutes in California, Virginia, and North Carolina,[316] the FTCA suits led by attorneys at the Asylum Seeker Advocacy Project ("ASAP") ensure that eugenics-based immigration policies will never seem "worth it" again.[317] Noting these reparation efforts in habeas court should help preclude federal habeas judges from repeating the old line from eugenics, which was that the benefits of excluding (especially non-white) immigrants through nonconsensual sterilization,[318] child separation,[319] and other public-charge-based deterrence efforts outweighed the costs.[320]

Finally, the joint recipients of the 2021 Nobel Prize for economics, especially David Card and Joshua Angrist, proved that increased immigration does not have a negative economic impact on destination countries.[321] The

principle in *Jacobson* is a cost/benefit balancing test. *Jacobson*, 197 U.S. at 24 (stating that "the risk of such an injury" should be "weighed as against the benefits").

315. BELLY OF THE BEAST 1:15:41 (Erika Cohn dir., 2020). *See* Sarah Stillman, *How Families Separated at the Border Could Make the Government Pay*, NEW YORKER (June 15, 2019), https://www.newyorker.com/news/news-desk/how-families-separated-at-the-border-could-make-the-government-pay [hereinafter Stillman, *How*] (citing FTCA, 28 U.S.C. § 1346).

316. Cal. Health & Safety Code § 24210; Va. Admin. Code, 12 VAC 35-240-10; N.C. Gen. Stat. § 143B–426.50; *see* Treatment of Certain Payments in Eugenics Compensation Act, 130 Stat. 976; BELLY OF THE BEAST 1:15:41 (Erika Cohn dir., 2020) ("We have yet to get an apology, we have yet to be acknowledged. We have to crack this thing wide open. CDC has to be made accountable." – statement of survivor Kelli Dillon); Ailsa Chang et al., *A Survivor Reacts to California's Reparations Program for Forced Sterilizations*, NPR (July 21, 2021, 4:03 PM), https://www.npr.org/2021/07/21/1018924484/a-survivor-reacts-to-californias-reparations-program-for-forced-sterilizations; Gary Robertson, *Compensating for the Priceless*, RICHMOND MAG. (May 4, 2016, 9:43 AM), https://richmondmagazine.com/news/features/compensating-for-the-priceless/.

317. Stillman, *How*, *supra* note 315.

318. *See* Maya Manian, *Sterilization: History Tragically Repeats Itself*, ACLU (Sept. 29, 2020), https://www.aclu.org/news/immigrants-rights/immigration-detention-and-coerced-sterilization-history-tragically-repeats-itself/.

319. *See* Rachel Monahan, *An Oregon Law Professor Visited Children at the Border and Told the World of the Horrors*, WILLAMETTE WEEK (July 3, 2019, 5:31 AM), https://www.wweek.com/news/courts/2019/07/03/an-oregon-law-professor-visited-children-at-the-border-and-told-the-world-of-the-horrors/; *cf.* Caitlin Dickerson, *"We Need to Take Away Children."*, THE ATLANTIC (Aug. 7, 2022), https://www.theatlantic.com/magazine/archive/2022/09/trump-administration-family-separation-policy-immigration/670604/ (confirming that the child separation policy was a conscious deterrence effort by the Trump administration).

320. *See* Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41292 (Aug. 14, 2019) (codified at 8 C.F.R. pts. 103, 212–14, 245, 248).

321. Christopher Rugaber et al., *3 US-Based Economists Win Nobel for Research on Wages, Jobs*, AP NEWS (Oct. 11, 2021), https://apnews.com/article/nobel-prizes-business-europe-3cbc672f994ae6f4f486a68b52c2bb32 ("By comparing the evolution of wages and employment in four other cities, Card discovered no negative effects [from increased immigration] for Miami resident with low levels of education. Follow-up work showed that increased immigration can have a

research of Card and Angrist appears to debunk old eugenic dogmas that underpinned the U.S. policy of general exclusion that began in 1924.[322] If increased immigration of unskilled laborers does not create a net cost for U.S. society, then Congress' recitation of eugenics to justify general exclusion no longer satisfies its burden of expressing an intelligible principle for excluding immigrants from entry by statute.[323]

This argument is also supported by groundbreaking economic studies of the effects of the illegal repatriation of over 2 million U.S. citizens and legal immigrants of Mexican ancestry in the 1930s.[324] The surreptitious attack on U.S. communities of Mexican ancestry in the 1930s was justified as a defense of the white working class.[325] But economic studies later proved that the 1930s repatriation program deepened the Great Depression for everyone, which seems to support the idea that laws for the general exclusion of immigrants may similarly contribute to economic downturn with no provable benefits, and thus may not actually satisfy the extremely broad test from *McCulloch v. Maryland* regarding Congress' "choice of means."[326]

positive impact on income for people born in the country."); *see* David Card, *Immigrant Inflows, Native Outflows, and the Local Labor Market Impacts of Higher Immigration*, 19 J. LABOR ECON. 22, 56–58 (2001); Joshua D. Angrist & Adriana D. Kugler, *Protective or Counter-Productive? Labour Market Institutions and the Effect of Immigration on EU Natives*, 113 ECON. J. F302, F328 (2003); David Card, *Is the New Immigration Really So Bad?* 24–26, 115 ECON. J. F300, F321-22 (2005), https://davidcard.berkeley.edu/papers/new-immig.pdf.

322. *See* sources cited *supra* note 321; Immigration Act of 1924, 43 Stat. 153 (establishing the policy of general exclusion for the first time according to the false economic prognostications of Harry Laughlin and other eugenicists).

323. *See* Mistretta v. United States, 488 U.S. 361, 372 (1989) (according to non-delegation doctrine, Congress cannot delegate the power to the executive branch to supply an intelligible principle for its legislation).

324. Schroeder, *Leviathan*, *supra* note 58, at 29.

325. Jongkwan Lee et al., *The Employment Effects of Mexican Repatriations: Evidence from the 1930's*, NBER Working Paper 23885, at 24 (2017), https://www.nber.org/system/files/working_papers/w23885/w23885.pdf ("Politicians at that time argued that this would give jobs to American workers and attenuate the unemployment problems caused by the Great Depression.").

326. *Id.* ("Given the large amount of pain, disruption and suffering that this campaign caused to Mexicans and their families, it is crucial to notice that it did not deliver any of the labor market benefits promised to natives. In fact, our estimates suggest that it may have further increased their levels of unemployment and depressed their wages."); McCulloch v. Maryland, 17 U.S. 316, 421, 424 (1819) (giving the broad standard for Congressional legislative power under the Necessary & Proper Clause, which laws that generally exclude immigrants may not actually satisfy: "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are Constitutional."); *but see* Prigg v. Pennsylvania, 41 U.S. 539, 541 (1842) (giving a classic Hegelian plenary power ends justify the means rationale that contradicted *McCulloch*: "The fundamental principle applicable to all cases of this sort would seem to be that, where the end is required, the means are given, and where the duty is enjoined, the ability to perform it is contemplated to exist on the part of the functionaries to whom it is entrusted.").

Conclusion: Moving Immigrant Writs Out of the Shadows and Into the Light

For the most part, Eric Bollman's immigration status remains undiscussed in the United States.[327] His case is not usually hailed as an example of how immigrants should be treated in federal courts.[328] *Bollman* was not emphasized in *Thuraissigiam*, and thus the Court did not say that an immigrant requesting habeas release like Bollman might also open a path to citizenship if a habeas judge is interested in ordering such enforcement.[329]

The six approaches given above will keep this option on the table for federal judges, while still allowing immigration attorneys to seek shadow wins and other kinds of soft administrative relief.[330] However, as *Thuraissigiam* demonstrated, there are times when the only strategy left for an immigrant is to walk into the light, by filing a public habeas petition.[331] For those faced with this choice, a few more little known facts about Eric Bollman might inspire.[332]

Prior to petitioning the court for habeas corpus release, Bollman was offered a pardon from President Jefferson that Bollman refused to accept, because he would not testify against his friends.[333] Then on Bollman's day in Court, it was the president who lost and the immigrant who won.[334] Because of Bollman's courageous perseverance, his case is now cited as a representation of the constitutional minimum of habeas corpus review required for all Americans.[335]

The possible upside of petitioning a federal habeas court, is that it can issue precedent in the full light of public view that future immigrants may

327. *See, e.g.*, DHS v. Thuraissigiam, 140 S. Ct. 1959, 1984 (2020) (Thomas, J., concurring) (citing *Ex parte* Bollman, 8 U.S. 75, 94 (1807)). *Cf.* Sweet, *supra* note 1, at 582, 586 (explaining Bollman's immigrant status).

328. *Thuraissigiam*, 140 S. Ct. at 1984 (Thomas, J., concurring) (citing *Bollman*, 8 U.S. at 94).

329. *Id.* at 1969 n.12.

330. *See supra* notes 197–98 and accompanying text.

331. *Thuraissigiam*, 140 S. Ct. at 1969.

332. *See, e.g.*, James Wesley Baker, *The Imprisonment of Lafayette*, AMERICAN HERITAGE (June 1977), https://www.americanheritage.com/imprisonment-lafayette.

333. *See* Jonathan Turley, *Trump Was Wrong to Pardon Arpaio, But Other Presidents Have Done Worse*, USA TODAY (Aug. 28, 2017, 3:15 AM), https://www.usatoday.com/story/opinion/2017/08/28/trump-wrong-to-pardon-arpaio-but-other-presidents-worse-jonathan-turley-column/606223001/.

334. *Bollman*, 8 U.S. at 136. *See* Letter from Thomas Jefferson to George Hay (June 20, 1807) (using very colorful language to complain about his losses in court).

335. *See, e.g.*, Boumediene v. Bush, 553 U.S. 723, 746, 779 (2008) (citing *Bollman*, 8 U.S. at 136 (citing Judiciary Act of 1789, 1 Stat. 73, § 14)). *Cf. Thuraissigiam*, 140 S. Ct. at 1969 n.12.

benefit from.[336] As emphasized above, successful immigrant precedents have rebounded to the benefit of all U.S. citizens, opening new avenues of judicial review to everyone.[337] Like Bollman, an immigrant may make a precedent that causes several others to be released as a result, either by future habeas writs or by forcing the executive branch to change its policies.[338]

After four years of Trump, the general feeling is that the president may no longer be implicitly trusted by the courts.[339] A majority of federal Circuit Courts that were previously silent about whether or not they could review immigration court *sua sponte* reversed course in favor of habeas corpus review.[340] These courts signaled they will no longer blindly defer immigration matters to the executive, regardless of the current party preference of the president.[341]

Some may still perceive habeas corpus for immigrants as a mere aspiration.[342] Some federal judges appear hesitant to draw Trump's harsh immigration policies into question even now,[343] though others may be more willing.[344] Still, in times of extreme uncertainty there is one thing of which we

336. *See, e.g.*, Woodby v. INS, 385 U.S. 276, 286 (1966); Schneiderman v. United States, 320 U.S. 118, 165–66 (1943) (Rutledge, J., concurring) ("Immediately, we are concerned with only one man, William Schneiderman. Actually, though indirectly, the decision affects millions.").

337. *Woodby*, 385 U.S. at 286, *extended by* Chapman v. California, 386 U.S. 18, 24 n.10 (1967); *see supra* notes 147–48. *But see Transcript: 'Fox*, *supra* note 243.

338. *See, e.g.*, *Boumediene*, 553 U.S. at 779 (quoting *Bollman*, 8 U.S. at 136) ("where imprisonment is unlawful, the court 'can only direct [the prisoner] to be discharged'"); *Schneiderman*, 320 U.S. at 165–66 (Rutledge, J., concurring).

339. *See* Rosalind S. Helderman & Elise Viebeck, *'The Last Wall': How Dozens of Judges Across the Political Spectrum Rejected Trump's Efforts to Overturn the Election*, WASH POST. (Dec. 12, 2020, 11:02 AM), https://www.washingtonpost.com/politics/judges-trump-election-lawsuits/2020/12/12/e3a57224-3a72-11eb-98c425dc9f4987e8_story.html?utm_campaign=wp_todays_headlines&utm_medium=email&utm_source=newsletter&wpisrc=nl_headlines; *see, e.g.*, Thompson v. Barr, 959 F.3d 476, 483 (1st Cir. 2020).

340. *Thompson*, 959 F.3d at 491; Lopez-Marroquin v. Barr, 955 F.3d 759, 759–60 (9th Cir. 2020).

341. *See, e.g.*, Luis v. INS, 196 F.3d 36, 41 (1999) ("As such, it is left to the discretion of the BIA and is not subject to review by this court."), *superseded by statute*, 8 U.S.C. § 1252(a)(2)(D), *as recognized in Thompson*, 959 F.3d at 480–84.

342. *See, e.g.*, Anil Kalhan, *Rethinking Immigration Detention*, 110 COLUMBIA L. REV. SIDEBAR 42, 58 (2010).

343. *See, e.g.*, Texas v. Biden, 554 F. Supp. 3d 818, 847–48, 857–58 (N.D. Tex. 2021) (finding that the termination of the Migrant Protection Protocols violated the Administrative Procedures Act, and enjoining the Biden administration from ending it through an executive memorandum), *application for stay denied*, 142 S. Ct. 926 (2021) (citing DHS v. Regents of the Univ. of Cal., 140 S Ct. 1891 (2020)), *rev'd*, No. 21–954, slip op. (2022).

344. *See, e.g.*, Al Otro Lado v. Mayorkas, No. 17-cv-02366, 2021 U.S. Dist. LEXIS 167128, at *62–63, *72 (S.D. Cal. 2021); *Thompson*, 959 F.3d at 491; *Lopez-Marroquin*, 955 F.3d at 759–60; Ms. L. v. ICE, 310 F. Supp. 3d 1133, 1149 (S.D. Cal. 2018) (ordering the government to end the child separation policy through preliminary injunction); John Gramlich, *How Border Apprehensions, ICE Arrests and Deportations Have Changed under Trump*, PEW RSCH. CTR. (Mar. 2,

can be certain: "It is not the critic who counts; not the man who points out how the strong man stumbles or where the doer of deeds could have done them better."[345]

Some lawyers may fall into cynicism, but others will enter the arena.[346] Only those who assert habeas corpus may confirm whether the Suspension Clause is a "meaningless shibboleth."[347] Or to say this another way, the fate foreseen in Kafka's parable *Before the Law* need not concern those who boldly enter through the gateway,[348] because even in failure a well-drawn habeas petition can illuminate a path forward for all of us.[349]

2020), https://www.pewresearch.org/fact-tank/2020/03/02/how-border-apprehensions-ice-arrests-and-deportations-have-changed-under-trump/.

345. BRENÉ BROWN: THE CALL TO COURAGE (Netflix, Apr. 19, 2019) (quoting Theodore Roosevelt, Citizenship in a Republic, Apr. 23, 1910, https://www.presidency.ucsb.edu/documents/address-the-sorbonne-paris-france-citizenship-republic).

346. *Id.*; Roosevelt, *supra* note 345 ("Let the man of learning, the man of lettered leisure, beware of that queer and cheap temptation to pose to himself and to others as a cynic, as the man who has outgrown emotions and beliefs, the man to whom good and evil are as one. The poorest way to face life is to face it with a sneer."); OCTAVIO PAZ, THE LABYRINTH OF SOLITUDE 20–21 (Lysander Kemp trans., 1961) (commenting on "the United States man," saying: "He is alone among his works, lost—to use the phrase by José Gorostiza—in a 'wilderness of mirrors.'"); *id.* at 49; *id.* at 212.

347. Jackson v. Virginia, 443 U.S. 307, 327 (1979) (Stevens, J., concurring).

348. Franz Kafka, *Before the Law* [1915], *available at* https://www.kafka-online.info/before-the-law.html.

349. *See, e.g.*, *Ex parte* Young, 209 U.S. 123, 168 (1908); THE CONSPIRATOR 1:53:04 (Lionsgate 2010).

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