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Expedited Removal in 2020. An Analysis of the
Department of Homeland Security vs. Thuraisingam Supreme Court Case:

Immigration policy in the United States has increasingly become more violent and exclusionary in the past decades. The 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) delegated an immense amount of legal authority to immigration officials that condensed procedures concerning asylum. Immigration officials were authorized to facilitate expedited removal which gives authority “to order the removal of aliens whom they have determined to be inadmissible, without providing for further review of such a decision,” (Fragoman, 445). Expedited removal operates separately from the judicial branch and decisions are dependent on immigrant officials’ judgment. The condensed process of expedited removal was originally established to differentiate “legitimate” asylees from the “bogus” Latin American and Haitian asylum seekers. Although Trump and his executive orders have greatly bolstered anti-immigrant rhetoric, the social frameworks utilized during his term were established previously in the 1990s. Nonetheless, the “zero-tolerance” attitude towards immigration of the Trump administration has been extended to Supreme Court decisions. The 2020 *Department of Homeland Security vs. Thuraisingam* Supreme Court decision exposes the federal government’s continuous reliance on the “refugee crisis” myth and ill-equipped officials to blatantly target and punish asylum seekers. Subsequently, due to the past three decades of weakening judicial review over executive immigration powers, the 2020 decision makes asylum even more exclusive. By bolstering immigration officials’ powers and the idea of an influx of refugees, the Supreme Court is able to frame asylum itself as suspect. In doing so, the decision fixates on the illegality of Thuraisingam and other asylees’ physical bodies. Thus, the decision establishes that crossing the

border without authorization entails limited rights, even when border crossers are potential asylees.

The 2020 *Dept. of Homeland Security v. Thuraissigiam* Supreme Court Case:

Vijayakumar Thuraisingam, a Sri Lanka native of the Tamil ethnic minority, entered the U.S from the southern US-Mexico border in 2017. Immigration officials caught Thuraisingam twenty-five yards north of the border and placed him into expedited removal. Under US law, an asylum seeker can be any “alien who is physically present in the United States,” and has a “credible fear of persecution in their home country based on their race, ethnicity, religion, or political views,” (Fragomen, 444). Thuraisingam applied for asylum under fear of persecution for his ethnicity while he was detained. An immigration official determined, however, that Thuraisingam did not have a credible fear and referred him for deportation. Thuraisingam then filed a habeas petition arguing that expedited removal deprived him of his statutory, regulatory, and constitutional rights to meaningful due process. The Southern California District Court dismissed his appeal. Thuraisingam then went to the US Court of Appeals claiming that the district court's denial of habeas corpus was unconstitutional under the clause USCS Const. Art. I, § 9, Cl 2, which states “the Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it,” *Dept. of Homeland Security v. Thuraissigiam*, No. 19-161, 591 U.S__ (2020). The US Court of Appeals reversed the district court decision as Thuraissigiam did not pose a national threat. The Supreme court, however, decided to overrule the US Court of Appeals reversal stating that the IIRIRA clause 8 U.S.C. §1252(e)(2), which prohibits “alien” detainees in expedited removal procedures from using the habeas review, did not violate the Suspension or Due Process Clauses.

Alito wrote the majority opinion, a seven to two decision for the DHS, and listed two main reasons for the overrule. The first reason provided by the court is that Thurgaissigam went beyond what the original habeas corpus writ intended, by invoking “the writ to achieve an entirely different end, namely, to obtain additional administrative review of his asylum claim and ultimately to obtain authorization to stay in this country” *Dept. of Homeland Security v. Thuraissigam*, No. 19-161, 591 U.S.__(2020). Second, the court argued that an “unestablished alien” in the United States “cannot claim any greater rights under the Due Process Clause” *Dept. of Homeland Security v. Thuraissigam*, No. 19-161, 591 U.S.__(2020). Therefore, “the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law” *Dept. of Homeland Security v. Thuraissigam*, No. 19-161, 591 U.S.__(2020). The court argued Thurgaissigam’s rights were not violated because the state provided him the bare minimum he was entitled to as an “unestablished alien”. The *Department of Homeland Security vs. Thuraisingam* court decision relies heavily on emphasizing the alien category to justify their denial of habeas corpus.

Thuraisingam was denied the ability to utilize protective legislation like habeas corpus because of his physical “alien” body and the augmented powers that the 1996 IIRIRA granted immigration officials. The IIRIRA, passed by congress in 1996, “was a momentous law that recast undocumented immigration as a crime and fused immigration enforcement with crime control,” (Macias-Rojas, 1; see also García Hernández 2016; Lind 2016). Equalizing unauthorized immigration to a criminal offense created a purported crisis that established the need for extra powers. Therefore, the IIRIRA authorized immigration officials to remove noncitizens quickly by working completely outside of immigrant and federal courts (Kanstrom,

1330). Furthermore, the IIRIRA established that undocumented border crosser, because of their unlawful status, had their rights determined by Congress not the constitution.

The IIRIRA was able to establish increased limitations and restrictions for immigrants placed in expedited removal. This included making detention for undocumented border crossers mandatory, denying asylum seekers the right to counsel, giving asylum seekers no time to communicate with family members or to seek legal assistance, and depriving asylum seekers of the right to appeal decisions (Kanstroom, 1335). The IIRIRA, “statutes stripped the federal courts of jurisdiction to hear any challenge to the system, including challenges on due process or other constitutional grounds,” (Kanstroom, 1336). By designating detention and all interview processes to border officials, immigrant judges, and asylum officers who look at the decision afterward, are made to rely on immigration officials' opinions. For that reason, immigration officials' opinions are taken as final and typically approved. When the Department of Homeland Security was established in 2003, Immigration and Naturalization Services (INS) was reorganized into three agencies. The three agencies being, Immigrations and Customs Enforcement, Customs and Border Protection, and United States Citizenship and Immigration Services. Beginning in 2002, the DHS worked to further expand immigration officials' police power by granting immigration officials extra authority 100 miles inland of the surrounding U.S border (Acer, Bryne, 269). The formation of the IIRIRA and DHS correlates with large numbers of Latin American and Haitian refugees who fled to the US during the 1990s and early 2000s. These populations' denial of asylum also demonstrates the extensive separation of powers in practice.

Excessive Powers in Practice, Latin Americans and Haitians:

The idea of asylum was introduced in the 1970s and the Refugee Act of 1980 “reflected efforts by Congress to curb the Executive's mass granting of asylum without consulting Congress, combined with the Executive Branch's desire to admit as many asylees as it deemed necessary for foreign policy or humanitarian reasons,” (O’Callaghan, 1761). The US, “viewed the refugee situation as symbolic of the problems of living under communism and saw the departure of refugees as a means of weakening communist regimes” (McBride, 292). Asylum was established as a sorting machine, allowing only those who served the US to receive it. In the ‘90s the Clinton administration welcomed some asylum seekers for political reasons, but Congress disagreed with Clinton’s decisions about how to process certain groups of asylees. Asylum seekers from places like Haiti and Central America did not serve the US politically, as the US supported the regimes that engaged in Haitians and Central Americans torture and persecution, hence restrictive policies reflected as much (O’Callaghan, 1764). Granting asylum was utilized as a political tool; therefore, it has largely been influenced by foreign policy and public prejudices (O’Callaghan, 1764). The IIRIRA intentionally aimed to “limit assistance to legal immigrants, reduce illegal immigration” and was “influenced significantly by American public opinion which viewed large numbers of immigrants as a threat to the American lifestyle” (McBride, 289). Haitian and Latin American refugees were depicted in the media as an invasive and dangerous racial threat. For example, Haitian refugees were held in concentration camps in Guantanamo Bay, though they qualified for asylum because they were HIV positive (Paik, 143). Latin American immigrants were declared as “a threat to national security” and framed as drug dealers, terrorists, and subversives (Massey, Durand, Pren, 1561). Asylum seekers or refugees were and are, “[d]epicted as culturally unsophisticated, sexually backward and impure” and are “burdened with an identity

seen to threaten un- marked whiteness” (Hubbard, 65). Congress proposed the IIRIRA during an upsurge of immigration from Latin America and Haiti to keep legal entry exclusive and utilize the public's fear of racial threat. Momentum and public fear of racial threats normalize and necessitate such legislation to exist, but also work to produce narratives about asylum seekers.

The IIRIRA was utilized to construct Latin American and Haitian asylum seekers as undeserving of asylum or rights. The IIRIRA added blockades to asylum to create the framework of a “bad refugee”. Barriers include the prohibition of people from “safe third countries” from applying for asylum, the one year after arrival statute of limitations for applications, and the barring of previously denied cases from applying again (Fragomen, 444). Such legislation creates the image or reality of potential bad refugees. Essentially,

“in systematic and predictable ways, asylum regimes disproportionately disqualify asylum seekers, and convert them into ‘illegal’ and deportable ‘migrants’. All such officially ‘unwanted’ or ‘undesirable’ non-citizens are stigmatized with allegations of opportunism, duplicity, and undeservingness. The compulsive denunciation, humiliation and exquisitely refined rightlessness of deportable ‘foreigners’, furthermore, supply the rationale for essentializing the juridical inequalities of citizenship and alienage as categorical differences that may be racialized” (De Genova, 1181).

Asylum requirements are so strict that the goal is to publicly render asylum itself suspect to narrow the number of people deemed deserving of it. Narratives of “bad” and “dangerous” Latin American and Haitian asylum seekers personalizes their denial and frames their claims to asylum as inherently untruthful.

The 1996 IIRIRA expedited removal process positioned Haitian and Latin American asylum seekers as inherently criminal and therefore rightless subjects (Paik, 60). Expedited removal is presented as a process of “truth-telling” and “establishes a particular structure that leads to particular conclusions and excludes others,” (Paik, 47). It is not simply that immigration

officials' exaggerated powers limit asylum seekers' rights, but the nature of the expedited process cultivates asylum as implicitly dubious. Expedited removal hence becomes a process where the authenticity of an applicant's testimony is dependent on aspects beyond their control. Global politics, domestic public opinions, and immigration officials' personal sentiment toward asylees are the determinants of conclusions about asylum seekers' experiences. Fundamentally, asylum seekers become rightless beyond the myriad of legal restrictions. They lose agency in telling their experience as their physical alien bodies prohibit them from telling their truth without the limitations associated with their legal status.

The "bogus refugee" framework that developed from racist and xenophobic contexts, spills over onto the treatment asylum seekers receive when they face immigration officials. Research from 1999 found applicants were, "not always given information in a language they can understand, and the outcome of an interview may depend on whether the particular officer takes a "benefits" or "enforcement" approach" (McBride, 304; see also Stancill, 1998). Moreover, though asylum officers and immigrant judges receive training for dealing with asylum seekers, immigration inspectors, "are not as well trained or qualified as asylum officers; few have legal backgrounds, and fewer have college degrees" (McBride, 305). Immigration officials' "demeanor intimidates many prospective asylum seekers, making them reluctant to put forward what may be legitimate claims" (McBride, 305). Insensitive people who are more likely to have disdain towards immigrants were, and are, deliberately put at the forefront of asylum cases. The tactical placement is meant to target traumatized and often non-English speaking asylum seekers. The groundwork of excluding Latin American and Haitian asylum seekers in the 1990s to early 2000s influences the Trump era policy and is what produced much of the justifications in the Supreme Court's 2020 decision.

The 2020 Case and the Trump Era:

The intensity of asylum restriction has increased during the Trump era and is reflected in the executive orders that work to suppress asylum claims. In 2018 Trump's administration announced his “zero-tolerance policy” against immigrants at the southern border. Trump extensively reduced the selection of official ports of entry that asylum seekers could enter the US from. Asylum seekers who crossed from the southern border and did not use the designated ports of entry were automatically ineligible to be granted asylum (Galbraith, 380). The act of, “tailoring the suspension to channel these aliens to ports of entry, so that, if they enter the United States, they do so in an orderly and controlled manner instead of unlawfully,” demonstrates the administration's animosity toward asylees and goal to limit the population (*Proclamation No. 9822, 83 Fed. Reg. 57,661 Nov. 9, 2018*). Trump's proclamation and restrictive policies demonstrate that asylum seekers in this era are illegal bodies before they are human beings in need of refuge or pawns for the US. The emphasis on “unlawful” migration, and the necessity to control it, suggests it threatens state authority and is something to be feared. The Trump era’s criminalization of border crossers limits asylum opportunity and is apparent in the *Thuraisingam* decision.

An imagined threat to state sovereignty transforms asylum seekers into criminals that must be dealt with by heightening DHS officials' police power over the border. Justice Alito says that the IIRIRA is necessary because it was crafted “for weeding out patently meritless claims and expeditiously removing the aliens making such claims from the country” *Dept. of Homeland Security v. Thuraissigiam*, No. 19-161, 591 U.S.__(2020). He supports his claim stating, “in 2019, a grant of asylum followed a finding of credible fear just 15% of the time” *Dept. of*

Homeland Security v. Thuraissigiam, No. 19-161, 591 U.S. __ (2020). Alito uses the low 15% credibility rate as proof that asylum seekers are suspicious upon entry and that legal procedures must be in place to guard against the majority of “bad” refugees. Though Thuraissigiam may have had a credible reason for fear, the framework of potential “meritless claims” establishes his act of crossing the border without documentation into the US as detrimental to state sovereignty. State sovereignty in juxtaposition to Thuraissigiam’s entrance is reiterated throughout the decision as Alito states, “[t]he power to admit or exclude aliens is a sovereign prerogative,” as, “the Constitution gives ‘the political department of the government’ plenary authority to decide which aliens to admit” *Dept. of Homeland Security v. Thuraissigiam*, No. 19-161, 591 U.S. __ (2020). In other words, immigration officials must have a specialized process where powers are strengthened to ensure U.S sovereignty is not violated by “illegal” border crossers; including legitimate asylum seekers. The Supreme Court argues that the US Court of appeals decision to reverse the district court ruling would, “undermine the ‘sovereign prerogative’ of governing admission to this country and create a perverse incentive to enter at an unlawful rather than a lawful location” *Dept. of Homeland Security v. Thuraissigiam*, No. 19-161, 591 U.S. __ (2020). The state's ability to practice control over their territory becomes the priority over asylum seekers’ safety. Like Trump’s 2018 Entry Suspension Proclamation and the IIRIRA’s restrictions to asylum, this court decision undermines Thuraissigiam’s humanity and simultaneously renews asylum as something that diminishes state jurisdiction. Essentially, asylum seekers are reestablished as a unique threat that entails a strict expedited removal process to uphold U.S sovereign integrity, not simply ward off undesirable asylum seekers. The construction of asylum seekers as primarily “illegal aliens” further plays a part in Thuraissigiam’s denial.

The Department of Homeland Security v. Thuraisingam supreme court decision obscures violence against asylum seekers by focusing on the “illegality” of Thuraisingam’s body. Justice Alito states,

“While aliens who have established connections in this country have due process rights in deportation proceedings, the Court long ago held that Congress is entitled to set the conditions for an alien’s lawful entry into this country and that, as a result, an alien at the threshold of initial entry cannot claim any greater rights under the Due Process Clause” *Dept. of Homeland Security v. Thuraissigiam*, No. 19-161, 591 U.S__ (2020).

An emphasis is placed on Thuraisingam’s “unestablished alien” status, as he was detained quickly after entering the US. The Supreme Court rules that Thuraisingam’s unestablished alien body entitles him to a shortlist of regulatory rights and that it is their sovereign right to do so. Thuraisingam’s alienness is highlighted because “in the American imagination, this original sin is not just illegal presence; it also concerns the nature of the illegal alien’s first contact with the United States. This is conceptualized as the trespass, an unlawful entry” (Volpp, 88).

Thuraisingam’s act of crossing the border without documentation, in the “American imagination” creates a dichotomy between himself and the citizen. Not simply because of his lack of legal status, but as an “illegal alien that is abstractly defined as something of a specter, a body stripped of individual personage” (Ngai, 61). The physical crossing of the border transforms Thuraisingam, regardless if he qualifies for asylum, into an “an alien body to be registered and maintained by the state” (Galli, 7). Creating the idea of an illegal alien insinuates danger and therefore illegal aliens lose their personhood and their “right to have rights” (Volpp, 84).

Thuraisingam argued the immigration officials during expedited removal denied him a meaningful opportunity to prove his case to asylum. He states he was not provided resources to

better assist him to explain his story. Yet, it becomes irrelevant because Thuraisingam first and foremost is an undocumented alien.

The Supreme Court establishes Thuraisingam as an illegal alien to utilize the restrictions the IIRIRA created, for undesirable Latin American and Haitian refugees, against him. Alito states that “Congress provided the right to a ‘determin[ation]’, whether he had ‘a significant possibility’ of ‘establish[ing] eligibility for asylum’ and he was given that right” *Dept. of Homeland Security v. Thuraissigiam*, No. 19-161, 591 U.S.__(2020). The Supreme court defines the expedited removal process and immigration officials’ authority as *meaningful enough* for an “illegal”, “unestablished”, and “alien” body. As a sovereign state, the US owes Thuraisingam nothing beyond what Congress has established the bare minimum for an “alien”, “illegal” being. Thuraisingam’s intrinsic illegality, and therefore rightlessness, made it more likely than not, in the context of Trump’s zero-tolerance era, to be perceived as a deceiver attempting to invade the US. However, because expedited removal is sufficient as due process, the reasoning for his rejection is not placed on the immigration officials’ bias, but rather on Thuraisingam’s inability to defend himself or provide evidence of his need for asylum. Similar to Latin Americans and Haitians from the previous context, Thuraissigiam’s “illegal” embodiment not only cuts him off from additional judicial review but also deprives him of his agency to tell his experience as he wishes. Thuraisingam’s experience is further diminished by the court’s use of the imagined refugee crisis.

The Supreme Court decision uses the idea of a refugee crisis to frame expedited removal as unavoidable. Justice Alito claims that “[e]ven without the added step of judicial review, the credible-fear process and abuses of it can increase the burdens currently ‘overwhelming our immigration system’” *Dept. of Homeland Security v. Thuraissigiam*, No. 19-161, 591

U.S. __ (2020). Alito insinuates expedited removal is needed to eliminate illegal immigrants who threaten US sovereignty, as well as to lighten the “burden” of asylum seekers on the immigration system. In other words, expedited removal is unavoidable because there is a surplus of inflowing asylum seekers. The logic of inevitability depends on the moral panic of the refugee crisis, as in the case of Latin American and Haitian refugees from before. Although data shows that immigration from the Mexico-US border has been decreasing since the late 1990s, with the probability of traditional crossing falling to an all-time low of 25% in 2010, Alito reinstates the idea of a refugee crisis to rationalize expedited removal (Massey, Durand, Pren, 1573).

The focus on a large number of asylum applications justifies expedited removals’ existence. Alito says, “[f]raudulent asylum claims can also be difficult to detect, especially in a screening process that is designed to be expedited and that is currently handling almost 100,000 claims per year” *Dept. of Homeland Security v. Thuraissigiam*, No. 19-161, 591 U.S. __ (2020). Alito stating that fraudulent claims are difficult to detect suggests a strict procedure is needed to ensure no noncitizen slips by without first being addressed by border enforcement. Blaming the difficulty to detect fraudulent claims on a large number of asylum claims, Alito enforces the idea that the expedited process is impossible to avoid. There is a reliance on the immigration officials’ expanded powers because there are too many claims to do otherwise. The fact that Thuraissigiam is a member of a persecuted minority group further demonstrates that the Supreme Court utilizes the imagined threat to state sovereignty and the refugee crisis as a scapegoat for the suppression of asylum seekers’ rights.

Thuraissigiam is from Sri Lanka, a country recovering from a civil war that lasted from 1983 to 2009. This Civil War has led to religious intolerance and violence. The war was mainly between the Sinhalese-dominant Sri Lankan government and the Liberation Tiger of Tamil

Eelam, who aimed to establish a separate state for the Tamil minority. Political and religious tensions between Sinhalese and Tamil populations were reinforced during the war and “many Tamils lost their lives in widespread communal violence which led to a large-scale exodus of Tamil refugees” (Shah, 576). In 2012 President Mahinda Rajapaksha’s administration was able to consolidate power in the executive and legislative branches of the country, demonstrating a priority of political consolidation rather than “ethnic reconciliation” (Uyangoda, 131). Rajapaksha had support from Buddhist monks and the majority Sinhalese population. Accordingly, minorities in the country lost their bargaining power as Rajapaksha did not strive to attain their support (Uyangoda, 135). Instead his administration, “sought to continue to persecute Tamils in the northeast and keep them marginalized politically and economically,” (Devotta, 285). The government expanded militarization and promoted the creation of Buddhist temples, statues, and other religious symbols in “areas no Buddhists lived as a way to consolidate a Buddhist presence throughout the island” (Devotta, 285). Furthermore, changes in the law reflected anti-minority sentiments as the state allowed violence towards minorities. For example, in 2003 a Supreme Court decision ruled that “only Buddhism, and, no other religion, qualified for state protection” (Devotta, 280).

Although Thuraissigiam explained he was beaten by a group of government officers because of his political views, he was identified as not having a satisfactory claim for asylum. The immigration officials who questioned him stated that because he could not identify who had harmed him or prove that it was because of his Tamil ethnicity, he was denied. Based on the history of Sri Lanka and Thuraissigiam’s experience, he may have qualified for asylum. However, conditions set by the IIRIRA that give immigration officials excessive powers, deny asylees legal resources, translators, and the right to counsel, Thuraissigiam was set up for failure.

Furthermore, the excuse of needing strict procedures to ward against the refugee crisis that was bolstered during the Trump administration, allowed the Supreme Court to obscure the violent and xenophobic trends in the decision.

In conclusion, the *Dept. of Homeland Security v. Thuraissigiam* Supreme Court case further enhanced expedited removals' separation from additional judicial review. The refugee crisis rhetoric from Trump's administration as well as the legal and social frameworks created in the '90s is used to justify the Court's opinion. Criminalizing Haitian and Latin American refugees' physical bodies framed expedited removal as a just process necessary to guard against undeserving bogus refugees. The idea of a racial threat justified and warned that Latin Americans and Haitians were a dangerous, backward population. The Trump era bolstered the idea of illegality and began to conflate the illegal immigrant category with the asylum seeker category. This is not to say that asylum seekers should have more rights than undocumented immigrants, but rather that Trump expounds the undeserving illegal framework to target broader ranges of immigrants. The groundwork from the '90s and the Trump-era allows the Supreme Court to posit Thuraissigiam as an illegal alien before he is an asylum seeker. The Supreme Court in effect continues the immense separation of powers to ensure future suppression of asylum claims and rights. By emphasizing the "surplus" of immigration cases in the US, Thuraissigiam's denial is framed as a necessary and unavoidable sacrifice. The fact that the decision is the first time that "the Supreme Court permitted a noncitizen who entered the country to be removed without judicial scrutiny of the legality of the removal" indicates the court decision emboldens the segregation of expedited removal powers (Kanstroom, 1356). As judge Sotomayor's dissenting opinion states, "the Court upends settled constitutional law and paves the way toward transforming already summary expedited removal proceedings into arbitrary administrative

adjudications" (Sotomayor, dissenting opinion *Dept. of Homeland Security v. Thuraissigiam*, No. 19-161, 591 U.S. __2020). Limiting asylum seekers' reach of judicial review "will leave significant exercises of executive discretion unchecked" (Sotomayor, dissenting opinion *Dept. of Homeland Security v. Thuraissigiam*, No. 19-161, 591 U.S. __2020). The Judicial branch was created to keep balance among the three branches of government, and such court decisions "should not hinge on the vicissitudes of the political climate or bend to accommodate burdens on the Judiciary" (Sotomayor, dissenting opinion *Dept. of Homeland Security v. Thuraissigiam*, No. 19-161, 591 U.S. __2020). For doing so, will only undermine judicial powers and processes both for citizens and noncitizens of the United States.

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