

## Clash of the Titans: Plenary Power and Habeas Corpus in *Castro*

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**ABSTRACT.** “To what expedient, then, shall we finally resort, for maintaining in practice the necessary partition of power among the several departments, as laid down in the Constitution?” Nearly 230 years have passed since we were first confronted with that opening line from *Federalist No. 51*, yet this question has not become any easier to answer. Although the struggle to delineate an appropriate separation of powers spans numerous arenas, one area of escalating concern is the debate over immigration policy. The Third Circuit recently engaged a sliver of that debate in *Castro v. Department of Homeland Security*, when it held that immigrants in expedited removal proceedings have no constitutional rights regarding their application to enter the United States—and thus may be denied habeas corpus at the legislature’s discretion without violating the Suspension Clause. This Essay challenges that conclusion, contending that judicial review over immigration procedures remains an invaluable safeguard in our constitutional system.

On August 29, 2016, the U.S. Court of Appeals for the Third Circuit held that immigrants apprehended at or near the border who are placed in expedited removal proceedings have *no* constitutional rights regarding their application to enter the United States. Consequently, they may be denied habeas corpus consistent with the Suspension Clause.<sup>1</sup> By asserting that Congress’s plenary power over immigration essentially overrides the judiciary’s power to “ensure against arbitrary and unlawful imprisonment,”<sup>2</sup> the Third Circuit stripped habeas corpus of its historic function: namely, ensuring “that a judge should hear

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1. *Castro v. U.S. Dep’t of Homeland Sec.*, 835 F.3d 422 (3d Cir. 2016).

2. Brandon L. Garrett, *Habeas Corpus and Due Process*, 98 CORNELL L. REV. 47, 64 (2012).

the sighs of all prisoners, regardless of where, how, or by whom they were held.”<sup>3</sup>

In so holding, the Third Circuit opinion pits the power of the political branches against the power of the judiciary<sup>4</sup> in a sphere where each is traditionally at its peak.<sup>5</sup> Since neither the power to regulate immigration nor Article III habeas jurisdiction is explicitly provided for in the Constitution, the Supreme Court has tremendous influence in shaping their contours.<sup>6</sup> As to the former, the Court has asserted that “[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.”<sup>7</sup> Yet as to the latter, the Court has repeatedly demonstrated that inadmissible, first-time immigrants can file habeas petitions to challenge their removal orders, even in circumstances where Congress clearly intended to abrogate judicial review.<sup>8</sup> In *Castro*, the Third Circuit assumed the unprecedented task of attempting to resolve these competing doctrines—ultimately holding that Congress’s plenary power over immigration prevails.

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3. PAUL D. HALLIDAY, *HABEAS CORPUS: FROM ENGLAND TO EMPIRE* 7 (2010).

4. The Third Circuit’s discussion of the Suspension Clause challenge is literally divided into three sections—one for habeas corpus, another for plenary power, and a third for their jurisdictional collision in expedited removal.

5. Compare *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (“This Court has repeatedly emphasized that ‘over no conceivable subject is the legislative power of Congress more complete than it is over’ the admission of aliens.”), with *INS v. St. Cyr*, 533 U.S. 289, 301 (2001) (“At 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.”).

6. The power to regulate immigration is “inherent in sovereignty, and essential to self-preservation,” *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892), and congressional authority over immigration is often attributed to a combination of the Naturalization Clause—which grants Congress the power “To establish a uniform Rule of Naturalization”—and the Necessary and Proper Clause. See U.S. CONST. art. I, § 8, cls. 4, 18; *INS v. Chadha*, 462 U.S. 919, 940 (1983). However, there is no constitutional provision that explicitly addresses the power to secure and regulate national borders. Similarly, while the Suspension Clause clearly places limits on the suspension of habeas corpus, there is significant scholarly debate over whether that negative prohibition also creates Article III habeas corpus jurisdiction and a positive right to the writ. See U.S. CONST. art. I, § 9, cl. 2; BRANDON L. GARRETT & LEE KOVARSKY, *FEDERAL HABEAS CORPUS: EXECUTIVE DETENTION AND POST-CONVICTION LITIGATION* 43-53 (2013).

7. *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950); see also *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953) (quoting *Knauff*).

8. See *Castro v. U.S. Dep’t of Homeland Sec.*, 835 F.3d 422, 436-37 (3d Cir. 2016) (“[D]espite the statutes’ finality provisions appearing to strip courts of all jurisdiction to review the Executive’s immigration-related determinations, the Supreme Court consistently recognized the ability of immigrants to challenge the legality of their exclusion or deportation through habeas corpus.”); Brief for Appellants Rosa Elida Castro, et al. at 13, *Castro*, 835 F.3d 422 (No. 16-1339) (“[E]ven excludable noncitizens have *always* been entitled to habeas.”) [hereinafter Appellants’ Brief].

Although the Supreme Court denied certiorari in this case,<sup>9</sup> *Castro* raises significant legal issues. As the Trump Administration continues to craft new immigration policies, it is likely that habeas corpus will be used to challenge those policies.<sup>10</sup> Consequently, *Castro* may provide guidance to lawyers on both sides as they litigate the claims of asylum seekers. Highlighting the unique tension between Congress's plenary immigration power and the Suspension Clause, this Essay proceeds in four Parts. Part I reviews the *Castro* opinion to set the stage for a deeper discussion of the interplay between habeas corpus and immigration law. Part II traces the origin of habeas corpus, which sheds light on the proper scope of habeas corpus in Part III. Part IV considers the normative and practical ramifications of expanding habeas corpus review beyond the context of expedited removal. Ultimately, this Essay concludes that while the law in this area is muddled, there are grounds for departing from the Third Circuit's analysis in future cases.

## I. HABEAS CORPUS IN CASTRO

*Castro* addressed the claims of twenty-nine Central American women and their thirty-five minor children who were apprehended by the Department of Homeland Security (DHS) shortly after arriving in the United States.<sup>11</sup> Having fled domestic and gang violence in El Salvador and Honduras, the families applied for asylum. Their applications were denied, largely because their expressed fears did not fit neatly into one of the protected categories specified by the asylum statute.<sup>12</sup> Facing expedited removal—a streamlined process with limited judicial review—they filed habeas corpus petitions, alleging that the officials who conducted their credible fear interviews applied an “incorrect legal standard” and “violated a host of procedural requirements.”<sup>13</sup> Under the REAL

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9. *Castro v. U.S. Dep't of Homeland Sec.*, 137 S.Ct. 1581 (2017).

10. Indeed, the first legal challenge to President Trump's highly contested executive order on immigration was framed in part as a petition for habeas corpus. See *Petition for Writ of Habeas Corpus and Complaint for Declaratory and Injunctive Relief, Darweesh v. Trump*, No. 1:17-cv-00480 (E.D.N.Y. Jan. 28, 2017).

11. *Castro v. U.S. Dep't of Homeland Sec.*, 163 F. Supp. 3d 157, 158 (E.D. Pa. 2016).

12. Appellants' Brief, *supra* note 8, at 7-9. To qualify for asylum under 8 U.S.C. § 1158(b)(1)(A), an individual must demonstrate that she is a “refugee” within the meaning of Section 1101(a)(42). This requires showing that she is unable or unwilling to return to her home country “because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.”

13. Appellants' Brief, *supra* note 8, at 9.

ID Act of 2005, however, federal courts are prohibited from hearing habeas claims of the type made by the petitioners.<sup>14</sup>

Against this backdrop, *Castro* posed a simple question: does the level of judicial review afforded by expedited removal—essentially limited to adjudicating “mistaken-identity claims”<sup>15</sup>—violate the Suspension Clause? While reaching the same answer, the Eastern District of Pennsylvania and Third Circuit differed remarkably in their rationale. Relying primarily on *Boumediene v. Bush*,<sup>16</sup> the district court found that immigrants in expedited removal proceedings had a right to habeas corpus, but that the scope of their right was “limited” and that expedited removal did not violate it.<sup>17</sup> The Third Circuit, however, denied their right to petition altogether.<sup>18</sup> Ultimately, this split is traceable to two persistent ambiguities: first, confusion over the source of habeas jurisdiction, and second, debate over the scope of the writ. The next Part addresses each ambiguity in turn.

## II. THE SOURCE OF HABEAS JURISDICTION

Although American habeas has operated under a statutory grant of jurisdiction since 1789,<sup>19</sup> in its earliest form, habeas arose as the common-law offspring of royal prerogative—a judicial extension of the divine right of kings.<sup>20</sup> Just as the king possessed plenary power within his jurisdiction, his direct agents in King’s Bench exercised derivative authority through habeas corpus to ensure that “specific powers the king granted to others . . . were not abused.”<sup>21</sup> Consequently, “[t]he identity, citizenship, and particular location of the prison-

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14. 8 U.S.C. § 1252(e)(2) (“Judicial review of any determination made under section 1225(b)(1) of [the provision governing inspection of applicants for admission into the United States] is available in habeas corpus proceedings, *but shall be limited to determinations of* (a) whether the petitioner is an alien, (b) whether the petitioner was ordered removed under such section, and (c) whether the petitioner can prove by a preponderance of the evidence that the petitioner is an alien lawfully admitted for permanent residence, has been admitted as a refugee under section 1157 of this title, or has been granted asylum under section 1158 of this title, such status not having been terminated, and is entitled to such further inquiry as prescribed by the Attorney General pursuant to section 1225(b)(1)(C) of this title.”) (emphasis added).

15. Appellants’ Brief, *supra* note 8, at 2.

16. 553 U.S. 723 (2008).

17. *Castro v. U.S. Dep’t of Homeland Sec.*, 163 F. Supp. 3d 157, 168-69 (E.D. Pa. 2016).

18. *Castro v. U.S. Dep’t of Homeland Sec.*, 835 F.3d 422, 445-46 (3d Cir. 2016).

19. GARRETT & KOVARSKY, *supra* note 6, at 50-51.

20. HALLIDAY, *supra* note 3, at 65-69.

21. *Id.* at 34.

er were entirely irrelevant; the question was merely whether the jailer, wherever he was, could be held to account by the sovereign by and through his bench.”<sup>22</sup> This boundless jurisdiction continued until the Habeas Corpus Act of 1679, at which point Parliament asserted itself as the delineator of judicial oversight.<sup>23</sup> A litany of self-serving suspension acts followed, some of which were so drastic that they inspired the Suspension Clause.<sup>24</sup> Yet despite the potential for rights-infringement that comes from tethering habeas to legislatures, American courts have almost exclusively embraced statutory jurisdiction.<sup>25</sup>

This history has enormous ramifications for *Castro*. As the petitioners noted, a significant body of precedent exists in which immigrants at the border obtained judicial review of their removal orders through habeas.<sup>26</sup> However, until the REAL ID Act, most immigrants filed their claims under the general habeas statute, 28 U.S.C. § 2241.<sup>27</sup> Thus, in hearing these petitions, courts were merely exercising the jurisdiction granted to them by Congress. Any clash between judicial review and immigration policy was a conflict of congressional making.<sup>28</sup> Because the REAL ID Act nullified 28 U.S.C. § 2241 in expedited removal cases,<sup>29</sup> immigration precedent cannot now independently provide a basis for habeas jurisdiction. To hear these claims, courts must draw on the prerogative that once animated the writ—a jurisdiction premised on the need to maintain a proper balance and exercise of power.

In order to exercise this jurisdiction, courts must possess authority to call the political branches to account. Although judicial prerogative flourished in the King’s Bench when it flowed from a single source, American prerogative is divided: the collective sovereignty of “We the People” is splintered into different branches, each operating within a unique sphere of powers and responsibil-

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22. Stephen I. Vladeck, *Book Review: The New Habeas Revisionism*, 124 HARV. L. REV. 941, 950 (2011) (reviewing HALLIDAY, *supra* note 3).

23. *Id.* at 956.

24. *Id.* at 959 (“[T]he short version is that the more Parliament intervened, the weaker the writ became.”).

25. See *Ex parte Bollman*, 8 U.S. 75, 93-94 (1807) (“[T]he power to award the writ by any of the courts of the United States, must be given by written law.”).

26. See Appellants’ Brief, *supra* note 8, at 12 (“If the government’s jurisdictional position were now to prevail, it would be the first time in U.S. history that noncitizens were denied access to the Great Writ to challenge the legal validity of their removal orders.”).

27. See, e.g., *INS v. St. Cyr*, 533 U.S. 289, 304-11 (2001).

28. Even in *INS v. St. Cyr*, which labeled a jurisdiction-stripping statute constitutionally suspect, the Supreme Court did not invoke common law jurisdiction. Instead, in a strategic act of statutory interpretation, it held that the provisions at issue did not actually rescind 28 U.S.C. § 2241, allowing the Court to resolve the merits of *St. Cyr*’s claim under the auspices of statutory authorization. *Id.* at 310, 314.

29. 8 U.S.C. § 1252(a)(2)(A).

ities. With prerogative thus divided, it is little surprise that American habeas has not enjoyed the “mirac[ulous]” flexibility that characterized the writ in early England.<sup>30</sup> This history may also explain why courts have acquiesced in a general chipping away of habeas jurisdiction altogether.<sup>31</sup>

Ironically, it is this same separation of powers principle that compels many prominent jurists to call for judicial review in areas like expedited removal. Brandon Garrett, for example, writes: “[T]he Suspension Clause draws meaning from its structural role in the Constitution as a check on Congress and the Executive . . . .”<sup>32</sup> Joshua Geltzer suggests the Suspension Clause empowers judges to “defend the separation of powers among those branches.”<sup>33</sup> On this view, rather than posing a threat to the separation of powers, habeas jurisdiction is a constitutional safeguard.<sup>34</sup>

The Supreme Court seemed to affirm this view in *Boumediene v. Bush* when it exercised habeas jurisdiction without statutory authorization—indeed, contrary to statute—demonstrating that federal courts can still draw upon judicial prerogative in habeas.<sup>35</sup> In that case, the Court found that enemy alien combatants detained at Guantánamo Bay were entitled to habeas despite clear statutory prohibitions. Writing for the majority, Justice Kennedy articulated his own version of the delicate interplay between congressional power and judicial prerogative:

The Clause protects the rights of the detained by affirming the duty and authority of the Judiciary to call the jailer to account . . . .

Abstaining from questions involving formal sovereignty and territorial governance is one thing. To hold the political branches have the power to switch the Constitution on or off at will is quite another. The former position reflects this Court’s recognition that certain matters requiring

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30. See HALLIDAY, *supra* note 3, at 67.

31. See generally Jed. S. Rakoff, *The Magna Carta Betrayed?*, N.Y. REV. BOOKS (Feb. 11, 2016), <http://www.nybooks.com/articles/2016/02/11/the-magna-carta-betrayed> [<http://perma.cc/PC43-MWDF>] (describing the historical origins of the writ of habeas corpus and its gradual diminishment in U.S. law).

32. Garrett, *supra* note 2, at 83.

33. Joshua Alexander Geltzer, *Of Suspension, Due Process, and Guantanamo: The Reach of the Fifth Amendment After Boumediene and the Relationship Between Habeas Corpus and Due Process*, 14 U. PA. J. CONST. L. 719, 767 (2012).

34. Not all scholars embrace this view. See, e.g., Aziz Z. Huq, *What Good is Habeas?*, 26 CONST. COMMENT. 385, 387-90 (2010) (examining statements by the Framers, among other things, as evidence that “the [alleged] strong connection between habeas and the separation of powers” is “neither obvious nor necessary”).

35. 553 U.S. 723, 776, 792 (2008).

political judgments are best left to the political branches. The latter 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.”<sup>36</sup>

If Justice Kennedy is correct, then courts retain inherent habeas jurisdiction even in areas—like expedited removal—that lie deep in the heart of congressional plenary power, because the Suspension Clause exists to prevent overreaching by the other branches. Consequently, any statute that purports to revoke jurisdiction in a manner that wrongfully deprives individuals of their opportunity to be heard violates the Suspension Clause.

### III. THE SCOPE OF HABEAS PROTECTIONS

By focusing on the petitioners’ legal status rather than on prerogative, the Third Circuit avoided answering the difficult question of whether habeas jurisdiction exists in the absence of statutory authorization. Fundamentally, the Third Circuit held that expedited removal did not violate the Suspension Clause because inadmissible immigrants like Rosa Castro lacked standing to raise a constitutional claim.<sup>37</sup> In so doing, the court mimicked the first step of the *Boumediene* analysis—namely, that individuals may be barred from “invoking the protections of the Suspension Clause . . . because of their status . . .”<sup>38</sup> Yet, while relying on this concept from *Boumediene*, the Third Circuit seemed to reach a contradictory result. If enemy alien combatants can invoke the Suspension Clause, it seems anomalous that single mothers and young children cannot. Intuitive as this may seem, however, the law remains murky. *Boumediene* may not apply outside an extraterritoriality analysis.<sup>39</sup> Furthermore, even if it does, it remains unclear which types of claims petitioners can raise. The following Section highlights a few brief observations about petitioners’ cognizable rights.

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36. *Id.* at 745, 765 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

37. *See* *Castro v. U.S. Dep’t of Homeland Sec.*, 835 F.3d 422, 442-45 (3d Cir. 2016).

38. *Boumediene v. Bush*, 553 U.S. 723, 739 (2008). Note that while original habeas corpus did not disqualify petitioners based on status, American law often does.

39. The Third Circuit declined to follow *Boumediene*’s multi-factor test precisely because they deemed it “of limited utility” outside the Supreme Court’s extraterritoriality jurisprudence. *Castro*, 835 F.3d at 445 n.25.

A. *Immigration Status Is Not Definitive*

Regardless of *Boumediene*'s applicability to expedited removal, there are strong historical reasons to believe that an individual's placement into expedited removal proceedings cannot restrict a courts' habeas jurisdiction over his or her claims. As habeas scholars repeatedly note, in its earliest form, habeas jurisdiction was related to prerogative: the question was whether a *jailer* could be held accountable, and it did not concern the rights or status of the petitioner.<sup>40</sup> Indeed, historically, access to habeas was not predicated on citizenship status until the Suspension Act of 1777, when Parliament imposed citizenship-based limitations to enable the prolonged detention of American sailors.<sup>41</sup> Many have suggested that it was this very suspension that inspired the Suspension Clause.<sup>42</sup> Because the Suspension Clause sought to "restor[e] the traditional order of writs . . . that had existed before the Parliamentary suspension acts that began in 1777,"<sup>43</sup> the writ should theoretically extend to non-citizens.

Nevertheless, the petitioners' legal status may still have a bearing on the *types* of claims they can raise. As DHS asserts, if asylum seekers "lack any due process minimums to vindicate through habeas," then "no Suspension Clause issue arises at all" and "the scope of habeas review [becomes] irrelevant."<sup>44</sup> This argument conceives of habeas as an "empty vessel."<sup>45</sup> Under this conception, because asylum seekers have "no constitutional rights regarding [their] application,"<sup>46</sup> they necessarily have no claims with which to fill a habeas petition—and any challenges to their removal orders and accompanying detention must fail.<sup>47</sup>

While the "empty vessel" concept has garnered support from several Justices,<sup>48</sup> the increasingly prevailing view is that habeas affords "fundamental pro-

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40. See Brief for Scholars of Habeas Corpus Law, Federal Courts, and Constitutional Law as Amici Curiae Supporting Appellants and Reversal at 20-21, *Castro*, 835 F.3d 422 (No. 16-1339); Garrett, *supra* note 2, at 61 ("[T]he common law writ was not based on a modern concept of individual rights, but rather a royal prerogative . . .").

41. Vladeck, *supra* note 22, at 957.

42. *Id.* at 959, 961-62.

43. *Id.* at 962.

44. Response Brief for Respondents-Appellees at 48-49, *Castro*, 835 F.3d 422 (No. 16-1339) [Hereinafter Respondents' Brief].

45. See generally Garrett, *supra* note 2, at 51-52.

46. *Landon v. Plasencia*, 459 U.S. 21, 32 (1982).

47. See *Castro*, 835 F.3d at 445.

48. See *Boumediene v. Bush*, 553 U.S. 723, 802 (2007) (Roberts, C.J., dissenting); *INS v. St. Cyr*, 533 U.S. 289, 337 (2001) (Scalia, J., dissenting).



cedural protections” of its own, independent of other constitutional rights.<sup>49</sup> A majority of the Supreme Court seemed to embrace this view in *Boumediene* by granting the petitions of enemy alien combatants without considering the scope of their (essentially nonexistent) due process rights. However, as Mary Van Houten notes:

By extending the Suspension Clause extraterritorially at Guantanamo, the Court made clear that the Clause was more than just an “empty vessel” used to achieve a remedial or procedural outcome. But “it did not specify what process the Suspension Clause ensures, nor to what degree due process concerns influence the analysis.”<sup>50</sup>

In light of this ambiguity, the literature is riddled with speculation about the scope of habeas protections.<sup>51</sup> Thoughtful analysis offered by numerous scholars suggests that the petitioners’ lack of due process rights does not automatically bar courts from exercising jurisdiction over their habeas claims. Some measure of procedural protection is required.

#### *B. Petitioners’ Claims May Be Cognizable*

Though the petitioners’ legal status is not dispositive, a question remains whether the petitioners suffered a class of harms within the scope of habeas review. Petitioners raise what they characterize as “a variety of *legal claims*,”<sup>52</sup> insisting, among other things, that asylum officers applied an incorrect legal standard in rejecting their applications. This formulation makes their claims “pure question[s] of law” if the wrong standard was applied, or at least “classic mixed question[s] of law and fact” if the officers “applied the correct legal standard but incorrectly found that [p]etitioners did not satisfy that stand-

49. Garrett, *supra* note 2, at 52 (quoting *Boumediene*, 553 U.S. at 785).

50. See Mary Van Houten, *The Post-Boumediene Paradox: Habeas Corpus or Due Process?*, 67 STAN. L. REV. ONLINE 9, 11 (2014), <http://www.stanfordlawreview.org/online/the-post-boumediene-paradox-habeas-corpus-or-due-process> [<http://perma.cc/FJF2-V7RA>] (quoting Garrett, *supra* note 2).

51. See generally Garrett, *supra* note 2 (divorcing habeas jurisdiction from due process rights); Geltzer, *supra* note 33 (identifying competing views on the relationship between habeas corpus and due process); Hiroshi Motomura, *Immigration Law and Federal Court Jurisdiction Through the Lens of Habeas Corpus*, 91 CORNELL L. REV. 459 (2006) (exploring four models of habeas corpus in immigration). *But see* Henry M. Hart, Jr., *The Power of Congress To Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1392-96 (1953) (arguing that due process and habeas corpus are necessarily intertwined); Van Houten, *supra* note 50 (similar).

52. Appellants’ Brief, *supra* note 8, at 33 (emphasis added).

ard.”<sup>53</sup> DHS, on the contrary, describes the petitioners as raising “questions of fact or a mixed question of law and fact involving deferential evidentiary review.”<sup>54</sup>

Astonishingly, both briefs concede that the petitioners’ claims are, at the very least, mixed questions of law and fact. Yet the petitioners and DHS differ sharply on whether such claims are cognizable in habeas. The petitioners look to *Boumediene* and *INS v. St. Cyr* for the proposition that mixed questions do qualify for habeas review.<sup>55</sup> In both cases, the Supreme Court explained that the “privilege of habeas corpus entitles the prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to ‘the erroneous application or interpretation’ of relevant law.”<sup>56</sup> DHS, in turn, relied on plenary power cases to cabin *Boumediene* and *St. Cyr* and render the habeas petitions unreviewable.<sup>57</sup> These include cases like *United States ex rel. Knauff v. Shaughnessy*, which stated that “it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien,”<sup>58</sup> and *Nishimura Ekiu v. United States*, which held that the “final determination of . . . facts may be entrusted by Congress to executive officers” such that “no other tribunal, unless expressly authorized by law to do so, is at liberty to reexamine or controvert the sufficiency of the evidence on which he acted.”<sup>59</sup> DHS argued that since Congress revoked 28 U.S.C. § 2241 as applied to expedited removal cases in the REAL ID Act, courts have no authority to entertain asylum seekers’ petitions.<sup>60</sup>

In part, this confusion over mixed claims is a natural consequence of seemingly incompatible Supreme Court precedents. The Court has extended habeas protections to noncitizens in *Boumediene* and *St. Cyr*—in direct contravention of statutory intent—and yet consistently upheld the plenary power doctrine.<sup>61</sup> The result is that, in some cases, the Court has used the Suspension Clause to grant noncitizens the opportunity to bring mixed questions before an Article

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53. *Id.*

54. Respondents’ Brief, *supra* note 44, at 60-61.

55. See Appellants’ Brief, *supra* note 12, at 20-21, 30, 33-34.

56. *Boumediene v. Bush*, 553 U.S. 723, 779 (2007) (citing *INS v. St. Cyr*, 533 U.S. 289, 302 (2001)).

57. See Respondents’ Brief, *supra* note 44, at 54-64.

58. *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950).

59. *Nishimura Ekiu v. United States*, 142 U.S. 651, 660 (1892).

60. Respondents’ Brief, *supra* note 44, at 40-42.

61. See *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (“This Court has repeatedly emphasized that ‘over no conceivable subject is the legislative power of Congress more complete than it is over’ the admission of aliens.”) (internal citations omitted).

III court while, in others, it has held that judicial review of very similar claims may be curtailed or even eliminated.<sup>62</sup> So which is it? Do the principles of *Boumediene* and *St. Cyr* carry into expedited removal? Or does plenary power control? Perhaps more importantly, how is a lower court to decide?

Absent guidance from the Supreme Court, lower courts are left to resolve this conflict for themselves. The Eastern District of Pennsylvania resolved the tension by relying on Third Circuit glosses that limit *St. Cyr*'s holding to mixed questions "where the facts are undisputed and not the subject of the challenge," insisting that *St. Cyr* does not "embrace review of the exercise of discretion, or the sufficiency of the evidence."<sup>63</sup> Adopting DHS's characterizations, the Eastern District found that the petitioners' claims were premised on disputed facts (largely because DHS made a point of disputing them) and were merely disguised challenges to evidentiary sufficiency. As such, the petitions were dismissed.<sup>64</sup> The Third Circuit, for its part, did not even reach the characterization issue because it resolved the case on the basis of the petitioners' placement into expedited removal alone.<sup>65</sup>

Because both leading Suspension Clause cases (like *Boumediene* and *St. Cyr*) and iconic plenary power cases (like *Knauff* and *Eiku*) rest on strong doctrinal foundations, divergent analyses are likely to persist. Unless and until the Supreme Court intervenes, the issue of what rights are cognizable in habeas will be far from settled. As the foregoing analysis demonstrates, there is a strong historical argument that the petitioners' habeas claims were wrongfully denied by the Third Circuit in *Castro*. Unfortunately, for reasons articulated in the following Part, efforts to reclaim these habeas rights will likely face an uphill battle.

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62. Some may try to distinguish *Boumediene* and *St. Cyr* based on the inadequacy of the habeas substitute afforded by the statutory scheme in those cases. However, because the Third Circuit in *Castro* never reached the issue, this Essay focuses primarily on entitlement to the right, rather than on the means by which that right should be fulfilled. See *Castro v. U.S. Dep't of Homeland Sec.*, 835 F.3d 422, 445-46 (3d Cir. 2016) (declining to reach the issue of whether expedited removal provides an adequate habeas substitute after concluding that petitioners "cannot invoke . . . the Suspension Clause").

63. *Castro v. U.S. Dep't of Homeland Sec.*, 163 F. Supp. 3d 157, 169 (E.D. Pa. 2016) (quoting *Bakhtriger v. Elwood*, 360 F.3d 414, 420 (3d Cir. 2004)).

64. *Id.* at 170-71, 174.

65. *Castro*, 835 F.3d at 445-46.

#### IV. NORMATIVE AND PRACTICAL IMPLICATIONS OF EXTENDING FULL HABEAS REVIEW TO EXPEDITED REMOVAL CASES

Beyond examining the source and scope of habeas corpus, it is worth considering the practical implications of extending full habeas review to expedited removal cases. While “[t]he American rule of law . . . depends on neutral, impartial judges who say what the law is, not what the law should be,” even those most committed to this ideal acknowledge that “it is probably not possible in *all* cases.”<sup>66</sup> Rather, “on occasion the relevant constitutional or statutory provision may actually *require* the judge to consider policy and perform a common law-like function.”<sup>67</sup> Whether *Castro* presents one of those occasions is open to debate. Nevertheless, it seems prudent to spend some time discussing policy considerations.

In 2016, the Migration Policy Institute (MPI), a Washington, D.C.-based think tank, reported: “As governments around the world face increasingly complex migration challenges, the difference between success and failure can often hinge on the ability of policymakers to win and maintain public trust.”<sup>68</sup> MPI points to two factors that are “particularly important” to maintaining public trust—namely, “the ability to select a significant majority of a country’s newcomers, and to properly assess asylum claims.”<sup>69</sup> The salience of these factors should not be surprising: they implicate both national security and national sympathy, border control and controlled compassion. An immigration policy that achieves these goals could ease anxieties on both sides of the aisle, and thereby boost public confidence in our entire immigration scheme. Expedited removal is important because it cuts to the heart of both selection and asylum. *Castro* in turn cuts deeper still, forcing us to define and defend a system for navigating these issues and for identifying who gets to decide if that system is within constitutional bounds.

It seems rather uncontroversial that Congress should take the lead in the policymaking function of MPI’s first prong, but which branch we entrust with ensuring the proper assessment of asylum claims depends largely on the meaning of “properly.” If *proper* is thought of in terms of morality or prudence, Con-

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66. Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2120 (2016).

67. *Id.*

68. Demetrios G. Papademetriou, *Maintaining Public Trust in the Governance of Migration*, MIGRATION POL’Y INST. 1 (May 2016), [http://www.migrationpolicy.org/sites/default/files/publications/TCM\\_Trust-PublicAnxiety-FINAL.pdf](http://www.migrationpolicy.org/sites/default/files/publications/TCM_Trust-PublicAnxiety-FINAL.pdf) [<http://perma.cc/Y58D-5TFB>]. The MPI is a nonprofit, nonpartisan think tank based in Washington, D.C. This report was authored by the MPI’s Transatlantic Council on Migration, a widely respected international body devoted to cutting-edge policy analysis and evaluation. *Id.*

69. *Id.*

gress seems the proper decider: as the branch entrusted with legislation, Congress possesses the expertise and constitutional authorization to craft a “uniform Rule of Naturalization,” which encompasses asylum-seeking immigrants.<sup>70</sup> On the other hand, if *proper* refers to the impartial “application or interpretation of relevant law,”<sup>71</sup> this function falls squarely within the prerogative of the judiciary. Thus, courts should defer to Congress on policy issues, but for questions regarding procedural fairness, courts would be remiss to abdicate their role.

This substance versus procedure distinction is perhaps nowhere more poignantly articulated than in Justice Jackson’s dissent in the iconic plenary power case, *Shaughnessy v. United States ex rel. Mezei*.<sup>72</sup> There, the Supreme Court deferred to the executive’s unilateral determination that Mezei posed a threat to national security and upheld his exclusion without a hearing.<sup>73</sup> In his dissent, Justice Jackson began his discussion of due process by agreeing with the Court that “[d]ue process does not invest any alien with a right to enter the United States” and that “[n]othing in the Constitution requires admission or sufferance of aliens hostile to our scheme of government.”<sup>74</sup> However, Justice Jackson was unwilling to defer wholesale to the political branches. His homily on the separation of powers is worth quoting at length:

Procedural due process is more elemental and less flexible than substantive due process. It yields less to the times, varies less with conditions, and defers much less to legislative judgment. Insofar as it is technical law, it must be a specialized responsibility within the competence of the judiciary on which they do not bend before political branches of the Government, as they should on matters of policy which comprise substantive law.

. . . Procedural fairness and regularity are of the indispensable essence of liberty. Severe substantive laws can be endured if they are fairly and impartially applied. Indeed, if put to the choice, one might well prefer to live under Soviet substantive law applied in good faith by our common-law procedures than under our substantive law enforcement by Soviet procedural practices. Let it not be overlooked that due pro-

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70. See U.S. CONST. art. I, § 8, cl. 4.

71. *Boumediene v. Bush*, 553 U.S. 723, 779 (2008) (internal quotation marks omitted).

72. 345 U.S. 206 (1953).

73. *Id.* at 214-16.

74. *Id.* at 223-24 (Jackson, J., dissenting).

cess . . . is the best insurance for the Government itself against those blunders which leave lasting stains on a system of justice . . . .<sup>75</sup>

For Justice Jackson, then, as for Justice Kennedy, courts play a crucial role in maintaining the separation of powers. Without intruding on policymaking, judges are uniquely situated to secure liberty and protect against governmental overreaching by ensuring procedural fairness through habeas corpus. Habeas jurisdiction should extend to mixed questions of law and fact like those raised by the petitioners in *Castro*.

All of this is not to say that extending procedural protections will be easy. There is no denying that greater judicial review in expedited removal will have some negative repercussions. There is already a crushing backlog in our immigration system,<sup>76</sup> and the number of immigrants applying for asylum at the border is rising at remarkable rates.<sup>77</sup> Expedited removal avoids the procedural hassles that attach to immigrants who gain due process rights—along with the litigation costs and significant delays that procedural due process entails. Increasing the scope of habeas protections may thus jeopardize the entire scheme.<sup>78</sup>

There is also some concern that asylum seekers may intentionally “game the system,” making an already difficult removal process even more so.<sup>79</sup> Habeas has a reputation for generating frivolous claims,<sup>80</sup> and opening expedited removal to habeas review might only further exacerbate backlogs. Finally, as the district court noted in *Castro*, there is evidence that the avenues of administrative review within expedited removal already provide relief for many with legitimate claims. Nearly eighty-seven percent of individuals in DHS family residential centers receive a positive credible fear determination, and nearly one in six negative determinations is overturned by an immigration judge on appeal.<sup>81</sup> In light of these countervailing factors, one can see why the Eastern District

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75. *Id.* at 224-25.

76. See T. ALEXANDER ALEINIKOFF ET AL., *IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY* 287 (8th ed. 2016).

77. *Castro v. U.S. Dep’t of Homeland Sec.*, 163 F. Supp. 3d 157, 162 (E.D. Pa. 2016) (reporting that the number of immigrants who expressed a fear of return rose from 5,250 in Fiscal Year 2009 to 51,001 in Fiscal Year 2014).

78. *Id.* at 174 (“The procedures Petitioners urge—necessitating pleadings, formal court proceedings, evidentiary review, and the like—would make expedited removal . . . impossible.”).

79. Papademetriou, *supra* note 68, at 9.

80. Indeed, Justice Jackson—the advocate of fair procedures in *Mezei*—compared the discovery of a “meritorious [habeas] application” to finding a needle in a haystack. *Brown v. Allen*, 344 U.S. 443, 537 (1953) (Jackson, J., concurring).

81. *Castro*, 163 F. Supp. 3d at 162.

held that “although Petitioners have a considerable interest in rigorous administrative procedures, the Government’s need for expedition and finality is greater still.”<sup>82</sup>

Despite these practical concerns, the fact remains that the petitioners have a potentially viable claim to habeas protections. And while *Castro*’s holding may be politically or practically convenient, securing a comfortable outcome using a flawed legal theory does not ultimately advance the cause of justice.<sup>83</sup> Honest legal analysis is the courts’ most powerful check on the other branches. So long as the relationship between habeas and plenary power remains ambiguous, it is the prerogative of the judiciary to grapple with these difficult issues.

### CONCLUSION

If courts possess independent habeas jurisdiction as a function of judicial prerogative and the separation of powers—and if the petitioners’ status does not preclude them from invoking habeas protections—the Third Circuit erred in its legal analysis. If mixed questions of law and fact are included in the scope of permissible habeas claims under *Boumediene* and *St. Cyr*, the Eastern District likely erred as well. Finally, if both courts erred and the petitioners necessarily possess habeas rights because habeas itself affords rights, the entire expedited removal scheme may be in jeopardy. This conclusion contains a lot of provisional *ifs*. However, as asylum applications continue to proliferate, other circuits may very soon have a fresh opportunity to address these points of confusion and bring increased clarity to the habeas corpus and plenary power doctrines.

The questions raised by expedited removal are not likely to disappear any time soon. In the meantime, individuals like Rosa Castro remain in detention awaiting a chance to appeal their denials of asylum. *Castro* is a case where legal theory comes alive—where ideals confront harsh realities, with families and children caught in the crossfire. By denying certiorari in *Castro*, the Supreme Court lost a remarkable opportunity to clarify existing doctrine and resolve questions about the source of habeas jurisdiction, the applicability of *Boumediene* and *St. Cyr* to immigration law, the scope of an appropriate habeas claim, and the proper balance of power between Congress and courts. It lost an opportunity to ensure that the petitioners received the procedural protections

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82. *Id.* at 174.

83. See *INS v. Chadha*, 462 U.S. 919, 944 (1983) (“[T]he fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government . . .”).

guaranteed them by statute—to fulfill an oversight role that was theirs under the Suspension Clause. But similar opportunities will surface in the future. The conflicting legal principles are far too entrenched to be resolved solely by lower courts. Only the Supreme Court possesses the constitutional authority necessary to engage Congress on this issue, and, until it does, ambiguity will persist. As other cases materialize, the time will come to dispense with the legal murkiness. The time is coming for the Court to say what the law is.

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