THE YALE LAW JOURNAL

JENNIFER LEE KOH

Executive Defiance and the Deportation State

ABSTRACT. A basic assumption in our legal system is that once a federal court issues an order, the government will obey. But the validity of that assumption has been tested over the years, including in the immigration context, and for reasons both related to and separate from the identity of the President. Indeed, understanding the government's failure to adhere to judicial authority in the immigration context requires an appreciation for the doctrinal, statutory, bureaucratic, and institutional-design factors that have aggrandized the role of the executive branch—both at the level of the President and in the lower ranks of the bureaucracy—in the arena of deportation.

This Feature explores executive defiance in the deportation state. It focuses attention on several categories of executive defiance that have emerged in the immigration context, and at varying levels of the Executive: (1) failure by the Board of Immigration Appeals to follow federal appeals court remands, which implicates the competence of the most robust adjudicatory process in the deportation system; (2) deportations that violate federal court orders, which highlight the power of frontline deportation agents; and (3) agency litigation conduct that violates professional norms, such as misrepresentations to courts or failure to comply with deadlines, where the role of various government lawyers comes into view. The Feature asserts that the judicial branch can and should respond with reasonable vigilance to instances of noncompliance, as can the Executive and Congress. However, the nature of executive defiance points to a need to rethink the underlying factors driving the rise and dominance of the deportation state.

AUTHOR. Visiting Professor of Law, UC Irvine School of Law, and Visiting Lecturer, University of Washington School of Law, 2020-21; Associate Professor of Law, Pepperdine Caruso School of Law (effective summer 2021). I am grateful to Robert Chang, Mary Fan, Jonathan Glater, Geoffrey Heeren, Laila Hlass, Eisha Jain, Peter Joy, Catherine Kim, Summer Kim, Stephen Lee, Lisa Manheim, Shalini Bhargava Ray, Chuck Roth, Mary Tanagho Ross, Maureen Sweeney, Shoba Sivaprasad Wadhia, and Chris Walker, as well as to participants in the *Yale Law Journal* scholarship workshop series, University of Washington School of Law faculty colloquium, and 2020 Clinical Writers' Workshop at NYU School of Law for feedback on earlier versions of this paper. I would like to thank attorneys Adina Appelbaum, Katrina Eiland, SangYeob Kim, Sean McMahon, Jessica Rofe, Mary Tanagho Ross, and Jay Bogan for sharing their litigation experiences with me; law students Jordan Lowery (UC Irvine) and Oliana Luke (University of Washington), as well as the UC Irvine School of Law library staff, for excellent research assistance; and UCI School of Law Dean Song Richardson and University of Washington School of Law Dean Mario Barnes for research assistant funds to support this project. This Feature benefited from excellent feedback and editing from the *Yale Law Journal* editors, especially Sumer Ghazala and Kshithij Shrinath. Any errors are mine.

FEATURE CONTENTS

INTRODUCTION

A prevailing assumption in our legal system is that once a federal court issues an order, the government will obey.[1] That assumption has been tested in recent years, especially but not exclusively in immigration law. The Supreme Court's much-anticipated decision in *Department of Homeland Security v. Regents of the University of California*, issued on June 18, 2020, held that the Trump Administration's attempt to rescind the Obama-era Deferred Action for Childhood Arrivals (DACA) policy for certain immigrants who came to the United States as children was arbitrary and capricious and, therefore, invalid.[2] Many observers expected that the Court's ruling had restored the prerescission DACA policy, thereby obligating the government to process first-time applicants for DACA in the absence of a new, post-*Regents* DACA policy.[3] But United States Citizenship and Immigration Services (USCIS)—which adjudicates DACA applications—immediately denounced the Court's ruling as having "no basis in law"[4] and refused to process new DACA applications.[5] The case has given rise to allegations,

1. *See* Nicholas R. Parrillo, *The Endgame of Administrative Law: Governmental Disobedience and the Judicial Contempt Power*, 131 HARV. L. REV. 685, 687 (2018) (observing that "scholars generally take for granted that . . . if a court ultimately sets aside or compels agency action, the agency will obey the court's order"); *see also* Thomas W. Merrill, *Judicial Opinions as Binding Law and as Explanations for Judgments*, 15 CARDOZO L. REV. 43, 46 (1993) (noting "widespread agreement" regarding the Executive's duty to "enforce valid final judgments rendered by courts"); Jon D. Michaels, *Baller Judges*, 2020 WIS. L. REV. 411, 422 n.36 ("After all, efforts by Executive Branch officials to, say, defy judicial decisions (or deny their applicability) remain few and far between."); *cf.* Richard H. Fallon, Jr., *Judicial Supremacy, Departmentalism, and the Rule of Law in a Populist Age*, 96 TEX. L. REV. 487, 489-91, 501 (2018) (pointing to President Jefferson's and President Lincoln's defiance of judicial orders to suggest that "[o]ur system is not, never has been, and probably never could be one of pure judicial supremacy").

2. 140 S. Ct. 1891, 1912 (2020).

3. *See, e.g.*, Joel Rose, *Despite Supreme Court's Ruling on DACA, Trump Administration Rejects New Applicants*, NAT'L PUB. RADIO (July 15, 2020, 4:03 PM ET), https://www.npr.org/2020/07/15/891563635/trump-administration-rejects-1st-time-daca-applications-violates-scotus-order [https://perma.cc/2C6N-Y2AG] ("Many immigration lawyers thought [the Supreme Court ruling] meant the program would have to be restarted to allow new applications.").

4. *USCIS Statement on Supreme Court's DACA Decision*, U.S. CITIZENSHIP & IMMIGR. SERVS. (June 19, 2020), https://www.uscis.gov/news/news-releases/uscis-statement-on-supreme-courts-daca-decision [https://perma.cc/QPR2-TV6D].

5. United States Citizenship and Immigration Services (USCIS) refused to process new applications even prior to a July 28, 2020 memorandum from Acting Department of Homeland Security (DHS) Secretary Chad Wolf directing the agency to refuse to accept initial applications for DACA pending his "full reconsideration of the DACA policy." *See* Memorandum from Chad F. Wolf, Acting Sec'y, Dep't of Homeland Sec., to Mark Morgan, Senior Official

both in and out of court, of defiance.[6] But the DACA case is only one of a series of high-profile cases involving executive defiance of the judiciary. Other recent examples include court sanctions imposed on the Education Department for violating a preliminary injunction (potentially the largest ever against a federal agency, in the amount of $100,000),[7] and against the Census Bureau for discovery lapses both prior to and after the Supreme Court's decision in the prominent citizenship-question litigation.[8]

One explanation for the surge of high-profile episodes of executive defiance across agencies may be the governance style of President Trump, who during his tenure openly denigrated the judiciary[9] and aggressively deployed executive power to advance his Administration's controversial policy goals.[10] DACA, for instance, is a program involving presidential discretion over immigration

Performing Duties of Comm'r, U.S. Customs & Border Prot., et al., Reconsideration of the June 15, 2012 Memo Entitled "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children" (July 28, 2020), https://www.dhs.gov/sites/default/files/publications/20_0728_s1_daca-reconsideration-memo.pdf [https://perma.cc/TW8Q-7ZHK].

6. *See* Casa De Maryland v. U.S. Dep't of Homeland Sec., No. 8:17-cv-02942-PWG (D. Md. July 17, 2020) (ordering compliance with the Supreme Court's *Regents* decision); Memorandum in Support of Plaintiffs' Motion for Order to Show Cause why Defendants Should Not Be Held in Contempt, or in the Alternative, to Compel Compliance with Fourth Circuit Mandate, *Casa De Maryland*, No. 8:17-cv-02942-PWG; Chantal da Silva, *Trump Admin Accused of Defying Supreme Court Order to Reopen DACA Program*, NEWSWEEK (July 16, 2020, 5:23 AM EDT), https://www.newsweek.com/trump-admin-accused-defying-supreme-court-order-reopen-daca-program-1518215 [https://perma.cc/ET87-2G7Y]; Mark Joseph Stern, *Trump Is Now Openly Defying the Supreme Court*, SLATE (July 28, 2020, 5:20 PM), https://slate.com/news-and-politics/2020/07/daca-donald-trump-supreme-court.html [https://perma.cc/D4L8-YYLL].

7. Calvillo-Manriquez v. DeVos, 411 F. Supp. 3d 535, 537, 540 (N.D. Cal. 2019) (imposing sanctions in the amount of $100,000 against the Education Department for violating a preliminary injunction in connection with student-loan litigation); Nicholas R. Parrillo, *The Contempt Finding and Sanctions Against Secretary DeVos and the Department of Education*, YALE J. REG. NOTICE & COMMENT BLOG (Oct. 31, 2019), https://www.yalejreg.com/nc/the-contempt-finding-and-sanctions-against-secretary-devos-and-the-department-of-education-by-nicholas-r-parrillo [https://perma.cc/6JBL-4XRF] (observing that the *Calvillo-Manriquez* fine may be the largest contempt fine issued against the federal government and not later invalidated by another court).

8. New York v. U.S. Dep't of Commerce, 461 F. Supp. 3d 80, 85, 94-95 (S.D.N.Y. 2020) (issuing sanctions arising from the Department of Commerce's "admitted failure to review and produce hundreds of documents that should have been disclosed prior to trial").

9. *In His Own Words: The President's Attacks on the Courts*, BRENNAN CTR. FOR JUST. (Feb. 14, 2020), https://www.brennancenter.org/our-work/research-reports/his-own-words-presidents-attacks-courts [https://perma.cc/8WTU-VJVE].

10. *See* Lisa Manheim & Kathryn A. Watts, *Reviewing Presidential Orders*, 86 U. CHI. L. REV. 1743, 1786-87 (2019).

priorities.[11] A President that directly defies an order of the Supreme Court reflects a conflict of governmental power at the highest levels.[12] When it comes to agency disobedience of judicial authority, presidential administration matters.[13]

But presidential administration is not the only thing that matters. Rather, the structural dynamics at play in immigration law—a field in which the "normal rules of constitutional law" do not consistently apply[14]—exert considerable influence on the executive branch's relationship with the courts. With immigration law, overwhelming executive power and limited judicial review have become defining features of the deportation state. These features provide critical background for understanding executive defiance and are not positioned to change dramatically after President Biden takes office. In certain respects, the immigration field enhances the power of the President. But the broader deportation bureaucracy, which has seen its power increase over time and become concentrated in its lower rungs, is also a critical player in determining how, and whether, the Executive complies with judicial authority.

This Feature explores executive defiance taking place at varying levels of the deportation state. It focuses on defiance that occurs when immigration agencies fail to adhere to binding federal-court orders and identifies factors driving executive defiance,[15] such as the refusal by the Board of Immigration Appeals (BIA) to follow federal-court orders, as well as deportations that violate federal-court orders. But understanding executive defiance also involves considering the actors impacted by and participating in the defiance. Given that the federal judiciary relies primarily on lawyers to represent the actions and interests of the Executive during judicial proceedings, and that the judiciary issues its own binding set of expectations on the conduct of those lawyers, this Feature includes the

---

11. Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1901 (2020).

12. President Andrew Jackson's initial defiance of the Supreme Court's decision in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), led to Jackson's alleged statement, "Marshall has made his decision; now let him enforce it!" *See* Bush v. Gore, 531 U.S. 98, 158 (2000) (Breyer, J., dissenting) (quoting DAVID LOTH, CHIEF JUSTICE JOHN MARSHALL AND THE GROWTH OF THE REPUBLIC 365 (1949)); *see also* Gerard N. Magliocca, *The Cherokee Removal and the Fourteenth Amendment*, 53 DUKE L.J. 875, 879 (2003) (discussing the Jackson-Marshall conflict).

13. *See generally* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2246 (2001) (exploring the impact of presidential administrations on agency functioning, and noting that the executive branch is the driving force in influencing the outcome of administrative processes).

14. Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 260.

15. The focus of this Feature is on executive defiance of binding judicial orders, and as such does not directly encompass episodes in which an agency fails to follow its own administrative precedent or rules, *see infra* discussion accompanying notes 87-92, or instances in which the Executive refuses to acquiesce to the precedential impact of judicial orders or opinions in similar—but not directly binding—cases, *see infra* discussion accompanying notes 127-132.

government lawyers who fail to adhere to well-settled professional norms and therefore defy the integrity of the judicial process in its definition of executive defiance.

Like the proverbial canary in the coal mine, executive disobedience signals deeper pathologies in the immigration system. Tolerating the Executive's refusal to comply with the judiciary risks tipping the balance of power against an already diminished judiciary with respect to immigration. The high human stakes involved in the deportation context arguably set this area of law apart from others and call out for attention. This Feature suggests that longstanding features of the deportation state—in combination with the Trumpian immigration agenda—have invited noncompliance at multiple points throughout the immigration executive.

The implications of executive defiance discussed here are not limited to the immigration arena alone, though. After all, permitting the Executive to defy the judiciary in one area of administrative law risks emboldening the Executive to transgress compliance norms across the administrative state. Perhaps because governmental disobedience to the judiciary, particularly court orders, is perceived as a deviation from settled legal norms,[16] its existence remains largely underexplored in the scholarly literature.[17] The Feature seeks to expand the scholarship on executive defiance and, through its examination of the deportation state, provides a context-specific point of comparison to other areas of administrative law in which executive defiance has emerged. The Feature's emphasis on immigration law also aims to illuminate the nature of executive and judicial power, both in the immigration field and more broadly. Managing the boundaries of executive and judicial power has given rise to spirited debates involving, for instance, the propriety of nationwide injunctions[18] and the continued vitality of deference doctrines.[19] Immigration is heavily implicated by—and serves as the

16. *See* Parrillo, *supra* note 1, at 687 (asserting that administrative-law "[s]cholars devote tens of thousands of pages to questions about when [lawsuits against administrative agencies] can be brought and how they should be decided," but they "take for granted that these suits matter in the end—that if a court ultimately sets aside or compels agency action, the agency will obey the court's order").

17. The exception is Nicholas Parrillo's work. Parrillo's empirical analysis of government disobedience of federal-court orders over time and across administrative law assesses the use, availability, and effectiveness of judicial tools to respond to disobedience. *See id.*; Nicholas R. Parrillo, *Negotiating the Federal Government's Compliance with Court Orders: An Initial Exploration*, 97 N.C. L. REV. 899, 903-07 (2019).

18. *See* Alan M. Trammell, *Demystifying Nationwide Injunctions*, 98 TEX. L. REV. 67, 68-71 (2019) (describing the debate over nationwide injunctions).

19. *See* Christopher J. Walker, *Attacking* Auer *and* Chevron *Deference: A Literature Review*, 16 GEO. J. L. & PUB. POL'Y 103, 110-13 (summarizing the Article I and Article III concerns associated with *Chevron* deference).

recurring context for—these conversations,[20] and thus provides nuance to parallel debates involving the two branches and the separation of powers.

Part I provides necessary context by discussing the consolidation of executive power in immigration law generally, and of deportation power specifically, in the hands of the President and the lower realms of the immigration bureaucracy. It also explores how the interplay of judicial and executive power is evolving in immigration law today. Part II analyzes recent examples of immigration-agency conduct that reflect varying degrees of defiance, proceeding from an instance of open defiance to progressively less definitive conduct that still falls within the boundaries of problematic disobedience: (1) the BIA's refusal to implement an order from the Seventh Circuit, which implicates the competence of the most robust adjudicatory process in the deportation system; (2) deportations that violate federal-court orders, which highlight the power of frontline deportation agents; and (3) the question of agency litigation conduct that violates professional norms, such as misrepresentations to courts or failure to comply with deadlines. Part III discusses ways in which courts, the Executive, and Congress can respond, while recognizing the limitations of each branch. Ultimately, responding to noncompliance may require rethinking the scale and operation of the deportation powers of the Executive.

I. EXECUTIVE DOMINANCE AND THE PLACE OF THE JUDICIARY IN IMMIGRATION LAW

This Part sets the stage for analyzing executive defiance by exploring the nature of executive and judicial power in the immigration system. It highlights how executive power has emerged in the deportation state and how judicial power, while attenuated, exerts meaningful influence over the implementation of executive policy.

20. *See, e.g.*, Wolf v. Cook Cty., 140 S. Ct. 681, 684 (2020) (Sotomayor, J., dissenting) (noting that "the Court's recent behavior on stay applications has benefited one litigant over all others," thereby threatening the "fair and balanced decisionmaking process"); Dep't of Homeland Sec. v. New York, 140 S. Ct. 599, 600 (2020) (Gorsuch, J., concurring) ("The real problem here is the increasingly common practice of trial courts ordering relief that transcends the cases before them. Whether framed as injunctions of 'nationwide,' 'universal,' or 'cosmic' scope, these orders share the same basic flaw."); Trump v. Hawaii, 138 S. Ct. 2392, 2425 (2018) (Thomas, J., concurring) (expressing "skeptic[ism] that district courts have the authority to enter universal injunctions"); Pereira v. Sessions, 138 S. Ct. 2105, 2120 (2018) (Kennedy, J., concurring) (suggesting reconsideration of *Chevron*).

A. Doctrinal and Statutory Considerations

The plenary power doctrine is a foundational starting point for nearly any immigration-related systemic inquiry. In its strongest form, the centuries-old doctrine suggests that Congress possesses the unfettered discretion to set forth immigration rules absent direct constitutional restraints.[21] A corollary to the judiciary's super deference to the legislature is that the implementation of immigration statutes by executive-branch officials also warrants deference. In *Nishimura Ekiu v. United States*, the Supreme Court in 1892 asserted that "the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law."[22] Two Cold War cases involving the prolonged detention of noncitizens at Ellis Island, *United States ex rel. Knauff v. Shaughnessy*[23] and *Shaughnessy v. United States ex rel. Mezei*,[24] reflect the plenary power doctrine at its height. In *Knauff*, for instance, the Court declared that "[t]he action of the executive officer" acting under authority delegated by the President and Congress "is final and conclusive."[25] *Mezei* similarly stated that "courts cannot retry the determination of the Attorney General," at least with respect to noncitizens "on the threshold of initial entry."[26] The courts have reinforced the judiciary's deferential posture to the Executive, especially when they treat noncitizens as situated outside U.S. territory.[27]

Although scholars have questioned the continued vitality of the plenary power doctrine, particularly the suggestion that immigration statutes are impervious to judicial scrutiny,[28] the legacy of *Nishimura Ekiu*, *Mezei*, and *Knauff*

---

21. *See* Legomsky, *supra* note 14, at 255-60 (explaining the contours of the plenary power doctrine); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 550-60 (1990) (describing the origins of the plenary power doctrine in immigration law).

22. 142 U.S. 651, 660 (1892).

23. 338 U.S. 537 (1950).

24. 345 U.S. 206 (1953).

25. 338 U.S. at 543.

26. 345 U.S. at 212.

27. The entry fiction doctrine is a corollary to the plenary power doctrine, and it has enabled courts to treat persons as outside the United States even where – as was the case in *Knauff* and *Mezei* – they were physically on U.S. territory. *See* Charles D. Weisselberg, *The Exclusion and Detention of Aliens: Lessons from the Lives of Ellen Knauff and Ignatz Mezei*, 143 U. PA. L. REV. 933, 964-65 (1995).

28. *See, e.g.*, Kevin R. Johnson, *Immigration "Disaggregation" and the Mainstreaming of Immigration Law*, 68 FLA. L. REV. F. 38, 44 (2016) (observing that "the Supreme Court has begun the process of dismantling immigration exceptionalism"); Catherine Y. Kim, *Plenary Power in the Modern Administrative State*, 96 N.C. L. REV. 77, 79-83 (2017) (explaining the Court's shift

recently received a significant boost from the Supreme Court. On June 25, 2020, the Court in *Department of Homeland Security v. Thuraissigiam* validated Congress's decision to insulate the vast executive infrastructure of expedited removal from habeas review.[29] Expedited removal, which permits frontline deportation officers to summarily deport certain recent arrivals to the United States, has been heavily insulated from judicial review by a series of statutory provisions.[30] Accordingly, the process has been criticized on procedural-integrity, fairness, accuracy, and accountability grounds.[31] A key critique of expedited removal has involved the documented failure of agency officials to follow the governing law in elementary ways, leading to concerns about a lawless and procedurally flimsy system that nonetheless exacts acute human consequences.[32] The potential availability of habeas review raised by the lower-court litigation presented a small opportunity to inject federal-court oversight to ensure that the agency followed its own governing law. But the Court's 7-2 decision removed habeas review as an option,[33] further insulating an agency program that, through executive-level expansions, now accounts for roughly thirty-five to forty percent of all removals in recent years.[34]

Thuraissigiam stands to be a watershed case with potentially far-reaching implications for the availability of habeas review and due-process rights in immigration.[35] Justice Samuel Alito's majority opinion set forth an extremely restrictive view of the types of immigration claims for which habeas review was available, relying on *Nishimura Ekiu* to reject a constitutional basis for the right to habeas.[36] By precluding habeas review, the Court effectively permitted the agency to disregard its own law. Although unnecessary to the Suspension Clause holding, the majority also found that Mr. Thuraissigiam—who had been

away from plenary power through a nondelegation lens); Matthew J. Lindsay, *Disaggregating "Immigration Law,"* 68 FLA. L. REV. 179, 181 (2016).

29. 140 S. Ct. 1959, 1963 (2020).

30. *See* Jennifer Lee Koh, *Removal in the Shadows of Immigration Court*, 90 S. CAL. L. REV. 181, 194-203 (2017).

31. *See id.* at 198-200.

32. *See id.* at 199.

33. *Thuraissigiam*, 140 S. Ct. at 1963. Five Justices joined in the reasoning of the majority opinion. *See id.* at 1988 (Breyer, J., concurring).

34. *See* Office of Immigration Statistics, *Immigration Enforcement Actions: 2017*, DEP'T HOMELAND SECURITY 9 (Mar. 2019), https://www.dhs.gov/sites/default/files/publications/enforcement_actions_2017.pdf [https://perma.cc/JT9F-PXJB].

35. *See* Gerald Neuman, *The Supreme Court's Attack on Habeas Corpus in* DHS v. Thuraissigiam, JUST SECURITY (Aug. 25, 2020), https://www.justsecurity.org/72104/the-supreme-courts-attack-on-habeas-corpus-in-dhs-v-thuraissigiam [https://perma.cc/P7EY-NSPD].

36. *Thuraissigiam*, 140 S. Ct. at 1971, 1977-80.

apprehended on U.S. soil twenty-five yards past the southern border, after an unauthorized entry—possessed no due-process rights beyond those granted by statute.[37] When adopted and extended by future courts, *Thuraissigiam* could lead to significant expansions of the Executive's deportation and detention powers over undocumented individuals, even those with strong ties to the United States,[38] and consequently for the overall calibration of power in the immigration landscape.

The single statute eliminating habeas review at issue in *Thuraissigiam* is one thread in an extensive web of statutory restrictions that have long insulated a range of executive actions from federal-court scrutiny.[39] Collectively, those provisions limit access to the federal district courts by requiring that appeals of removal orders be filed in federal circuit courts;[40] limit judicial review over certain types of matters (such as bond or discretionary decisions);[41] limit habeas review in various circumstances, including decisions to initiate removal proceedings or execute removal orders;[42] create obstacles to lodging broader challenges to the immigration laws in federal court;[43] and prevent whole categories of noncitizens from obtaining recourse in the courts.[44] As noted, a series of jurisdiction-limiting provisions applies with particular force to expedited removal.[45] Although the

37. *Id.* at 1981-83.

38. *See* Designating Aliens for Expedited Removal, 84 Fed. Reg. 35409 (July 23, 2019) (expanding regulatory authority to use expedited removal against persons unable to prove prior physical presence in the United States for a two-year period immediately preceding the date the immigration officer determined the person inadmissible); *see also* Make the Rd. N.Y. v. Wolf, 962 F.3d 612, 635 (D.C. Cir. 2020) (reversing a district court's injunction against the rule).

39. *See generally* Lenni B. Benson, *Back to the Future: Congress Attacks the Right to Judicial Review of Immigration Proceedings*, 29 CONN. L. REV. 1411 (1997) (describing these restrictions).

40. *See, e.g.*, 8 U.S.C. § 1252(a)(5) (2018) (specifying that petitions for review "shall be the sole and exclusive means for judicial review").

41. *See, e.g.*, *id.* § 1226(e) (limiting judicial review of certain bond decisions); *id.* § 1252(a)(2)(B) (barring review of the Attorney General's discretionary decisions "regardless of whether the judgment, decision, or action is made in removal proceedings").

42. *See, e.g.*, *id.* § 1252(b)(9) (limiting habeas jurisdiction over removal orders); *id.* § 1252(g) (depriving courts of jurisdiction over "the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders").

43. *See, e.g.*, *id.* § 1252(f)(1) (limiting jurisdiction to issue injunctive relief).

44. *See, e.g.*, *id.* § 1252(a)(2)(B) (barring judicial review of certain discretionary relief decisions); *id.* § 1252(a)(2)(C) (barring judicial review of removal orders against noncitizens deemed removable due to certain criminal offenses).

45. *See id.* § 1252(e) (barring judicial and habeas review of expedited removal orders); *see also* Jennifer Lee Koh, *When Shadow Removals Collide: Searching for Solutions to the Legal Black Holes Created by Expedited Removal and Reinstatement*, 96 WASH. U. L. REV. 337, 360-68 (2018) (describing statutory bars to judicial review of expedited removal).

Supreme Court has construed certain judicial-review provisions narrowly,[46] the prospect of an adverse jurisdictional ruling can threaten to unravel many litigation claims. On a cumulative basis, the broad and comprehensive nature of the statutory bars means that judicial review is arguably haphazard and uneven, thus leaving the judiciary on unequal footing vis-à-vis the executive branch.

B. Institutional and Bureaucratic Considerations

Institutional and bureaucratic considerations have also led to a centralization of executive-branch authority in immigration. Multiple factors — historical practice, expansions to the immigration bureaucracy bolstered by congressional funding, and the state of the doctrine — contribute to what Adam Cox and Cristina Rodríguez characterize as a "de facto delegation" of tremendous swaths of immigration power to the President.[47] Today, "the most important way in which Congress's Code has empowered the President has been through the rise of the deportation state."[48] For instance, legislative changes in 1996 subjected large portions of the population to deportation while restricting avenues for noncitizens to seek relief from removal. These broad rules governing who can be deported, together with the reality that millions of individuals are in theory subject to deportation (as a consequence of the highly restricted availability of admission at the front end of the immigration process), mean that decisions made by the Executive over whom to charge as removable carry particularly high consequences.[49] The President's deportation priorities become, in effect, one of the

---

46. *See, e.g.*, Nasrallah v. Barr, 140 S. Ct. 1683, 1694 (2020) (holding that § 1252(a)(2)(C)'s limitation on judicial review of factual challenges to final orders of removal does not extend to International Convention Against Torture orders); Guerrero-Lasprilla v. Barr, 140 S. Ct. 1062, 1069-70 (2020) (holding that § 1252(a)(2)(C) permits review of the application of a legal standard to undisputed or established facts); Immigration & Naturalization Serv. v. St. Cyr, 533 U.S. 289, 314 (2001) (holding that § 1252 does not bar habeas jurisdiction over removal orders); Reno v. Am.-Arab Anti-Discrimination Comm., 525 U.S. 471, 482 (1999) (holding that § 1252(g) applies only to claims arising from the Attorney General's decision or action to commence proceedings, adjudicate cases, or execute removal orders).

47. *See* ADAM B. COX & CRISTINA M. RODRÍGUEZ, THE PRESIDENT AND IMMIGRATION LAW 105, 127-29 (2020) [hereinafter COX & RODRÍGUEZ, THE PRESIDENT AND IMMIGRATION LAW]; Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 YALE L.J. 458, 510-19 (2009); Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law Redux*, 125 YALE L.J. 104, 108, 130-35 (2015).

48. COX & RODRÍGUEZ, THE PRESIDENT AND IMMIGRATION LAW, *supra* note 47, at 8.

49. *Id.* at 111-14. Cox and Rodríguez also explain that the Executive has historically exercised high levels of discretion with respect to the allocation of enforcement power and the nature of its enforcement priorities over time. *See id.* at 114-30.

most significant sources of immigration power and policy.[50] Under President Trump, every immigrant was a priority for deportation.[51]

The President is not the sole holder of executive immigration power. Power has also concentrated in the lower levels of the immigration bureaucracy—distributed across multiple agencies but primarily in the two main immigration-enforcement agencies, Immigration and Customs Enforcement (ICE) and Customs and Border Protection (CBP).[52] The dominant culture in those agencies, long before the ascension of Trump, prioritizes deportation.[53] This culture is pervasive in the deportation state, despite the fact that the immigration statutes reflect multiple goals beyond enforcement—such as family unification and providing protection to certain vulnerable populations, including refugees and asylum-seekers.[54] As Robert Knowles and Geoffrey Heeren explain, agency culture reflects a zealous commitment to "hyper-regulation" of the law, demonstrates political resilience across presidential administrations, and can result in the cooptation of other immigration offices' and agencies' missions towards a proenforcement orientation.[55] Indeed, these conditions may be as much a product of bureaucratic incentives that have developed over time as the identity of the President.[56] The Obama Administration's efforts to insulate certain categories of immigrants from deportation, for instance, conflicted with the proenforcement impulses of frontline agents at ICE.[57] The Trump Administration, by contrast, has conveyed to frontline agents—through what Shalini Bhargava Ray argues is an abdication of its constitutional responsibility to supervise the immigration

50. *Id.* at 129-30.

51. *See* SHOBA SIVAPRASAD WADHIA, BANNED: IMMIGRATION ENFORCEMENT IN THE TIME OF TRUMP 29-61 (2019).

52. *See* COX & RODRÍGUEZ, THE PRESIDENT AND IMMIGRATION LAW, *supra* note 47, at 98-101.

53. Robert Knowles & Geoffrey Heeren, *Zealous Administration: The Deportation Bureaucracy*, 72 RUTGERS U. L. REV. 749, 753-55 (2020); Nina Rabin, *Victims or Criminals? Discretion, Sorting and Bureaucratic Culture in the U.S. Immigration System*, 23 S. CAL. REV. L. & SOC. JUST. 195, 209-25 (2014).

54. *See, e.g.*, Rabin, *supra* note 53, at 241-42 (noting that enforcement obstructs other goals of the immigration statutes).

55. Knowles & Heeren, *supra* note 53.

56. *See id.* at 813.

57. *See, e.g.*, Ming H. Chen, *Administrator-in-Chief: The President and Executive Action in Immigration Law*, 69 ADMIN. L. REV. 347, 385-87 (2017); Stephen Lee & Sameer M. Ashar, *DACA, Government Lawyers, and the Public Interest*, 87 FORDHAM L. REV. 1879, 1880-81, 1892 (2019).

bureaucracy—that these agents may fulfill the impulses of the agency culture to deport and detain as many people as possible.[58]

Within the agencies, the locus of power has shifted further downward to the front lines of ICE and CBP.[59] Where the ability of law to constrain individuals on the ground is limited, discretion in the practice of bureaucratic, granular details carried out by lower levels of the immigration bureaucracy carries significant impact.[60] Frontline agents have discretion to decide whom to arrest, whom to detain, and whether to execute a deportation.[61] As I have written elsewhere, they possess authority to issue directly the vast majority (eighty to eighty-five percent) of removal orders—primarily through expedited removal, discussed above, as well as through the reinstatement of previously executed removal orders—without hearings before immigration courts and with severely limited federal-court review.[62] Actors with professional obligations outside the agency mission—such as lawyers—possess relatively diluted authority over removal.[63] Immigration judges (IJs), for instance, have been divested of many discretionary powers by the 1996 laws and have experienced further reductions of power under Trump-era policy moves.[64] While multiple agencies exist, those with a

58. *See* Shalini Bhargava Ray, *Abdication Through Enforcement*, 96 IND. L.J. (forthcoming 2021) (manuscript at 3-4), https://ssrn.com/abstract=3573110 [https://perma.cc/2JYB-CUCE] (arguing that the lack of enforcement priorities in President Trump's immigration agenda amounts to abdication of the President's constitutional duty to supervise the executive branch).

59. *See* K-Sue Park, *Self-Deportation Nation*, 132 HARV. L. REV. 1878, 1926-28 (2019).

60. *See* COX & RODRÍGUEZ, THE PRESIDENT AND IMMIGRATION LAW, *supra* note 47, at 113-14; *see also* Inés Valdez, Mat Coleman & Amna Akbar, *Missing in Action: Practice, Paralegality, and the Nature of Immigration Enforcement*, 21 CITIZENSHIP STUD. 547, 553 (2017) ("[A] larger, messier reality exists" on the ground in immigration law, which does not "conform to what lawmakers and the judicial review of immigration cases say.").

61. *See* COX & RODRÍGUEZ, THE PRESIDENT AND IMMIGRATION LAW, *supra* note 47, at 10-11, 145 (noting that "[l]ow-level executive branch officials thus play a crucial role in effectuating the enforcement power, as they are the ones responsible for the daily exercise of enforcement discretion within the system," such as decisions about "whom to investigate, arrest, and deport").

62. Koh, *supra* note 30, at 183-84, 226-27; Koh, *supra* note 45, at 341.

63. *See* Knowles & Heeren, *supra* note 53, at 795 ("[B]y settling on that small set of core tasks aimed at indiscriminate deportation and zero tolerance, [U.S. Immigration and Customs Enforcement (ICE)] has sidelined the work of certain professionals at the agency, such as lawyers, whose training involves drawing subtle distinctions and whose outside obligations might compel them to constrain the agency's exercise of discretion.").

64. *See* COX & RODRÍGUEZ, THE PRESIDENT AND IMMIGRATION LAW, *supra* note 47, at 113-14 (observing that "[l]awmakers have formally constrained the authority of judges and other actors in the system to temper the consequences of a prosecutor's decision to pursue deportation"); Jennifer Lee Koh, *Barricading the Immigration Courts*, 69 DUKE L.J. ONLINE 48, 48-49 (2020) (describing executive policies under President Trump that have precluded noncitizens from accessing the immigration courts).

weaker enforcement orientation—such as USCIS, the benefit-adjudicating agency within the Department of Homeland Security (DHS)—have experienced a significant shortfall of resources and authority or have seen their priorities bend toward enforcement under the Trump Administration.[65]

Today's deportation bureaucracy is quasi-criminal and paramilitary—qualities that in turn enhance its power. As scholars working at the intersection of criminal and immigration law have amply shown, immigration agents possess a wide range of coercive and carceral tools associated with criminal-law enforcement: access to a national web of publicly and privately operated detention centers,[66] the use of force and technological surveillance capacity associated with criminal-law enforcement,[67] widespread assistance from state and local law enforcement and administrative authorities,[68] and a multibillion-dollar budget.[69] Because the law treats deportation as a civil sanction rather than a criminal punishment, the doctrinal limitations that might otherwise rein in the agency's abuse of its criminal-like law-enforcement powers are not a source of judicial oversight.[70] The sprawling deportation state not only possesses the direct power to deport but to order social relationships. As K-Sue Park asserts, the bureaucracy reflects a logic of self-deportation, characterized by the loss of procedural protection and the use of visible tactics designed to inflict fear, produce subordination, and exert control over affected communities.[71]

---

65. *See* Knowles & Heeren, *supra* note 53, at 776-80; *USCIS Averts Furlough of Nearly 70% of Workforce*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Aug. 25, 2020), https://www.uscis.gov/news/news-releases/uscis-averts-furlough-of-nearly-70-of-workforce [https://perma.cc/4YEX-9ZYZ] (noting that "unprecedented spending cuts" and "[a]ggressive spending reduction measures will impact all agency operations").

66. *See* César Cuauhtémoc García Hernández, *Immigration Detention as Punishment*, 61 UCLA L. REV. 1346, 1382-84 (2014).

67. *See* Margaret Hu, *Algorithmic Jim Crow*, 86 FORDHAM L. REV. 633 (2017); Anil Kalhan, *Immigration Policing and Federalism Through the Lens of Technology, Surveillance, and Privacy*, 74 OHIO ST. L.J. 1105, 1107-11 (2013); Anil Kalhan, *Immigration Surveillance*, 74 MD. L. REV. 1, 4-6 (2014).

68. Christopher N. Lasch, R. Linus Chan, Ingrid V. Eagly, Dina Francesca Haynes, Annie Lai, Elizabeth M. McCormick & Juliet P. Stumpf, *Understanding "Sanctuary Cities,"* 59 B.C. L. REV. 1703, 1723-36 (2018) (describing an array of programs that "put state and municipal law enforcement in the service of federal immigration enforcement goals").

69. COX & RODRÍGUEZ, THE PRESIDENT AND IMMIGRATION LAW, *supra* note 47, at 99-100; Exec. Office of the President, *Stronger Border Security: 2019 Budget Fact Sheet*, WHITE HOUSE (2018), https://www.whitehouse.gov/wp-content/uploads/2018/02/FY19-Budget-Fact-Sheet_Border-Security.pdf [https://perma.cc/R79G-X9MG] (reporting a $14.2 billion budget for Customs and Border Protection (CBP) and $8.3 billion budget for ICE for 2019).

70. *See* Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 472-73 (2007).

71. *See* Park, *supra* note 59, at 1931.

C. The Role and Relevance of the Judiciary

Multiple vectors point to a dominant President and an equally strong bureaucratic force exercising deportation power, but the role of the judiciary — however diminished — should not be discounted. Judicial review may not be consistent, but where available, litigants and courts are active. Despite the plenary power doctrine's continued influence, numerous limitations, exceptions, and weaknesses in the doctrine exist. Depending on the claim, courts may engage in robust review. To be sure, equal-protection and other rights-based claims have faced difficulty gaining traction in the courts.[72] Other claims do prevail. Procedural due process operates as a critical source of judicial challenges to immigration action.[73] Statutory arguments, too, have long gone forward without the constraints of plenary power, often importing constitutional values along the way.[74] In the Trump era, Administrative Procedure Act claims — namely allegations of arbitrary and capricious agency conduct and failures to adhere to notice-and-comment rulemaking — were particularly successful.[75]

Despite mixed results, the judiciary has shaped the scope and timing of President Trump's immigration agenda, especially with respect to top-down policies. Nationwide injunctions at the district-court level have prevented many controversial policies from going into effect. Even if temporary, the partial slowdown of Trump's immigration vision matters for those directly impacted by recent policy changes and produces expressive benefits for national discourse around immigration, politics, and law.[76] Even short-term rulings result in media attention and community-education efforts that supply additional opportunities for notice and policy refinement not previously provided by the agencies. Cases in which individual noncitizens appeal their cases or challenge agency action serve as critical vehicles for correcting error and allow the judiciary to engage in broader

---

72. *See* Cristina M. Rodríguez, Trump v. Hawaii *and the Future of Presidential Power over Immigration*, *in* AMERICAN CONSTITUTION SOCIETY SUPREME COURT REVIEW 2017-2018, at 161, 179-80 (2018); Jayashri Srikantiah & Shirin Sinnar, *White Nationalism as Immigration Policy*, 71 STAN. L. REV. ONLINE 197, 204 (2019).

73. *See generally* Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625, 1626-32 (1992) (discussing the evolution of constitutional immigration law, and arguing that procedural due process has "flowered in immigration law as a significant exception to the plenary power doctrine").

74. *See, e.g.*, Motomura, *supra* note 21.

75. *See, e.g.*, Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1892 (2020); Kate Aschenbrenner Rodriguez, *Eroding Immigration Exceptionalism: Administrative Law in the Supreme Court's Immigration Jurisprudence*, 86 U. CIN. L. REV. 215, 218-19 (2018).

76. *See, e.g.*, H. Lee Sarokin, *Americans' Faith in Law Is at Stake in the DACA Case*, ATLANTIC (Apr. 28, 2020), https://www.theatlantic.com/ideas/archive/2020/04/daca-case-lee-sarokin/610756 [https://perma.cc/9RGQ-YGND].

oversight of the executive branch.[77] The courts have also crafted rights and remedies for noncitizens on the ground, such as the ability to seek bond hearings for detained immigrants.[78] It is perhaps no surprise that, for the past several years, immigration law has repeatedly given rise to some of the most significant contemporary debates emerging from the interplay between judicial and executive power.[79] As those debates play out, a more immediate challenge faces the federal courts: an immigration executive showing growing signs of resistance to judicial authority.

II. EXECUTIVE DEFIANCE IN THE DEPORTATION STATE

Despite the Executive's broader dominance in the immigration field, nothing permits the executive branch to simply disregard or defy judicial orders. Indeed, refusing compliance with judicial orders raises a number of problems. Rule-of-law concerns are prominent, given judicial review's role in ensuring that an agency complies with its own statutory and regulatory mandates. Defiance undermines the rationales for judicial review, for instance, by eroding the ability of the judiciary to correct mistakes, provide appropriate relief in individual cases, and oversee administrative policy and practice on a broader scale.[80] Making compliance with judicial orders optional would eviscerate the role of an already limited judicial branch and raise acute separation-of-powers concerns. In the immigration context, the stakes are particularly high — both for individuals for whom physical liberty and livelihood are at stake, as well as for the national community and its resolution of ongoing conversations over membership, exclusion, race, and identity. The regulated subjects — noncitizens — lack the same opportunities to participate in the political process that other regulated entities across the administrative state enjoy.

Furthermore, tolerating executive defiance would deepen the lack of accountability that is already bubbling throughout the deportation system. Visible

77. Jonah Gelbach and David Marcus argue that judicial review allows courts to identify "entrenched problems of internal agency administration" affecting mass administrative adjudication and point to the federal courts' steady criticism of the quality of asylum adjudication as an example. Jonah B. Gelbach & David Marcus, *Rethinking Judicial Review of High Volume Agency Adjudication*, 96 TEX. L. REV. 1097, 1101, 1103-06 (2018).

78. *See, e.g.*, Padilla v. ICE, 953 F.3d 1134, 1140-42 (9th Cir. 2020) (upholding the grant of a preliminary injunction providing for the right to bond hearings for certain asylum seekers, notwithstanding the Attorney General's decision in *In re* M-S-, 27 I. & N. Dec. 509 (A.G. 2019)).

79. *See supra* note 18 and accompanying text.

80. Scholars have debated the effectiveness of judicial review's error-correction function — and of judicial review generally — in the context of high-volume agency adjudication. *See* Gelbach & Marcus, *supra* note 77, at 1108-11.

episodes of executive resistance to judicial authority may reflect the tip of the iceberg when it comes to lawlessness in the deportation bureaucracy. While this Feature focuses on the Executive's defiance of the judiciary, the adjacent issue of internal agency defiance of executive rules and statutory limits is closely related. Indeed, the deportation context illuminates the relationship between judicial review and the rule of law more broadly.[81] For example, border officials have steadily failed to follow clear and explicit statutory and regulatory requirements for screening immigrants at the border, even in the presence of multiple international human-rights observers.[82] Along similar lines, the lack of law binding parts of the deportation state enhances the power of the bottom rungs of the deportation bureaucracy. Mandatory-detention provisions prevent IJs from making custody determinations over certain categories of immigrants,[83] and yet frontline officers — sometimes in conjunction with agency policymakers — have considerable discretion to decide whom to detain, often operating in the absence of clear law.[84] The irregularity of judicial review dilutes the influence of government lawyers within the agency, who might otherwise act as an internal source of routine compliance with the law.[85] The practical availability of judicial — and administrative — review also depends on access to competent counsel, but immigration is notorious for access-to-counsel problems, again as a result of both statutory design and on-the-ground reality.[86]

As this Part shows, executive defiance of judicial orders and deviation from judicial norms appears to be afoot, at multiple points, degrees, and levels of

---

81. *See, e.g.*, Shruti Rana, *"Streamlining" the Rule of Law: How the Department of Justice is Undermining Judicial Review of Agency Action*, 2009 U. ILL. L. REV. 829, 836-38 (critiquing the elimination of judicial review of Board of Immigration Appeals (BIA) decisions to assign cases to single-member affirmances without opinion on rule-of-law principles); David S. Rubenstein, *Taking Care of the Rule of Law*, 86 GEO. WASH. L. REV. 168, 224 (2018) ("Judicial review . . . requires the executive branch to defend its legal reasoning in ways that discourse in other public forums cannot.").

82. *See* Koh, *supra* note 45, at 353-55.

83. *See* García Hernández, *supra* note 66, at 1372.

84. *See* Kate Evans & Robert Koulish, *Manipulating Risk: Immigration Detention Through Automation*, 24 LEWIS & CLARK L. REV. 789, 794 (2020) (critiquing the use of an algorithmic classification system for detention decisions made by ICE).

85. *See* Knowles & Heeren, *supra* note 53, at 800 ("[W]hen regulated entities — the immigrants — have few due process rights and the regulators — ICE and USCIS — face little prospect of meaningful judicial review, the lawyers have less influence and the bureaucrats are empowered.").

86. *See generally* Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 2-4 (2015) (discussing the results of the first national study on access to counsel in immigration courts). Indeed, the cases discussed in Part II reflect the exception rather than the norm, in that they involved competent (and in many cases, some of the best) counsel.

authority in the deportation system and in ways that have thus far escaped serious study. This Part highlights three categories: defiance from the BIA, wrongful deportations, and deviations from norms of lawyerly conduct.

A. Defiance from the Board of Immigration Appeals

The vast majority of administrative-agency appeals in the federal circuit courts are appeals of decisions issued by the BIA,[87] a subagency of the Department of Justice (DOJ) that is the place of first appeal of removal orders issued by IJs. The BIA "has been described as '[t]he single most important decision-maker in the immigration system.'"[88] In some respects, this statement is true. The BIA issues roughly thirty precedential decisions each year and thus shapes the nationwide interpretation of the immigration laws. The BIA also has a broader role in shaping deportation policy through the adjudication of tens of thousands of appeals each year.[89] In other respects, however, the BIA's role is quite limited, in that its review is largely confined to decisions made by IJs presiding over immigration courts[90] in a system where deportation agents exercise power outside of the immigration courts.[91] Furthermore, many grounds exist upon which to critique the BIA, particularly for its quality of adjudication, politicization, and lack of decisional independence; indeed, a core feature of the BIA

87. *Federal Judicial Caseload Statistics 2019*, U.S. CTS., https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2019 [https://perma.cc/477P-TUT8].

88. Quinteros v. Att'y Gen., 945 F.3d 772, 794 (3d Cir. 2019) (McKee, J., concurring) (citation omitted).

89. Exec. Office for Immigration Review, *All Appeals Filed, Completed, and Pending*, U.S. DEP'T JUST. (Oct. 23, 2019), https://www.justice.gov/eoir/page/file/1199201/download [https://perma.cc/DWP2-DAXF] (showing the pending caseload at BIA for FY 2019 at 70,183, a significant increase from FY 2018 at 35,503).

90. *See* 8 C.F.R. § 1003.1(b) (2020) (describing the BIA's jurisdiction); *see also* Exec. Office for Immigration Review, *Statistics Yearbook Fiscal Year 2018*, U.S. DEP'T JUST. 35-36 (2018), https://www.justice.gov/eoir/file/1198896/download [https://perma.cc/6DJ5-TJE9] (providing statistics on BIA reviews). The majority of cases the BIA reviews are appeals of removal orders issued by immigration judges (IJs), which constitute a minority of all removal orders. *See* Koh, *supra* note 30, at 183-85; Exec. Office for Immigration Review, *supra*. Most decisions not made by IJs—such as discretionary decisions by ICE or CBP officers to stay previously issued removal orders—are not appealable to the BIA. *See* 8 C.F.R. § 241.6(b) (2020) (stipulating that denials of administrative stays of removal are "not appealable"). The BIA does have authority to issue stays of removal. *See* 8 C.F.R. § 1003.2(f) (2020).

91. *See supra* text accompanying notes 59-65.

is that its members are appointed by and remain accountable to the Attorney General.[92]

But the reality is that the Board is designed to reflect the *best* of what the executive immigration-adjudication system has to offer. After all, its focus on IJ decisions means that the BIA reviews the most procedurally robust deportation processes available at the agency level. As an appellate agency, it functions as a source of law in the deportation system and aspires to correct for error, ensure uniformity, engage in deliberation, and possess expertise.[93] Claims that the judiciary should extend *Chevron* deference to determinations of the BIA reverberate in federal litigation.[94] Direct disobedience from the Board of a federal-court order—even if a single instance—thus warrants attention and concern, as it may serve as a warning signal that the accountability the BIA is designed to provide (however limited) is malfunctioning.

The Board engaged in outright defiance of such a nature in Jorge Baez-Sanchez's deportation-defense case.[95] Mr. Baez-Sanchez had lived in the United States since the age of four,[96] and sought to fight his deportation over the course of multiple years—four of which he spent in ICE detention.[97] The central question in Mr. Baez-Sanchez's deportation case involved whether the IJ presiding over the trial-level stage of the removal proceedings possessed the legal authority to grant Mr. Baez-Sanchez's request for a waiver—an "inadmissibility waiver"[98]—necessary to facilitate his application for a form of lawful immigration status known as a U visa, which would allow for a defense to his removal.[99]

---

92. *See Quinteros*, 945 F.3d at 789 (describing the BIA as "an agency focused on ensuring [the noncitizen's] removal rather than . . . the neutral and fair tribunal it is expected to be"); Stephen H. Legomsky, *Deportation and the War on Independence*, 91 CORNELL L. REV. 369, 375-79 (2006).

93. *See, e.g.*, David Hausman, *The Failure of Immigration Appeals*, 164 U. PA. L. REV. 1177, 1192-96 (2016) (critiquing the BIA's inability to correct for disparities in IJ decisionmaking).

94. Notably, despite such claims, scholars have persuasively argued in favor of limiting *Chevron* deference to BIA decisions. *See* Maureen A. Sweeney, *Enforcing/Protection: The Danger of* Chevron *in Refugee Act Cases*, 71 ADMIN. L. REV. 127, 134-35 (2019); Shoba Sivaprasad Wadhia & Christopher J. Walker, *The Case Against* Chevron *Deference in Immigration Adjudication*, 70 DUKE L.J. (forthcoming 2021) (manuscript at 5) (on file with author).

95. Baez-Sanchez v. Barr (*Baez-Sanchez II*), 947 F.3d 1033 (7th Cir. 2020); Baez-Sanchez v. Sessions (*Baez-Sanchez I*), 872 F.3d 854 (7th Cir. 2017).

96. Opening Brief and Short Appendix of Petitioner at 4, *Baez-Sanchez I*, 872 F.3d 854 (No. 16-3784).

97. Baez-Sanchez v. Kolitwenzew, 360 F. Supp. 3d 808, 810-11 (C.D. Ill. 2018).

98. The waiver allows a person to receive a U visa despite the existence of grounds of inadmissibility, which refer to statutory categories that otherwise disqualify a person from receiving a U visa. *See* 8 U.S.C. § 1182(a) (2018) (listing the grounds of inadmissibility).

99. *Baez-Sanchez I*, 872 F.3d at 854-56.

At the time of Mr. Baez-Sanchez's first trip to the Seventh Circuit, in 2017, a split had developed between the Seventh and Third Circuits. The Seventh Circuit had found in *L.D.G. v. Holder* that IJs possessed authority to issue the inadmissibility waivers,[100] while the Third Circuit and BIA disagreed.[101] Judge Frank Easterbrook, writing for the three-judge panel, affirmed *L.D.G.*, based on the panel's reading of a relevant federal regulation.[102] The court then remanded the case for the Board to consider legal arguments presented in the Attorney General's brief which the court had declined to address.[103] The court did not, however, invite the Board to revisit the court's regulatory interpretation.[104]

But on remand, the Board effectively ignored the Seventh Circuit's regulatory interpretation as applied to Mr. Baez-Sanchez's case. Instead of adhering to the scope of the remand, it reinterpreted the same regulation, vacated the IJ's grant of the inadmissibility waiver, and ordered Mr. Baez-Sanchez removed.[105] The Board's postremand order was decided by a three-member panel, a sign that the Board understood that the case raised legal issues of significant enough importance to warrant more than a usual single-member assignment.[106] After referring to the Seventh Circuit's holding that IJs have authority to issue inadmissibility waivers as a "statement,"[107] the Board indicated that the Attorney General "disagree[d]" with the Seventh Circuit on the very legal question already addressed by the federal appeals court.[108] The Board relied on an intervening

100. 744 F.3d 1022, 1024, 1032 (7th Cir. 2014).

101. Sunday v. Att'y Gen., 832 F.3d 211, 212 (3d Cir. 2016); *In re* Khan, 26 I. & N. Dec. 797, 797 (B.I.A. 2016).

102. *Baez-Sanchez I*, 872 F.3d at 855 (interpreting 8 C.F.R. § 1003.10(a) as delegating to IJs all the power granted to the Attorney General); *see L.D.G.*, 744 F.3d at 1024.

103. *Baez-Sanchez I*, 872 F.3d at 856 (citing SEC v. Chenery Corp., 318 U.S. 80, 87-88 (1943)).

104. *Id.*

105. *In re* Baez-Sanchez, at *3-4 (B.I.A. Mar. 27, 2019) (on file with author).

106. Most BIA cases are decided through single-member review, but three-member review is available for six categories of cases that generally signal the existence of underlying issues of national importance, such as the need to address inconsistent rulings across immigration judges or to establish precedent. Exec. Office for Immigration Review, *Board of Immigration Appeals Practice Manual*, U.S. DEP'T JUST. 4 (Oct. 5, 2020), https://www.justice.gov/eoir/page/file/1324276/download [https://perma.cc/M2AS-3MNY].

107. *In re* Baez-Sanchez, at *1.

108. *Id.* at *2.

decision of the Attorney General, *In re Castro-Tum*,[109] which had adopted a contrary interpretation of the regulation at issue in *Baez-Sanchez I*.[110]

Mr. Baez-Sanchez returned to the Seventh Circuit. The panel opinion, written again by Judge Easterbrook and published in January 2020, repeatedly emphasized the egregiousness of the Board's response.[111] Judge Easterbrook expressed disbelief at the Board's decision to write "that our decision [was] incorrect," an act that "beggars belief."[112] The opinion conveyed outrage over the Board's failure to engage fully with the actual issues contained in the scope of the remand order and described the Board's response as having "flatly refused to implement our decision."[113] The *Baez-Sanchez* panel further emphasized that the court had "never before encountered defiance of a remand order" and "hope[d] never to see it again."[114]

While the court stopped short of issuing a contempt order, the overall sentiment conveyed by the opinion was one of contempt, stating: "Members of the Board must count themselves lucky that Baez-Sanchez has not asked us to hold them in contempt, with all the consequences that possibility entails."[115] The court questioned the Board's legitimacy as a participant of the legal profession, as well as its understanding of basic principles of constitutional law:

> The Board seemed to think that we had issued an advisory opinion, and that faced with a conflict between our views and those of the Attorney General it should follow the latter. Yet it should not be necessary to remind the Board, all of whose members are lawyers, that the ''judicial Power'' under Article III of the Constitution is one to make conclusive decisions, not subject to disapproval or revision by another branch of government.[116]

---

109. *Castro-Tum* was issued after the first *Baez-Sanchez* order and before the Board adjudicated the case on remand. *In re* Castro-Tum, 27 I. & N. Dec. 271 (A.G. 2018). *Castro-Tum* has since been challenged and vacated in several federal appeals courts. *See* Morales v. Barr, 963 F.3d 629, 640 (7th Cir. 2020) (refusing to follow *Castro-Tum*); Romero v. Barr, 937 F.3d 282, 286 (4th Cir. 2019) (vacating *Castro-Tum*).

110. *Castro-Tum*, 27 I. & N. Dec. at 284 n.6 (acknowledging the conflict with *Baez-Sanchez I*).

111. Baez-Sanchez v. Barr (*Baez-Sanchez II*), 947 F.3d 1033, 1035-36 (7th Cir. 2020).

112. *Id.* at 1035.

113. *Id.*

114. *Id.*

115. *Id.* at 1035-36.

116. *Id.* at 1036.

The panel's outrage shaped the remedy granted by the court. Instead of remanding the case again to the Board, the court vacated the decision, thereby leaving the IJ's grant of the inadmissibility waiver in place.[117] The court explained that the purpose of the ordinary remand rule was to "afford the agency an opportunity to have its say on an issue," but that "[t]he Board had that opportunity and disdained it," and described the BIA's response as "obduracy."[118] Another remand, the court explained, would "do little beside give the Board a free pass for its effrontery."[119] The court went so far as to spell out its expectations of future compliance by stating the obvious: "The Executive Branch must honor [our] decision."[120]

To appreciate the exceptional nature of the Board's actions, it is necessary to acknowledge — and discuss the boundaries of — agency nonacquiescence. Agency nonacquiescence is a theory of agency conduct that refers to situations in which an agency chooses not to adopt the previous interpretation of a federal court on the same legal issue.[121] The justification for nonacquiescence generally comes out of a desire to encourage judicial dialogue and the percolation of disputed issues, as well as a recognition of the role of agencies in setting uniform policy.[122] Agency nonacquiescence, particularly the *inter*circuit variation in which agencies refuse to adopt the legal interpretation of an out-of-circuit federal court, occurs with some frequency in the immigration context and throughout administrative law.[123] *Intra*circuit nonacquiescence occurs where the agency does not adopt the legal interpretation of a federal court within the same circuit.[124] Intracircuit nonacquiescence is significantly more controversial, as it effectively allows the executive branch to severely limit the impact of judicial review beyond a single case, thereby both undermining the influence of the judiciary on agency policy and

117. *Id.* at 1037. *See generally* Christopher J. Walker, *The Ordinary Remand Rule and the Judicial Toolbox for Agency Dialogue*, 82 GEO. WASH. L. REV. 1553, 1553 (2014) (exploring the judiciary's application of the remand rule in immigration adjudications in the courts of appeals).

118. *Baez-Sanchez II*, 947 F.3d at 1036-37.

119. *Id.* at 1037.

120. *Id.*

121. *See generally* Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679, 681-83, 743-53 (1989) (describing agency nonacquiescence broadly and endorsing certain uses of intracircuit nonacquiescence).

122. *See id.* at 736-37, 743-49.

123. *See* ROBERT J. HUME, HOW COURTS IMPACT FEDERAL ADMINISTRATIVE BEHAVIOR 94, 96 (2009) (describing intercircuit nonacquiescence as "fairly routine" and noting that it is "commonly practiced" by the BIA).

124. *Id.* at 96 (defining intracircuit nonacquiescence as "when an agency refuses to apply a circuit's precedents to other cases arising within the same jurisdiction").

depriving similarly situated litigants of favorable court rulings.[125] The Supreme Court has not prohibited intracircuit nonacquiescence; on the contrary, the Court has endorsed variations of it, and intracircuit nonacquiescence has evolved into a legitimate, albeit problematic, practice.[126]

But the Board's conduct in *Baez-Sanchez* falls squarely outside the realm of nonacquiescence.[127] The Seventh Circuit seemed to accept the legitimacy of intracircuit nonacquiescence, noting that, had the BIA adopted a contrary view of an IJ's regulatory authority to grant a U visa waiver in a different case, then defiance issues would not have been implicated.[128] As Judge Easterbrook stated, the executive-branch entities "are not free to disregard our mandate in the *very case* making the decision."[129] Under an approach favorable to nonacquiescence, the BIA had no obligation to change its position as a matter of nationwide policy in future cases, even in the Seventh Circuit. But no existing doctrine or theory allowed the Board to disobey the federal court in Mr. Baez-Sanchez's case. BIA members are indeed lawyers—and yet the Board gave no signal that it believed it was doing something out of the ordinary in that case.[130] A possible explanation for the Board's conduct was that the panel members lacked the requisite knowledge of administrative and constitutional law to draw principled

---

125. *See* Matthew Diller & Nancy Morawetz, *Intracircuit Nonacquiescence and the Breakdown of the Rule of Law: A Response to Estreicher and Revesz*, 99 YALE L.J. 801, 803 (1990) (arguing that legitimizing nonacquiescence "upsets the balance between agencies and courts by rendering the judiciary essentially powerless to enforce congressional limitations on agency conduct for long periods of time").

126. The Supreme Court's 2005 decision in *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005), which held that circuit courts must extend *Chevron* deference to agency interpretations of ambiguous statutes even in the face of contrary circuit-court precedent, has also encouraged nonacquiescence. *See* Wesley Sze, Note, *Did* X *Mark the Spot?:* Brand X *and the Scope of Agency Overrides of Judicial Decisions*, 68 STAN. L. REV. 235, 273 (2016) (asserting that "*Brand X* did not herald a new doctrine inasmuch as it was merely an extension of longstanding agency policies of nonacquiescence").

127. *See* Parrillo, *supra* note 1, at 691 n.15 (observing that nonacquiescence "has substantial claims to being legitimate" while "noncompliance with a court order that actually binds that agency . . . is subject to a contempt finding").

128. Baez-Sanchez v. Barr (*Baez-Sanchez II*), 947 F.3d 1033, 1036 (7th Cir. 2020) ("The Attorney General, the Secretary, and the Board are free to maintain, *in some other case*, that our decision is mistaken . . . ." (emphasis added)).

129. *Id.* (emphasis added).

130. The Board's opinion did not, for instance, seek to justify its departure from the Seventh Circuit's remand order, and no single member issued a concurring opinion acknowledging the unusualness of the Board's actions, although one member did write a concurrence addressing other matters in the case. *See generally In re* Baez-Sanchez (B.I.A. Mar. 27, 2019) (on file with author).

distinctions between nonacquiescence and defiance.[131] Indeed, the case may illustrate the dangers of legitimizing intracircuit nonacquiescence, particularly where the agency lacks the institutional competence to assess the boundaries of nonacquiescence. A related account might be that the panel chose to embrace the Board's institutional identity as a subordinate to the Attorney General and President over its role in a governmental structure that includes the federal courts—a shift that Attorneys General in the Trump era have actively cultivated.[132]

Irrespective of the cause, the actions of the Board in *Baez-Sanchez* are particularly striking because the defiance in that case occurred as part of the formal and direct process associated with judicial review. If repeated, this type of defiance would constitute a breakdown of the most robust of the deportation system's adjudicatory procedures. Indeed, at least a second such episode of defiance from the BIA has arguably taken place. On November 18, 2020, the Ninth Circuit in *Castillo v. Barr* found that the BIA failed to adhere to an earlier remand order in the same case from the appeals court, which had directed the BIA to reconsider the credibility of an expert witness's testimony.[133] The panel decision noted that "the Board's defiance of our previous decision in this matter and disagreement with our holding that the IJ did not find [the expert witness] credible was ill-advised," and employed the language of *Baez-Sanchez* to admonish the BIA.[134]

Furthermore, direct defiance in *Baez-Sanchez* and *Castillo* could signal the existence of permissible—but undesirable—resistance on the part of the BIA to judicial authority in subtler forms. Given the proximity between nonacquiescence and defiance, the seemingly lone episode of defiance in *Baez-Sanchez* could portend a future involving excessively robust assertions of nonacquiescence positions by the immigration executive.[135] It might also introduce new iterations

131. *See* Alina Das, *Administrative Constitutionalism in Immigration Law*, 98 B.U. L. REV. 485, 506-21 (2018) (describing the BIA's "incoherent, and at times conflicting, view of its authority to engage in constitutional analysis or otherwise apply constitutional norms in decisionmaking," and characterizing its approach as both a "conceptual constraint" and a competence issue).

132. *See* Tal Kopan, *AG William Barr Promotes Immigration Judges with High Asylum Denial Rates*, S.F. CHRON. (Aug. 23, 2019), https://www.sfchronicle.com/politics/article/AG-William-Barr-promotes-immigration-judges-with-14373344.php [https://perma.cc/3GMY-K9R6]; *The Attorney General's Judges: How the U.S. Immigration Courts Became a Deportation Tool*, INNOVATION L. LAB & SOUTHERN POVERTY L. CTR. 17 (2019), https://www.splcenter.org/sites/default/files/com_policyreport_the_attorney_generals_judges_final.pdf [https://perma.cc/XVX2-KHD6].

133. Castillo v. Barr, 980 F.3d 1278, 1282 (9th Cir. 2020).

134. *Id.* at 1283 ("Our prior disposition was not an advisory opinion, but a conclusive decision not subject to disapproval or revision by another branch of the federal government.").

135. *See generally* R. Parker Sheffy & Geoffrey A. Hoffman, *Appellate Exceptionalism? The Troubling Case of Immigration Decisions' Continued Precedential Effect Even After Circuit Court Vacatur*,

of unresponsiveness from the BIA in cases where federal courts initiate dialogue aimed at facilitating the quality of future judicial review.[136] For instance, the Second Circuit recently advised in an appeal of an asylum denial that a precedential decision from the Board on remand "would be especially useful" to resolve an outstanding legal issue in the case.[137] The BIA responded, instead, with dismissal of the appeal in an unpublished decision.[138] While not rising to the level of defiance, the BIA's response undercuts the opportunity to exercise deliberation, engage in dialogue, and showcase substantive expertise on unsettled legal issues — thereby exacerbating executive-judicial tension.

B. Wrongful Deportations

This Section pivots away from the BIA and casts its attention on the lower levels of the deportation bureaucracy. It focuses on the recurrence of wrongful deportations, in which the government physically removes people from the U.S. territory notwithstanding the existence, or anticipated entry, of a judicial order prohibiting the deportation.[139] Of the three categories described in this Feature, wrongful deportations throw most starkly into question the deportation bureaucracy's competence and respect for the rule of law, irrespective of presidential leadership. Beyond the rule-of-law concerns, wrongful deportations are difficult to rectify: lawyers often have little knowledge of their clients' circumstances, and the logistical difficulties of locating and returning individuals cause delay and can expose deported individuals to serious harm.

Deportations that violate court orders are not necessarily new; indeed, case law from as early as 1923[140] and throughout various administrations reflects episodes of such deportations, often executed within hours and minutes of court

---

2020 U. ILL. L. REV. ONLINE 129, 129-30 (describing the BIA's practice of continuing to recognize the precedential effect of decisions despite vacatur by federal courts of appeals).

136. *See* Walker, *supra* note 117, at 1607-20 (identifying courts' efforts to initiate dialogue between the courts and agencies, within the executive branch, and between agencies and Congress).

137. Ordonez Azmen v. Barr, 965 F.3d 128, 133 (2d Cir. 2020) (quoting Azmen v. Lynch, 625 F. App'x. 561, 563 (2d Cir. 2015)). Thanks to Chuck Roth for bringing this case to my attention.

138. *Id*.

139. When referring to the governmental act of physically removing a person from the United States pursuant to an administrative order, I use the terms "deportation" and "removal" interchangeably, notwithstanding the technical distinction between the two concepts in the Immigration and Nationality Act.

140. United States *ex rel*. Nazaretian v. Tod, 291 F. 665, 665 (S.D.N.Y. 1923) (refusing to issue an order of contempt although the Commissioner of Immigration refused to recognize a writ of habeas corpus for a noncitizen detained at Ellis Island).

orders.[141] Though not the primary focus here, deportations may also be deemed wrongful for a range of reasons not necessarily involving judicial orders.[142] But anecdotal evidence from the past several years points to an ominous uptick in deportations carried out in defiance of court orders. In one case, *Guerra-Castaneda v. Barr*, the American Civil Liberties Union (ACLU) of New Hampshire collected affidavits (filed under seal) from immigration attorneys attesting to the existence of eight such cases that occurred roughly over the course of 2019.[143] In that litigation, an affidavit filed by a single law office practicing in the Boston area documented five anonymized examples of ICE unlawfully deporting, or attempting to deport, clients despite the existence of judicial or BIA orders rendering those deportations invalid.[144] And in the past several years, at least four litigation challenges to broader agency practices involved the wrongful deportations of individuals who were plaintiffs or class members.[145] Significantly more wrongful deportations than documented in this Feature likely exist,

141. *See, e.g.*, Arce v. United States, 899 F.3d 796, 799 (9th Cir. 2018) (describing an individual who received an automatic stay of removal from the Ninth Circuit Court of Appeals that became effective at 11:25 AM on February 6, 2015, but who was nonetheless removed at 2:15 PM); Silva v. United States, 866 F.3d 938, 939 (8th Cir. 2017) (describing the removal of an individual despite the issuance of an automatic stay of removal by the circuit court); Vasquez v. Aviles, 639 F. App'x 898, 900 (3d Cir. 2016) (describing an individual who claimed eligibility for DACA and was granted a temporary stay of removal three hours after deportation to Guatemala); Patel v. Ashcroft, 378 F.3d 610, 611 (7th Cir. 2004) (describing an individual whose stay of removal was issued minutes prior to deportation).

142. Scholars have framed deportations as wrongful or unlawful where further review reveals that a person's deportation lacked an adequate legal or factual basis (such as the deportation of U.S. citizens). *See, e.g.*, Rachel E. Rosenbloom, *Remedies for the Wrongly Deported: Territoriality, Finality, and the Significance of Departure*, 33 U. HAW. L. REV. 139, 140 (2010); Jacqueline Stevens, *U.S. Government Unlawfully Detaining and Deporting U.S. Citizens as Aliens*, 18 VA. J. SOC. POL'Y & L. 606, 630-31 (2011). In addition, deportations are framed as wrongful or unlawful where flawed orders issued by ICE to local law-enforcement officials cause removal. *See* Eisha Jain, *Wrongful Deportation*, 70 DUKE L.J. (forthcoming 2021). Deportations that violate administrative stays can also be classified as unlawful and raise similar issues to those that violate federal-court orders. *See* Adam J. Garnick, *Access to Federal District Courts for Immigrants: The Narrowing of § 1252(b)(9) Post*-Jennings, 169 U. PA. L. REV. (forthcoming 2021) (noting the removal of noncitizens despite administrative stays of removal).

143. Guerra-Castaneda v. Barr, ACLU N.H., https://www.aclu-nh.org/en/cases/guerra-castaneda-v-barr [https://perma.cc/4DBK-KGW7] ("Preliminary affidavits from immigration lawyers around the country show at least eight of these wrongful deportation cases from the past year alone, indicating that this is not a one-off or rare circumstance.").

144. Joint Affidavit of Attorneys Jeffrey R. Rubin, Todd C. Pomerleau, and Kimberly A. Williams, Ex. 6 to Petitioner's Response to Respondent's September 26, 2019 Submission and Brief on the Issue of Contempt, at 2-8, Guerra-Castaneda v. Barr, No. 19-1736 (1st Cir. Oct. 2, 2019).

145. *See infra* text accompanying notes 162-163 (*J.L. v. Cissna*); 171-173 (*Grace v. Sessions*); 190 (describing the deportation of Héctor García Mendoza); 209 (*Hamama v. Adducci*).

but this Section provides a starting point from which to understand the scope and nature of the practice.[146]

Obtaining a judicial order prohibiting an individual's deportation is not a given in light of the legal hurdles to obtaining such an order. In individual immigration cases, federal appellate courts regularly receive requests for stays of removal in conjunction with petitions for review (PFRs),[147] since a stay of removal does not automatically issue upon the filing of a PFR.[148] Those stay requests must satisfy a rigorous four-factor test set forth by the Supreme Court in *Nken v. Holder*[149]—a case in which, as discussed in Section II.C.3, the standard adopted by the Court was informed in part by misrepresentations later recanted by the government.[150] Indeed, most stay requests are rejected.[151] Federal habeas litigation has also given rise to judicial stays or temporary restraining orders, for instance, where the noncitizen seeks a motion to reopen at the agency level but has not received an administrative stay of removal.[152] Jurisdictional bars regularly make the process of obtaining such orders via habeas difficult, though,[153] and potentially more so in light of the Supreme Court's ruling in *Thuraissigiam*.[154] Federal courts have also issued preliminary injunctions and stays in

146. The variety of methodological approaches guiding the collection of cases discussed here—media and internet searches, searches of unpublished decisions, scouring of court filings, and word-of-mouth referrals from attorneys—underscores the challenge of identifying such cases in a systematic manner.

147. *See* Nken v. Holder, 556 U.S. 418, 425 (2009) ("[C]ourts of appeals considering a petition for review of a removal order may prevent that order from taking effect and therefore block removal while adjudicating the petition.").

148. 8 U.S.C. § 1252(b)(3)(B) (2018).

149. The requirements for a stay of removal involve (1) likelihood of success on the merits, (2) irreparable injury to the applicant absent a stay, (3) injury to other parties, and (4) the public interest. *See Nken*, 556 U.S. at 434. The *Nken* Court also stated that the harms associated with removal, alone, "cannot constitute the requisite irreparable injury," and that "[t]here is always a public interest in prompt execution of removal orders." *Id*. at 435-36.

150. *See infra* Section II.C.3.

151. *See* Fatma Marouf, Michael Kagan & Rebecca Gill, *Justice on the Fly: The Danger of Errant Deportations*, 75 OHIO ST. L.J. 337, 364 (2014) (finding that 26% of stay motions are granted, based on data that excludes the Second Circuit). Marouf, Kagan, and Gill also find that in nearly half of all cases in which noncitizens prevailed at the federal appellate courts, the initial request for a stay was rejected. This suggests that significant numbers of noncitizens are deported despite having meritorious appeals. *See id.* at 337.

152. *See, e.g.*, Yael Ben Tov, *The Right to Stay: The Suspension Clause, Constitutional Avoidance, and Federal District Court Jurisdiction to Grant Stays of Removal Despite 8 U.S.C. § 1252(g)*, 41 CARDOZO L. REV. 811, 812-13 (2019).

153. *See id*. at 813-14.

154. *See supra* Section I.A.

connection with litigation challenges to broader agency action, as some of the examples below illustrate.

Judicial responses to the deportation of noncitizens despite judicial directives vary. Existing legal authorities do not provide a clear roadmap for courts,[155] and so what little published case law exists demonstrates a lack of coherence. Unsurprisingly, courts' assessment of jurisdictional bars is a significant factor in determining whether they intervene at all. Some courts have responded by capitulating to the deportation, dismissing matters on either mootness or jurisdictional grounds (or both).[156] In January 2020, immigration officials deported an Iranian college student whose visa had been revoked at Logan Airport in Boston, despite an emergency stay issued by the federal district court.[157] But the court subsequently dismissed the student's habeas petition, citing the plenary power cases, jurisdiction-stripping provisions, and the then-pending *Thuraissigiam* litigation to find that the lack of physical presence rendered the case moot.[158] The district court went on to assert—without explanation—its belief that it had "no authority to order DHS to locate the petitioner and arrange for his return to the United States."[159] Other times, the courts conclude that the removals did not appear to be intentional, especially where the deportation took place technically prior to the court order, even if within the same day.[160] Others have waited until the

155. Patel v. Ashcroft, 378 F.3d 610, 612 (7th Cir. 2004) (noting that the immigration statute "does not explicitly address the question of illegal removal").

156. *See, e.g.*, Vasquez v. Aviles, 639 F. App'x 898, 901-02 (3d Cir. 2016) (upholding the district court's denial of a civil contempt motion for deportation effected three hours prior to an emergency stay and dismissing the habeas petition on mootness grounds); *Patel*, 378 F.3d at 613 (dismissing a motion for stay of removal as moot where a noncitizen had been deported in violation of a stay that was "issued too late to be communicated to the airline in time to stop the departure").

157. *See* Shannon Dooling, *Iranian Student Deported from Boston Despite Court Order; Federal Judge Dismisses Case*, WBUR (Jan. 21, 2020), https://www.wbur.org/news/2020/01/21/iranian-northeastern-cbp-immigration-deportation-shahab-dehghani-boston-logan [https://perma.cc/E8AN-76KU].

158. *See* Order at 4, Abadi v. U.S. Customs & Border Prot., No. 20-cv-10114-RGS (D. Mass. Jan. 23, 2020) (first citing Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206 (1953); and then citing United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537 (1950)).

159. *Id.* at 4 n.4.

160. *See, e.g.*, *Vasquez,* 639 F. App'x at 900 (noting that a deportation occurred three hours before the district court issued a temporary stay)*; Patel*, 378 F.3d at 611, 613 (noting that "the violation of the stay was technical and inadvertent" where the stay was granted when Patel's plane had already departed).

noncitizen prevailed on the merits of their case to order that ICE facilitate return to the United States.[161]

But when the courts assert jurisdiction, recent litigation reveals a potentially growing willingness by the courts to respond in meaningful ways. *J.L. v. Cissna* was a class-action lawsuit challenging a USCIS policy related to the adjudication of Special Immigrant Juvenile Status (SIJS) applications for certain young immigrants.[162] The government deported five class members over the course of roughly one year in 2019, in violation of a preliminary-injunction order requiring the government to provide fourteen days' advance notice to plaintiffs' counsel before removing any class members.[163] The district court held the government in contempt for the deportations and issued both compensatory and coercive sanctions.[164] The sanctions specifically required that the agency pay plaintiffs' counsel in the amount of $500 per day beyond a court deadline for which the class members were not returned.[165] The court also emphasized that "the harm and injustice caused to the five class members"—young immigrants who were deported to countries in which they faced further harm and abuse—made a contempt finding "particularly appropriate."[166] With respect to the class members, the court ordered that their applications for SIJS be reviewed "immediately" for gaps in the sufficiency of the applications and adjudicated within specified time frames.[167] In addition, the court ordered that the government pay attorneys' fees for costs incurred by plaintiffs' counsel to remedy the deportations.[168] *J.L.* may be an outlier in terms of the court's willingness to impose monetary contempt sanctions for wrongful deportations, although repeat instances of erroneous removal could give rise to similar sanctions in the future.[169]

---

161. *See, e.g.*, Nunez-Vasquez v. Barr, 965 F.3d 272, 287 (4th Cir. 2020) (remanding "with instructions that the Government be directed to return Nunez-Vasquez to the United States" despite requesting briefing on implications of the deportation while stay was pending earlier in the proceedings); Order at 1, Nunez-Vasquez v. Barr, No. 19-1841 (4th Cir. Sept. 27, 2019) (referencing removal while a motion for stay was pending).

162. *See* Complaint at 1-2, J.L. v. Cissna, 341 F. Supp. 3d 1048 (N.D. Cal. 2018) (No. 18-cv-04914-NC).

163. *See J.L.*, 341 F. Supp. at 1071 (order granting preliminary injunction).

164. J.L. v. Cuccinelli, No. 18-cv-04914-NC, 2020 BL 56066, at *6 (N.D. Cal. Feb. 20, 2020) (holding defendants in civil contempt and ordering sanctions).

165. *Id.* at *8.

166. *Id.* at *6.

167. *Id.* at *7.

168. *Id.* at *7-8.

169. At one point in the *Guerra-Castaneda v. Barr* litigation, Mr. Guerra-Castaneda's lawyers sought sanctions of $1,000 per day following his deportation in violation of court order—a

A more common intervention is for courts to order that ICE return the deported individuals, engage in continued monitoring of those returns, and require ICE to explain the circumstances associated with the deportations.[170] In *Grace v. Sessions*, plaintiffs challenged the implementation of a controversial Attorney General decision, *In re A-B-*, which interpreted asylum laws in a way that severely reduced the viability of claims that individuals fleeing private violence like domestic violence and gang-based violence could bring.[171] One of the plaintiffs' immediate requests was for the court to stay the execution of their expedited removal orders.[172] But just days after the litigation was filed and as the court was hearing oral argument on the plaintiffs' request for a stay of deportation, the government deported two named plaintiffs—"Carmen" and her young daughter.[173] District court Judge Sullivan's comments at the hearing demonstrate both indignation and surprise: as Judge Sullivan put it, "Somebody . . . seeking justice in a United States court is just—is spirited away while her attorneys are arguing for justice for her?"[174] The court granted the stay, and ordered that the government return the two plaintiffs immediately.[175] Judge Sullivan further

deportation that led to his imprisonment and mistreatment in a Salvadoran prison for approximately ten months. *See* Petitioner's Response to Respondent's September 26, 2019 Submission and Brief on the Issue of Contempt at 12-15, Guerra-Castaneda v. Barr, No. 19-1736 (1st Cir. Oct. 2, 2019). Mr. Guerra-Castaneda returned to the United States while the contempt motion was pending before the First Circuit, after a Salvadoran court provisionally dismissed the charges against him due to lack of evidence. *See* Petitioner's Status Report at 1, Guerra-Castaneda v. Barr, No. 19-1736 (1st Cir. Oct. 30, 2020); Respondent's Status Report at 2, Guerra-Castaneda v. Barr, No. 19-1736 (1st Cir. Nov. 3, 2020).

170. *See, e.g.*, Arce v. United States, 899 F.3d 796, 799 (9th Cir. 2018) (referencing a court order for the return of the petitioner); Singh v. Att'y Gen., No. 15-10136-FF (11th Cir. July 2, 2015) (ordering the return of the petitioner after discovering he was deported despite a pending request for a stay); Rodriguez Sutuc v. Att'y Gen., No. 15-2425 (3d Cir. June 19, 2015) (ordering the immediate return of the petitioners, and noting that the court "would have granted Petitioners a stay of removal, but was informed that Petitioners were removed earlier today"); Ramirez-Chavez v. Holder, No. 11-72297 (9th Cir. Apr. 10, 2012) (ordering the return of the petitioner following deportation despite a temporary stay of removal); Turnbull v. United States, No. 1:06cv858, U.S. Dist. LEXIS 53054, at *6-8 (N.D. Ohio July 23, 2007) (referencing a court order for the return of the plaintiff who was removed in violation of a stay order); Ying Fong v. Ashcroft, 317 F. Supp. 2d 398, 402, 408 (S.D.N.Y. 2004) (ordering the return of the plaintiff who was removed in violation of a court order).

171. Complaint for Declaratory and Injunctive Relief, Grace v. Sessions, No. 1:18-cv-01853-EGS (D.D.C. Aug. 7. 2018) (challenging *In re* A-B-, 27 I. & N. Dec. 316 (A.G. 2018)).

172. *See id.* at 33.

173. *See* Transcript of Temporary Restraining Order Proceedings at 40-41, *Grace*, No. 1:18-cv-01853-EGS (D.D.C. Aug. 9, 2018) [hereinafter Transcript].

174. *Id.* at 45.

175. Order at 2-3, *Grace*, No. 1:18-cv-01853-EGS (D.D.C. Aug. 9, 2018) (describing an August 8, 2018 conference).

indicated that the court would contemplate holding defendants in contempt absent swift compliance with the return order.[176] In *Grace*, the government secured the timely return of the two wrongfully deported individuals, at least in part because the court issued its order close in time to the flight being in transit, and no contempt order followed.[177] The court did require the government to submit explanations of the events leading to the attempted deportation.[178]

When the courts require a response and explanation from the government, it showcases how simple — even granular — details in the operation of the agency involving frontline officers can lead to defiance of judicial orders. In *Grace*, for instance, government filings point to oversights and mistaken entries in an ICE software database.[179] Communications to the agency regarding the federal-court activity had been transmitted.[180] However, an instruction to "not remove" in the database was improperly coded due to a misunderstanding regarding the impact of related developments in Carmen's case.[181] The miscoding led to a front-line deportation officer processing Carmen and her daughter for removal,[182] despite Carmen's sworn attestation that she informed agents — after being awoken at 3:00 AM and told to prepare for deportation — that she "was not supposed to be deported that day because [she] was appealing [her] case."[183] The government in similar wrongful-deportation cases has pointed to a "series of inadvertent errors" involving delays in the physical transfer of the noncitizen[184] and "unintentional human error."[185] To be sure, clerical error alone may not sufficiently explain every wrongful deportation, as illustrated by one case involving allegations

176. *Id.* at 3.

177. *See* Transcript, *supra* note 173, at 46; Status Report at 1, *Grace*, No. 1:18-cv-01853-EGS (D.D.C. Aug. 10, 2018).

178. Minute Order, *Grace*, No. 1:18-cv-01853-EGS (Aug. 10, 2018) (civil docket at 35) (directing defendants to submit a report "explaining the circumstances surrounding the removal of plaintiffs on the morning of August 9, 2018," and including a requirement that "[t]he report shall be supported by declarations of appropriate officials").

179. *Cf.* Declaration of Christopher M. Cronen at 5, *Grace*, No. 1:18-cv-01853-EGS (Aug. 13, 2018) (stating, in a declaration from the Deputy Assistant Director for Domestic Operations — East, with ICE's Enforcement and Removal Operations, that initial reporting was "interpreted . . . to indicate that Carmen had not been removed").

180. *See* Declaration of Daniel Bible at 3-4, *Grace*, No. 1:18-cv-01853-EGS (D.D.C. Aug. 13, 2018).

181. *See id.* at 3-6.

182. *See id.* at 5-6.

183. Declaration of Carmen at 1, *Grace*, No. 1:18-cv-01853-EGS (Aug. 13, 2018).

184. Respondent's Supplemental Brief Regarding Issues Related to Petitioner's Improper Removal from the United States at 1, 14, Guerra-Castaneda v. Barr, No. 19-1736 (1st Cir. Nov. 1, 2019).

185. *See* Letter from Andrea N. Gevas, Office of Immigration Litig., U.S. Dep't of Justice, to Patricia S. Connor, Clerk of Court, First Cir., at 4, Bonilla v. Sessions, No. 17-1178 (1st Cir. Feb. 24, 2017).

of deportation officers resorting to physical beating and the prolonged use of a taser to attempt to deport an individual in violation of a Third Circuit stay of removal.[186]

Discovering whether an unlawful deportation has taken place can present considerable obstacles. As discussed in the next section, DOJ lawyers representing the immigration agencies in federal court have been largely ineffective at monitoring compliance by their agency clients. The burden of detecting noncompliance has thus shifted to lawyers for the noncitizens. A particularly dramatic example of this dynamic occurred in *Grace*, in which plaintiffs' counsel learned of the deportations *during* the hearing on whether to grant the stay as a result of an email from a pro bono advocate—to the surprise of government counsel.[187] Similarly, in *J.L.*, class counsel's discovery of one class member's deportation prompted inquiries with the government about the possibility of other such deportations, and those questions eventually led to the detection of four additional such cases.[188] For those without vigilant and zealous counsel, the risk of an erroneous deportation runs higher.[189]

Yet immigration lawyers experience significant challenges in obtaining information about their clients' deportation, particularly where doing so involves relying directly on detention and deportation officials for information. Héctor García Mendoza was a named plaintiff in district-court litigation challenging detention conditions resulting from COVID-19 and was reportedly deported to Mexico around the same time that a federal judge granted a temporary restraining order prohibiting his removal.[190] According to a legislative inquiry letter, his

186. *See* Complaint at 1-2, 13-14, Madjitov v. United States, No. 1:20-cv-04394 (E.D.N.Y. Sept. 18, 2020) (describing beatings, neck injuries, and tasings during an attempt to deport Bakhodir Madjitov on June 10, 2019, hours after the Third Circuit issued an emergency stay of his removal and Mr. Madjitov's attempts to explain that he had been granted a stay, along with ICE officers' insistence that the stay did not exist). Shortly after filing a lawsuit seeking damages in connection with the attempted deportation, ICE officials deported Mr. Madjitov, who by that time no longer had a stay of removal. See Matt Katz, *ICE Swiftly Deports Uzbek Man After He Alleges Being Beaten in Custody*, GOTHAMIST (Sept. 22, 2020, 9:49 AM), https://gothamist.com/news/ice-swiftly-deports-uzbek-man-after-he-alleges-being-beaten-custody [https://perma.cc/3AUP-3BRJ].

187. *See* Transcript, *supra* note 173, at 41.

188. Order Holding Defendants in Civil Contempt and Ordering Sanctions at 3-4, J.L. v. Cuccinelli, No. 18-cv-04914-NC (N.D. Cal. Feb. 14, 2020).

189. *See* Order at 2, Singh v. U.S. Att'y Gen., No. 15-10136-FF (11th Cir. July 2, 2015) (identifying, two months after a pro se individual was deported while their motion for stay was pending, that ICE had executed the deportation "without notifying the government, [the Office of Immigration Litigation at the Department of Justice], or this Court").

190. *See* Matt Katz, *ICE Detainee Who Sued His Jailers Was Swiftly Deported. Now He's Missing*, GOTHAMIST (May 28, 2020, 2:24 PM), https://gothamist.com/news/ice-detainee-who-sued-his-jailers-was-swifty-deported-now-hes-missing [https://perma.cc/AG9W-6AT3].

lawyers faced numerous obstacles to receiving accurate information about his whereabouts both immediately prior to and after his deportation,[191] which ultimately required intervention from a congressional representative in order to confirm the fact of his deportation.[192] Communication difficulties faced by lawyers representing detained clients are well-documented,[193] but those seemingly mundane details facilitate the agency's defiance of judicial authority where the stakes are arguably highest.

Finally, facilitating return—and rectifying the harms caused by wrongful removals—presents considerable challenges. In *J.L.*, for instance, at least three of the five deported class members were attacked in their home countries.[194] Although the government eventually returned four of the five class members, it cited various logistical challenges, including communication, the absence of counsel, and the difficulty of securing travel papers, as barriers to their return and reasons for why it continued to delay bringing them back.[195] One class member did not return due to an apparent combination of choice and communication lapses.[196] COVID-19 travel restrictions affecting Guatemala caused delays in the

---

191. Letter from Albio Sires, Representative, U.S. Cong., et al. to Chad Wolf, Acting Sec'y, U.S. Dep't of Homeland Sec., and Matthew T. Albence, Acting Dir., U.S. Immigration & Customs Enf't 2 (May 22, 2020), https://sires.house.gov/sites/sires.house.gov/files/documents/Garcia%20Mendoza%20ICE%20Final.pdf [https://perma.cc/GU27-ZPRT] (describing phone calls not being returned, as well as a lawyer being told that a lack of response to their inquiries was due to a facility being "likely busy dealing with an influx of calls" and subsequently being told "that Mr. García Mendoza was no longer at the facility," but without confirming his plans for his deportation).

192. *See id.* (describing how after a grant of the court's order, "[i]t was not until Congressman Joaquin Castro's office inquired about his whereabouts that ICE stated that Mr. García Mendoza had already been deported to Mexico"). Echoing similar difficulties, Mr. Guerra-Castaneda's lawyer from the pending First Circuit case described how during her efforts to locate her client, she was "emphatically" told by a deportation officer that her client would not be deported to El Salvador but "was on a flight destined for Boston," and only learned from her client's friend days later that he had been deported. Affidavit of Nina J. Froes, attached as Exhibit 2 to Petitioner's Response to Respondent's September 26, 2019 Submission and Brief on the Issue of Contempt at 3, Guerra-Castaneda v. Barr, No. 19-1736 (1st Cir. Oct. 2, 2019).

193. *See, e.g.*, Complaint for Injunctive and Declaratory Relief at 3-4, Torres v. U.S. Dep't of Homeland Sec., No. 5:18-cv-02604 (C.D. Cal. Dec. 14, 2018).

194. *See* Order Granting in Part Petitioner's Motion for Temporary Restraining Order at 6-7, Garcia v. Barr, No. 5:20-cv-013879-NC (N.D. Cal. Mar. 9, 2020) (noting attacks on Garcia in Guatemala); Verified Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2241 and Complaint for Injunctive and Declaratory Relief at 3, Calderon v. Barr, No. 2:20-cv-11235 (E.D. Mich. May 18, 2020) [hereinafter *Calderon* Habeas] (same for Calderon).

195. *See* Notice of Inability to Comply with ECF No. 252 at 3-7, J.L. v. Cuccinelli, No. 5:18-CV-4914-NC (DMR) (N.D. Cal. Feb. 28, 2020).

196. *See* Defendants' Update in Response to ECF No. 263 at 4, *J.L.*, No. 5:18-CV-4914-NC (N.D. Cal. Mar. 13, 2020) (referring to the status of class member E.A.).

return of another member.[197] Upon return, class members were initially detained.[198] And even where class members' SIJS applications were ultimately approved, the class members were required to file subsequent habeas actions to litigate the validity of their removal orders and prevent their re-deportations, thereby necessitating further federal-court intervention.[199] Had their original deportations in violation of the preliminary injunction not occurred, those class members might have obtained lawful permanent status through less adversarial adjudicative processes.

Deportations that defy a court order thus implicate various levels of the immigration bureaucracy. To be sure, political pressure to increase the overall number of deportations exists as a result of the President's immigration agenda. But evidence of top-down directives to defy court orders does not appear to exist. Indeed, although some cases involve deportations of plaintiffs in high-profile litigation, most are yet another of the thousands of deportation cases being run through the system. The deportations appear to implicate the front lines of the deportation bureaucracy and demonstrate the consequences of a system that lacks accountability. Judicial interventions provide opportunities to learn more about such deportations, while judicial abdications of responsibility relegate these deportations to continued administrative secrecy.

C. Deviations from Litigation Norms and the Obligations of Lawyers

When agencies that are parties in federal-court litigation defy court orders, the professional conduct and obligations of government lawyers representing those agencies may be implicated. A range of scholarly views on the proper role of government lawyers exists, particularly with respect to whether those lawyers owe special duties to serve the public interest or if they instead resemble private lawyers representing the interests of private clients.[200] But irrespective of the lawyering model, government lawyers—like all lawyers—must conform to the ethical duties associated with the legal profession, which include a duty to

197. The court stayed the per diem sanctions for the delay in return caused by COVID-19. *See* Order Granting Defendants' Motion for Reconsideration at 4-5, *J.L.*, No. 5:18-cv-4914-NC (N.D. Cal. Mar. 27, 2020), 2020 WL 2562896, at *2-3 (discussing class member R.M.N. and noting that "the COVID-19 pandemic [was] [a] factor[] outside of Defendants' control").

198. *See* Defendants' Update in Response to ECF No. 263 at 2-3, *J.L.*, No. 5:18-CV-4914-NC (N.D. Cal. Mar. 13, 2020).

199. *See, e.g.*, *Calderon* Habeas, *supra* note 194 (filing seeking habeas relief for a *J.L.* class member).

200. *See* Lee & Ashar, *supra* note 57, at 1906-09 (discussing the existing scholarship on the various conceptions of government lawyers); Rebecca Roiphe, *A Typology of Justice Department Lawyers' Roles and Responsibilities*, 98 N.C. L. REV. 1077, 1101-04 (2020) (describing differing views of government lawyers in the context of the Department of Justice's (DOJ's) Civil Division).

maintain the integrity of court proceedings.[201] Factual misrepresentations, standing alone, might not violate specific court orders, yet the expectation of candor from litigants is widespread and fundamental. And where the government is the only source for facts at issue in litigation, that obligation might be even stronger.[202] The provision of factually incorrect information thus not only implicates ethical rules for the lawyers involved, but can also be viewed as a form of defiance towards the integrity of the judicial process. Accordingly, government lawyers representing the immigration-enforcement agencies in judicial proceedings may need to exercise *more* diligence than existing norms of practice would otherwise suggest.

1. *Wrongful Deportations Revisited Through the Lens of Government Lawyers*

The wrongful-deportation cases discussed above reveal steady interagency communication disconnects between DOJ lawyers and their agency clients that have arguably caused lawyers to transgress their professional obligations to the court. In most immigration cases, the immigration agencies associated with DHS are represented by lawyers from a specialized division of the DOJ Civil Division, the Office of Immigration Litigation (OIL).[203] OIL enjoys considerable respect within DOJ and is generally understood to be a reputable source for immigration analysis. OIL consults regularly with other agency offices—including the Attorney General—on evolving aspects of immigration policy.[204]

But OIL lawyers have repeatedly found themselves in the uncomfortable position of having made representations to the courts about the government's promises not to deport, only to see those statements defied by the actions of their agency clients.[205] OIL lawyers do not appear to have actively participated in facilitating wrongful deportations. For instance, according to submissions from the government in *Bonilla*, OIL lawyers for their part took reasonable steps to

---

201. *Cf.* Roiphe, *supra* note 200, at 1130-32 (giving an anecdote, in the context of DOJ's immigration enforcement, to illustrate the duty not to make absurd arguments).

202. *See* Nancy Morawetz, *Convenient Facts:* Nken v. Holder, *The Solicitor General, and the Presentation of Internal Government Facts*, 88 N.Y.U. L. REV. 1600, 1607-08 (2013).

203. *Office of Immigration Litigation*, U.S. DEP'T JUST., https://www.justice.gov/civil/office-immigration-litigation [https://perma.cc/N7QJ-DE3D].

204. Margaret H. Taylor, *Behind the Scenes of* St. Cyr *and* Zadvydas*: Making Policy in the Midst of Litigation*, 16 GEO. IMMIGR. L.J. 271, 293-94 (2002).

205. In *Grace*, the briefing on the stays had taken place on an accelerated schedule, largely due to the government's representations that its promise not to deport any of the plaintiffs would expire on August 9, 2018, at 11:59 PM. Order, Grace v. Sessions, No. 1:18-cv-01853-EGS (D.D.C. Aug. 9, 2018) (describing the August 8, 2018 conference).

ensure compliance: they communicated news of the stays with their lawyer counterparts at the agency and asked their agency contacts to confirm the distribution of those communications.[206] When such deportations do take place, OIL lawyers invariably express surprise, attempt to engage in remedial efforts, and acknowledge that norms were violated.[207] But a disconnect between the values of the government lawyers and the priorities of their government clients appears to exist. Furthermore, the lawyers' usual methods of compliance do not seem capable of preventing those deportations from taking place, given that usually clerical, low-level errors — overlooked emails, misplaced paperwork, incomplete database entries — seem to drive many wrongful deportations.[208]

2. Top-Down Policy Pressure

Top-down executive priorities can also give rise to violations of similar norms and throw the conduct of the government lawyers into question. Such dynamics were present in *Hamama v. Adducci*, a class-action habeas lawsuit that arose out of immigration arrests and detentions of hundreds of Iraqi nationals with old, unexecuted removal orders in the Detroit, Michigan area in 2017.[209] In *Hamama*, a federal district-court judge imposed sanctions against the government as a result of factual misrepresentations made during the litigation,[210] as

206. *See* Letter from Andrea N. Gevas, Office of Immigration Litig., U.S. Dep't of Justice, to Patricia S. Connor, Clerk of Court, *supra* note 185, at 1-3 (describing a DOJ-Office of Immigration Litigation (OIL) attorney's reliance on counsel at the ICE Office of Chief Counsel and communications with the agency).

207. *See, e.g.*, Respondent's Supplemental Brief Regarding Issues Related to Petitioner's Improper Removal from the United States, *supra* note 184, at 6 ("Respondent acknowledges and sincerely regrets the violation."); Letter from Andrea N. Gevas, Office of Immigration Litig., U.S. Dep't of Justice, to Patricia S. Connor, Clerk of Court, *supra* note 185, at 4 ("The Government fully recognizes the seriousness of its failure to provide the Court with accurate information while a stay request was pending, and apologizes to the Court and Mr. Bonilla.").

208. *See supra* text accompanying notes 179-185.

209. 261 F. Supp. 3d 820, 823-24 (E.D. Mich. 2017) (describing the procedural history), *rev'd*, 912 F.3d 869, 874-80 (6th Cir. 2018).

210. Hamama v. Adducci, 349 F. Supp. 3d 665, 699 (E.D. Mich. 2018), *rev'd*, 946 F.3d 875, 877-78 (6th Cir. 2020). The government argued that a high likelihood of Iraq accepting the deportees existed, despite the fact that Iraq had canceled a deportation scheduled to take place on June 29, 2017. *Id.* at 677. Two declarations from director-level ICE officials stated that the cause of the June 2017 flight cancellation was the *Hamama* preliminary injunction itself — the implication being that, had the district court not enjoined removals to Iraq, the deportations would have gone forward pursuant to Iraq's willingness to participate in involuntary repatriation of its nationals. *Id.* at 677-78. However, numerous documents subsequently identified through the litigation suggested that Iraq possessed, and had communicated to U.S. officials,

well as the government's repeated failure to comply with a series of court-ordered discovery deadlines.[211] The form of sanction was a factual finding that "no significant likelihood of Petitioners' removal in the reasonably foreseeable future" existed,[212] such that the court granted the plaintiff's requested injunctive relief that certain class members detained for over six months be released on orders of supervision.[213]

Top-down immigration policy priorities appear to have influenced the sanctioned conduct. The Trump Administration had signaled its strong motivation to convince Iraq to accept involuntary repatriations of its nationals, part of a broader effort to increase its capacity to deport people physically from countries that had previously refused to accept deportations.[214] To be sure, aspects of the case collided with the lower levels of the immigration bureaucracy—indiscriminate sweeps of immigrant communities, mass detentions, and at least one deportation of a class member in contravention of a court order.[215] But high-level immigration policy was at stake; indeed, the *Hamama* court observed that the Government's "demonstrably false statements" and discovery delays were a result of its "hope that its situation will improve in the future," referring to an anticipated change in Iraq's stance towards involuntary repatriations.[216]

With respect to the OIL lawyers, the court described them as "quite capable" attorneys, but pointed to the attorneys' expected familiarity with basic discovery rules as grounds upon which to conclude that the government's discovery conduct "demonstrates clear bad faith."[217] While the court did not sanction or castigate the lawyers in their personal capacities, the context for the sanctions—

significant doubts about whether to proceed with the repatriations irrespective of the court's order. *Id.* The court's review of the evidence led it to conclude that the ICE officials' sworn statements that the court's injunctive order caused the flight cancellation were "demonstrably false." *Id.* at 677.

211. *Id.* at 699-700.

212. *Id.* at 700.

213. *Id.* at 702.

214. Protecting the Nation from Foreign Terrorist Entry into the United States, Exec. Order No. 13,780, 82 Fed. Reg. 13,209, 13,211-12 (Mar. 6, 2017) (explaining the removal of Iraq from the travel ban because, inter alia, "the Iraqi government has expressly undertaken steps to enhance . . . the return of Iraqi nationals subject to final orders of removal"); *see also* JILL H. WILSON, CONG. RESEARCH SERV., IF11025, IMMIGRATION: "RECALCITRANT" COUNTRIES AND THE USE OF VISA SANCTIONS TO ENCOURAGE COOPERATION WITH ALIEN REMOVALS 2 (2020) (describing measures taken by the Trump Administration to pressure countries that refuse to comply with repatriation requests).

215. *See* Order Regarding Muneer Subaihani at 1, Hamama v. Adducci, No. 2:17-cv-11910 (E.D. Mich. Jan. 15, 2019).

216. *Hamama*, 349 F. Supp. 3d at 699-700.

217. *Id.* at 699.

making false statements and bad faith with respect to elementary discovery rules—suggests shortfalls in lawyering conduct by any standard.[218] The district court's ruling in *Hamama* illustrates how executive-enforcement priorities can produce defiant government lawyering, and the judiciary's increased willingness to respond to deviations from professional norms.[219]

3. Misrepresentations to the Supreme Court

DOJ lawyers at the Office of the Solicitor General (OSG) enjoy particular prestige and influence on executive policy at the highest levels. Often referred to as the "Tenth Justice" of the Supreme Court, the Solicitor General is widely understood as possessing special responsibility in the implementation of their duties, which include representing a range of government agencies in litigation before the Supreme Court.[220] However, despite OSG's lauded reputation, it has made grievous misrepresentations to the Court regarding deportation and detention policy.

The OSG has twice admitted making factual misrepresentations of agency practice and policy that have arguably influenced the outcome of two key Supreme Court immigration decisions.[221] The first case, *Demore v. Kim*, was an immigration-detention case decided by the Supreme Court in 2003, in which the Court upheld the constitutionality of a statutory provision mandating detention of certain noncitizens facing deportation.[222] But in 2016, OSG admitted in a letter to the Court that the Executive Office for Immigration Review, the DOJ subagency that houses the immigration courts, had made "significant errors" in

218. *Cf.* New York v. Dep't of Commerce, No. 18-CV-2921, slip op. at 3 (S.D.N.Y. May 21, 2020) (asserting that, in the context of census litigation, failure to produce documents in discovery is "unacceptable for any litigant, and particularly for the Department of Justice").

219. *Hamama* also illustrates the ongoing potency of jurisdictional bars. A month after the district court's decision imposing sanctions on the government, the Sixth Circuit held in an appeal of preliminary-injunction orders issued earlier in the case that the court lacked jurisdiction over the entire action. Hamama v. Adducci, 912 F.3d 869, 874-80 (6th Cir. 2018) (finding that the removal claims were barred by 8 U.S.C. § 1252(g) (2018) and the detention claims were barred by 8 U.S.C. § 1252(f)(1) (2018)). The Sixth Circuit directly invalidated the sanctions in a subsequent order based on similar jurisdictional grounds. Hamama v. Adducci, 946 F.3d 875, 877-78 (6th Cir. 2020).

220. *See* Morawetz, *supra* note 202, at 1606-08.

221. Additionally, in 2011, then-Solicitor General Neal Kumar Katyal acknowledged that the OSG's office had misled the Supreme Court in connection with the World War II Japanese American internment cases involving Fred Korematsu and Gordon Hirabayashi. *See* Neal Kumar Katyal, *The Solicitor General and Confession of Error*, 81 FORDHAM L. REV. 3027, 3031-37 (2013); Morawetz, *supra* note 202, at 1603-04.

222. 538 U.S. 510 (2003).

generating statistics that OSG had relied on.[223] Those statistics had understated the average length of detention for certain immigrants based on the charges against them and the procedural status of their immigration court cases.[224] The Court cited to these statistics and thus they appear to have shaped the Court's decision.[225]

The second case is *Nken v. Holder*, a 2009 case involving the standard for granting a stay of removal,[226] in which the OSG claimed in its briefing that the government had a "policy and practice" of returning noncitizens who later prevailed in litigation.[227] The Court relied on the government's assertions to hold in part that noncitizens could not argue that the harm of removal itself was a factor in favor of granting a stay.[228] But three years after the Court's decision, the OSG issued a letter indicating that its representations about the existence of such a "policy and practice" were misleading, and that it "is not confident that the process for returning removed aliens, either at the time its brief was filed or during the intervening three years, was as consistently effective as the statement in its brief in *Nken* implied."[229] Neither admission led to any sanction, consequence, or other remedial measure by the Supreme Court.[230]

While less is known about the internal chain of events that led to discovery of the misrepresentations in *Demore*, Nancy Morawetz's analysis of documents obtained through Freedom of Information Act litigation brought after the *Nken* decision—which prompted the OSG's admissions—provides unique insight into how the *Nken* misrepresentations came about.[231] Those communications

---

223. Letter from Ian Heath Gershengorn, Acting Solicitor Gen., Office of the Solicitor Gen., U.S. Dep't of Justice, to Scott S. Harris, Clerk, Supreme Court of the U.S. 2 (Aug. 26, 2016), https://trac.syr.edu/immigration/reports/580/include/01-1491%20-%20Demore%20Letter%20-%20Signed%20Complete.pdf [https://perma.cc/3TME-FZ28].

224. *See id.* at 1-2.

225. *See Demore*, 538 U.S. at 529-31 (citing the government's statistics regarding the length of detention to uphold the constitutionality of a mandatory-detention statute).

226. 556 U.S. 418 (2009).

227. Morawetz, *supra* note 202, at 1617-18 (citing Brief for the Respondent at 44, *Nken*, 556 U.S. 418 (No. 08-681)).

228. *Nken*, 556 U.S. at 435 ("Aliens who are removed may continue to pursue their petitions for review, and those who prevail can be afforded effective relief by facilitation of their return, along with restoration of the immigration status they had upon removal." (citing Brief for the Respondent at 44, *Nken*, 556 U.S. 418 (No. 08-681))).

229. Letter from Michael R. Dreeben, Deputy Solicitor Gen., Office of the Solicitor Gen., U.S. Dep't of Justice, to William K. Suter, Clerk, Supreme Court of the U.S. 4 (Apr. 24, 2012), https://www.justsecurity.org/wp-content/uploads/2018/05/SG_Letter-nken-v-holder.pdf [https://perma.cc/DMD7-TU6G].

230. *See* Morawetz, *supra* note 202, at 1650.

231. *Id.* at 1619-33.

suggest shortcomings on the part of the lawyers involved in the case. Morawetz suggests that OSG lawyers displayed gaps in diligence in fully assessing the existence of a consistent policy or practice; in addition, OSG lawyers showed a willingness to frame information provided by other offices and agencies in a manner most favorable to OSG's litigation position.[232] The documents likewise suggest deficiencies on the part of OIL to communicate fully its understanding that there was an absence of consistent practices of facilitating return.[233] Finally, Morawetz's analysis suggests that DHS lawyers—who were closest to the agency's practices—also failed to communicate candidly and thoroughly their knowledge to both OIL and OSG.[234] Responsibility for the misrepresentations thus appears at least partially attributable to the OSG, OIL, and DHS lawyers involved in *Nken*. In the meantime, the substantive rulings produced in both cases pushed more discretionary authority into the hands of frontline deportation agents.

The lack of control over deportations by DOJ-OIL lawyers, high-level executive priorities in *Hamama*, and an arguable lack of diligence in *Nken* and *Demore* collectively suggest that standard norms governing practice may be insufficient. In order for government lawyers representing the deportation-oriented components of the Executive to reflect fully the level of professionalism and ethical conduct expected from their offices, they may need to exert more diligence in counseling and confirming the actions of their agency clients. Government lawyers do not necessarily occupy the locus of activity where executive defiance is implicated. Indeed, the BIA's conduct in *Baez-Sanchez* did not involve government lawyers at all, and the case's wrongful-deportation context suggests that the lower rungs of the deportation state, through frontline officers overseeing logistical details, were largely responsible for violations of court orders. But as government lawyers increasingly admit to having made misrepresentations to the federal courts,[235] the degree to which a resistant Executive might impair those

232. *Id.* at 1619-26 (documenting the exchange of emails between OSG and attorneys from DOJ-OIL and DHS).

233. *Id.* at 1626-31 (describing internal DOJ-OIL knowledge of cases in which DOJ "impeded the return of successful litigants").

234. *Id.* at 1631 ("The correspondence among [DHS] attorneys shows a keen recognition of the fact that deportees who returned via parole did not regain their prior immigration status. However, these internal DHS concerns were not passed on to OIL or the OSG.").

235. *See, e.g.*, Letter from Audrey Strauss, Acting U.S. Attorney for the S. Dist. of N.Y., to Judge Jesse Furman, U.S. Dist. Judge, S. Dist. of N.Y. 2 (July 23, 2020) (admitting that statements provided to the court regarding the federal ban on New York residents' participation in the DHS Trusted Traveler Program were "inaccurate in some instances and [gave] the wrong impression in others," and therefore "undermine[d] a central argument in [the government's] briefs and declarations").

lawyers' ability to maintain the integrity of judicial proceedings as well as to serve the public interest warrants attention.

III. RESPONDING TO EXECUTIVE DEFIANCE

This Part moves beyond sounding the alarm bell with respect to executive defiance and focuses primarily on potential responses from the judiciary. But unilateral judicial responses to defiance have limits, making it necessary to consider what role the legislative and executive branches might play.

A. Judicial Responses to Executive Defiance

The judiciary has a range of tools available to it for encountering disobedience from the Executive, and exercising these tools offers some noteworthy benefits—and limitations. Contempt is the most obvious remedy.[236] Sanctionless findings of contempt in particular are a relatively common response to governmental disobedience across administrative law.[237] Contempt can also lead to sanctions in the form of fines against the agency.[238]

The reality is that contempt, with or without sanctions, may have limited impact on its own. Parrillo argues that contempt's power lies in its shaming effect, and that shaming effect may have influence on certain agency officials, many of whom have a stake in maintaining legitimacy before the courts[239] and believe that obedience to the courts is a professional obligation.[240] Even a sanctionless contempt order from a federal appeals court to members of an adjudicatory agency like the BIA would likely have a strong stigmatizing effect on the agency and the individual members. Fines, too, may be modest and have more symbolic

---

236. *See* Parrillo, *supra* note 1, at 692-93 (explaining the judicial contempt power under 18 U.S.C. § 401, and the availability of civil coercive sanctions, civil compensatory sanctions, or criminal sanctions).

237. *Id.* at 773-75.

238. *Id.* at 704-39.

239. Parrillo, *supra* note 1, at 770-89; *see also* HUME, *supra* note 123, at 6 (explaining that "on the whole administrators listen to courts and take the words they say seriously"); Gelbach & Marcus, *supra* note 77, at 1157-58 (discussing agency responsiveness to judicial review as explicated in Robert Hume's empirical study).

240. *See* Parrillo, *supra* note 1, at 789 (explaining that the shaming power of courts on government officials is dependent in part on the reputational belief "that *other* officials virtually never disobey").

than practical effect on the agency, particularly given that funds would typically come from a congressional appropriation rather than the agency's budget.[241]

But given the bureaucratic and institutional realities associated with the deportation state, the shaming effects of contempt or judicial admonishments may be lost on other agency officials—particularly frontline deportation officers—who might face little professional stigma from a contempt order due to the structure of their professional communities and obligations.[242] And government lawyers, who do feel the sting of shaming effects and language, may lack the internal influence within the deportation state to curb future instances of defiance.

Still, even if the direct impact of contempt findings is limited, the very process of contemplating contempt—for instance, through an order to show cause—can prompt remedial agency action.[243] In the wrongful-deportation context or where the conduct of government lawyers is in question, signaling the possibility of contempt stands in sharp contrast to dismissing a matter on jurisdictional grounds or doing nothing.[244] Judicial contemplation of sanctions allows courts to acknowledge the individual harm inflicted by the noncompliance, particularly where the threat of violence and the harms of prolonged detention exist.[245] Requiring that the agency explain the events leading to the noncompliance increases transparency of government practices not normally subject to judicial review and can require the government to conduct internal diligence into procedural malfunctions. While written declarations are a common way to require explanation from the agency, courts can also require personal court appearances or even depositions of agency heads, which may on their own prompt internal agency review by garnering the attention of agency heads.[246]

---

241. *See id.* at 735-39 (discussing the congressional appropriation process associated with the payment of agency fines, noting that "[a]n appropriation ordinarily *would* be available to pay a contempt fine," but detailing a lack of clarity concerning whether civil-coercive or contempt fines might require an appropriation from the agency's budget).

242. *See* Irene I. Vega, *Toward a Cultural Sociology of Immigration Control: A Call for Research*, 63 AM. BEHAV. SCIENTIST 1172, 1173 (2019).

243. *See* Morawetz, *supra* note 202, at 1628-29 (discussing a case in which the client prevailed on the merits after deportation, and noting that "[o]nce the contempt motion was filed . . . the government lawyers began working" to facilitate return).

244. *See supra* text accompanying notes 156-161.

245. *See supra* text accompanying note 174.

246. *See* Parrillo, *supra* note 17, at 925-26 (suggesting that personal appearances or depositions of top agency officials may operate as "quasi sanction[s]" when seeking compliance with a court order); *cf.* Order Directing Respondents to Appear, Yaide v. Wolf, No. 3:19-CV-07874-CRB (N.D. Cal. Feb. 7, 2020) (requiring the personal appearance of a DHS official to explain the delays in the physical return of a deported asylum seeker).

Courts can utilize their equitable powers to craft orders that affect a noncitizen's rights, like the appointment of counsel[247] or certain orders of attorneys' fees.[248] Courts might consider extending this authority to setting the terms of a noncitizen's immigration or detention status upon return.[249] Along similar lines, the Supreme Court's decisions to leave intact the portions of its opinions in *Nken* and *Demore* that could have been shaped by the government's misrepresentations were a missed opportunity.[250]

Courts could also double down and monitor the executive branch more aggressively. Courts theoretically possess authority to order, and have occasionally sought, the imprisonment of agency officials and fines against those officials in their personal capacities in other areas of law, although the use of such tools is rare.[251] As Parrillo's study shows, the more forceful judicial responses such as litigation findings, personal imprisonment or fines, and even civil sanctions associated with contempt may stand on legally tenuous grounds where federal agency defendants are involved, and these actions can face defenses such as sovereign immunity.[252] Moreover, appeals courts have expressed ambivalence towards judicial reactions that go further than sanctionless contempt, even if they have not wholly rejected courts' legal authority to utilize them.[253]

Courts might increase their monitoring of the Executive, particularly in the context of large-scale, ongoing litigation in which glimpses of executive defiance surface or where long-term compliance is ordered. Courts can require more frequent compliance reports and updates. Preliminary injunctions may give rise to short-term opportunities for monitoring. Judges can also consider the appointment of special masters and adjuncts to the federal courts.[254] Indeed, in an October 2020 order arising out of district-court litigation involving the conditions

---

247. *See* Perez v. Barr, 957 F.3d 958, 965 (9th Cir. 2020) ("It has long been recognized that courts have the inherent authority to appoint counsel when necessary to the exercise of their judicial function, even absent express statutory authorization.").

248. *See supra* note 168 and accompanying text. Attorneys' fees are also permitted under the Federal Rules of Civil Procedure. *See, e.g.*, FED. R. CIV. P. 56(h) (providing for attorneys' fees where an affidavit or declaration is submitted in bad faith).

249. *See* Mendez v. Immigration & Naturalization Serv., 563 F.2d 956, 959 (9th Cir. 1977) (ordering the return of a noncitizen's same immigration status held prior to deportation).

250. *See supra* text accompanying note 230.

251. Parrillo, *supra* note 1, at 739-64.

252. *See generally id.* (analyzing the judiciary's unwillingness to sanction agencies).

253. Parrillo's study found that "the judiciary as an institution—particularly the higher courts—has exhibited a virtually complete unwillingness to allow sanctions, at times intervening dramatically to block imprisonment or budget-straining fines at the eleventh hour." *Id.* at 697.

254. Shira Scheindlin, *We Need Help: The Increasing Use of Special Masters in Federal Court*, 58 DEPAUL L. REV. 479, 479-81 (2009) (describing the 2003 amendments to Federal Rule of Civil Procedure 53 to facilitate the use of special masters).

of detention at a Southern California ICE facility amidst the COVID-19 pandemic, Judge Hatter Jr. both described the government's litigation conduct as reflecting "straight up dishonesty"[255] and, accordingly, indicated that the court would consider the appointment of a special master "to ensure that the information the [c]ourt receives in this case is both accurate and timely."[256] Special masters, however, generally require the consent of the parties unless an "exceptional condition" or difficult accounting or computational issue arises.[257] In many immigration cases, therefore, the appointment of a special master may not be warranted or even permitted under the Federal Rules of Civil Procedure.

Ultimately, judicial shaming may be the judiciary's most powerful tool, even outside of formal exercises of contempt power. Courts can employ language that has shaming implications or that otherwise initiates dialogue with other branches of government, whether or not the language is associated with possible contempt findings.[258] Judge Easterbrook's harsh language in *Baez-Sanchez*, for instance, can be viewed as a warning signal for the possibility of future resistance to judicial orders from the BIA.[259] Shaming language may also help establish norms of adjudication for other members of the federal judiciary.[260] Sharply worded judicial reprimands can elicit the attention of the other branches of government, thereby prompting internal reviews, congressional inquiries, policy shifts, and regulatory or legislative reform when political will exists. Judicial shaming can also validate the critiques of those working outside of government towards more expansive visions of immigrants' rights in the United States.[261]

Reasons to tread cautiously when it comes to expanding the judiciary's oversight role over the Executive exist, because judges can abuse their authority when it comes to monitoring, compliance, and contempt.[262] From a separation-of-powers perspective, the Article III limitation on the judiciary to the adjudication of cases and controversies can raise substantive concerns about perceived overreaching into the Executive's operations. Technical separation-of-powers

---

255. Roman v. Wolf, No. ED CV 20-00768 TJH, 2020 WL 6107069, at *1 (C.D. Cal. Oct. 15, 2020).

256. *Id.* at *2.

257. FED. R. CIV. P. 53(a)(1).

258. *See* Walker, *supra* note 117, at 1618-20.

259. *See supra* text accompanying notes 111-120.

260. *See* Jason A. Cade, *Judicial Review of Disproportionate (or Retaliatory) Deportation*, 75 WASH. & LEE L. REV. 1427, 1446-49 (2018) (identifying benefits of federal courts using "scolding" language in reference to immigration enforcement decisions).

261. *See id.*

262. *See generally* Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735 (2001) (discussing separation-of-powers concerns implicated by the exercise of inherent powers by federal courts, including judicial abuse of contempt power).

violations aside, excessive judicial doubling-down can spark reactionary responses and political ill-will in the other branches of government.

Moreover, the changing composition of the federal judiciary following the Trump Administration's active appointment of federal judges could impact the courts' receptivity to vindicating the rights of noncitizens in the years to come.[263] The immigration policies of the Trump Administration led many to view the federal courts as a limitation on the xenophobic and lawless impulses of the President. However, President Biden's efforts to reverse the Trump-era immigration agenda could face resistance in the federal courts. Still, to the extent that defiance originates in entrenched segments of the deportation bureaucracy such as front-line deportation agents, the types of defiance identified in this Feature are likely to persist in some form.

Accordingly, strengthening the judicial response to and role in monitoring executive defiance is warranted. Judicial interventions can create a stronger public record of executive defiance, prompt remedial impact, and perhaps most importantly, send a signal to other branches of government that executive defiance is underway. Even so, expectations of unilateral judicial monitoring of the Executive seem misplaced, particularly in the immigration context, given the judiciary's traditionally weakened role.

B. Legislative and Executive Responses

If the judiciary is ill-equipped to monitor independently a recalcitrant executive, other branches of government have a role to play.[264] The President's immigration policy priorities and general respect for the judicial branch all impact the future of executive defiance from the deportation state. With respect to immigration priorities, the President's management of the deportation bureaucracy is critical — and will prove critical for President Biden. Presidential influence over deportation policy extends to a long list of areas including deportation priorities, the use of summary removal and other adjudicatory procedures that rely on front-line officers to process high-stakes decisions without judicial review, and an appreciation (or lack thereof) for the nuance and complexity of immigration

---

263. *See* John Gramlich, *How Trump Compares with Other Recent Presidents in Appointing Federal Judges*, PEW RES. CTR. (July 15, 2020), https://www.pewresearch.org/fact-tank/2020/07/15/how-trump-compares-with-other-recent-presidents-in-appointing-federal-judges [https://perma.cc/L3CV-7DT7].

264. *See* Christopher J. Walker, *Constraining Bureaucracy Beyond Judicial Review*, DAEDALUS (forthcoming 2021) (arguing for administrative-law approaches that incorporate responses from all three branches of government, particularly where agency action protected from judicial review is involved).

law.[265] The President, along with agency heads, can effectuate executive programs and accountability mechanisms designed to ensure compliance. And through public words and internal top-down policy, the President influences the executive branch's respect for the rule of law and for the judiciary across all areas of law.

But a core claim in this Feature is that executive power in the deportation state goes beyond the identity of the President, necessitating attention to how other entities within the executive branch may exert influence on executive-judicial interaction. Executive-branch lawyers may be required to exercise extra vigilance when it comes to securing the compliance of their agency clients with the norms and orders of the judiciary.[266] Although changing agency culture will remain a challenge, the executive branch can initiate internal protocols that enhance accountability or engage in reviews of episodes of defiance in response to judicial criticism. For instance, in the mid-2000s, the federal courts issued a steady stream of critiques regarding the quality of immigration adjudication.[267] The Bush Administration responded with an internal review and a series of recommendations.[268] The effectiveness of the Bush-era recommendations is debatable,[269] but each of the areas highlighted in this Feature — the BIA's postremand conduct, wrongful deportations, and the conduct of government lawyers — could benefit from further internal agency review and internal monitoring, particularly given that the executive branch has far greater access to its own policies and practices than Congress or the courts. While internal agency review requires political

265. *See supra* Section I.B (discussing presidential and executive power in immigration law).

266. *See supra* Section II.C (arguing that government lawyers representing immigration enforcement agencies may need to exercise more diligence to ensure compliance).

267. *See, e.g.*, Benslimane v. Gonzales, 430 F.3d 828, 830 (7th Cir. 2005) ("[T]he adjudication of these cases at the administrative level has fallen below the minimum standards of legal justice."); Dia v. Ashcroft, 353 F.3d 228, 250 (3d Cir. 2003) (holding that the immigration-judge adjudication in the case "consists not of the normal drawing of intuitive inferences from a set of facts, but, rather, of a progression of flawed sound bites that gives the impression that she was looking for ways to find fault with Dia's testimony"); Colmenar v. Immigration & Naturalization Serv., 210 F.3d 967, 973 (9th Cir. 2000) ("We do not enjoy second-guessing the way Immigration Judges run their courtrooms. But when a petitioner has so clearly been denied a full and fair hearing, we have no choice.").

268. *See* Memorandum from the Att'y Gen. to the Deputy Att'y Gen., Assistant Att'y Gen. for Legal Policy, Dir. of the Exec. Office for Immigration Review & Acting Chief Immigration Judge, Measures to Improve the Immigration Courts and the Board of Immigration Appeals (Aug. 9, 2006), https://www.justice.gov/sites/default/files/ag/legacy/2009/02/10/ag-080906.pdf [https://perma.cc/5X3Z-FDLM].

269. *See, e.g.*, *Immigration Courts: Still a Troubled Institution*, SYRACUSE TRAC IMMIGRATION (June 30, 2009), https://trac.syr.edu/immigration/reports/210 [https://perma.cc/QRX8-VHXS] (reviewing and critiquing the 2006 reform effort).

will, and faces the problem of implementation and effectiveness, it nonetheless increases transparency and discourse around the operation of the bureaucracy.

Congress possesses the authority to make fundamental changes to the immigration laws in many areas, such as the broad deportation standards and requirements that have given rise to the concentration of executive power, the statutory authorization for deportation programs that bypass immigration courts, and the availability of judicial review. But the political feasibility of effecting sweeping legislative change in the immigration arena has proven elusive. Congress's appropriations authority over agency budgets, an influential factor that has driven the rise of the deportation state and immigration-detention infrastructure,[270] could similarly lead to reductions and controls over the existing bureaucracy. And while drastic reductions in ICE and CBP's detention and deportation budgets, for instance, would likely trigger intense political debate, it is possible that budget decisions may fare better in the political arena, either by eliding sustained public attention or because of greater public receptivity to the notion of scaling back the resources of an agency with waning public popularity.[271] Aside from direct statutory reform, Congress and individual members of Congress can exercise their oversight powers to inquire into specific episodes or trends raised when the government disobeys court directives.[272]

Indeed, it seems unlikely that any one branch of government can address the concerns identified in this Feature in a long-term, politically resilient manner. The most effective progress may take place outside the halls of government altogether, and in the public discourse over the logic, size, power, and expansiveness of the deportation state as currently constituted. Here, too, the public's understanding of the Executive's unwillingness or incapacity to comply with judicial authority might lend credence to calls to reconsider the value of deportation and detention in the United States.

---

270. *See* COX & RODRÍGUEZ, THE PRESIDENT AND IMMIGRATION LAW, *supra* note 47, at 100.

271. *See Public Expresses Favorable Views of a Number of Federal Agencies*, PEW RES. CTR. (Oct. 1, 2019), https://www.pewresearch.org/politics/2019/10/01/public-expresses-favorable-views-of-a-number-of-federal-agencies [https://perma.cc/TL3W-DF9Z] (reporting that ICE "is the sole agency asked about in the survey viewed more negatively (54% unfavorable) than positively (42%)").

272. *See, e.g.*, Letter from Edward J. Markey, Elizabeth Warren & Ayanna Pressley, Members, Cong., to Mark A. Morgan, Acting Comm'r, U.S. Customs & Border Prot. (Jan. 23, 2020), https://pressley.house.gov/sites/pressley.house.gov/files/20.1.23.%20CBP%20Targetting%20of%20Iranian%20Students%20Letter.pdf [https://perma.cc/9Y47-VQTA]; Letter from Albio Sires, *supra* note 191.

CONCLUSION

The examples of noncompliance discussed in this Feature point to an understanding of defiance that is not necessarily produced by premeditated, intentional insubordination towards the judicial branch. Rather, executive defiance from the deportation state grows out of an immigration bureaucracy that is ill-structured to account for the judiciary as a participant in the enforcement of immigration law. An unresolved question here is what role the judiciary *should* have in setting limits on immigration enforcement. The worldview animating the status quo of irregular judicial review — facilitated by the existing statutory collection of jurisdictional bars and the plenary power doctrine — suggests that by and large, the federal courts should leave the work of deportation to the Executive. But this creates a tension with the expectation of compliance, such that when judicial interventions are the exception rather than the norm, the immigration bureaucracy grows increasingly incapable of, and disincentivized from, complying with judicial orders. This resistance is particularly present in light of top-down pressures from the President, institutional-capacity challenges, and the general absence of counsel in the system. To be sure, judicial participation in immigration enforcement may be perceived by some as an unwelcome intrusion and even as an overstepping of Article III power by others. To others, the irregularity of judicial review in immigration as a whole may be all the more reason to insist on compliance.

Indeed, regulating the boundaries of judicial and executive power is an ongoing project. While the goal of this Feature is not to provide a dispositive theory for any of the several debates involving judicial and executive authority, the experience of executive defiance and the deportation state may point toward at least two broader implications. First, acknowledging both the existence of and context in which executive defiance is taking place supports favoring a stronger judicial role, which may ultimately cut in favor of nationwide injunctions, against *Chevron* deference, and against assertions of agency nonacquiescence — at least in the immigration context. Relatedly, given that the immigration ecosystem fails to reflect a standard balance of power across all three branches, importing conventional separation-of-powers principles directly into the immigration sphere without regard to the existing imbalance of power may be inadequate.

Second, paying attention to the ways in which executive power has aggrandized over time and bleeds into noncompliance with the judiciary might serve as a warning signal for other areas of law. It is possible that the Executive's refusal to comply with court orders in areas outside of immigration law may be explained primarily by Trumpian politics. But to the extent that assertions of defiance by the Executive are taking place across the administrative state, then a closer examination of the broader relationship between judicial and executive

power in those agencies may be in order. The inauguration of President Biden will likely lead some to welcome the deployment of executive power in the interests of undoing policy changes enacted under Trump. But in the long term, relying on executive power to achieve justice and fairness in immigration law may face limitations or even prove counterproductive, in light of the institutional and bureaucratic dysfunction in the deportation sphere.

Whatever one's view on the proper balance of judicial and executive power, recurring defiance of the courts disturbs prevailing expectations about the rule of law. In immigration, the need to address the underlying factors producing or exacerbating defiance irrespective of presidential leadership — doctrinal and statutory forces that insulate the Executive from judicial review, the growth and funding of the deportation bureaucracy, and a culture of lawlessness in the deportation agencies — takes on greater urgency. Political imagination and a reorientation of the national conversation on the appropriate role of deportation and detention are critical to any movement forward.