

## NOTES

### PROTECTING NONCITIZENS' LIBERTY WHEN THE EXECUTIVE SEEKS TO PUNISH

#### INTRODUCTION

On March 15, 2025, the White House announced that President Trump had invoked an eighteenth-century wartime authority to order the summary removal of noncitizens who were believed to be members of the Venezuelan gang Tren de Aragua.<sup>1</sup> Within hours, the government loaded over 260 noncitizens onto three planes and flew them directly to a notorious foreign prison, the Terrorism Confinement Center<sup>2</sup> (CECOT), in El Salvador.<sup>3</sup> While being shipped to any foreign detention center overnight constitutes a stunning abrogation of liberty, that the men were sent to CECOT in particular magnified the rights violation. Referred to by Salvadoran human rights observers as a humanitarian “black hole,” CECOT is known for being a place that no one leaves.<sup>4</sup> The facility’s bright, fluorescent “lights are never turned off” and prisoners are given no semblance of privacy.<sup>5</sup> Detainees are forced to sleep on metal cots with no pillows or sheets, eat with their bare hands, and stay in cells packed to twice their capacity.<sup>6</sup> Upon arriving in El Salvador, the removed men were greeted by masked guards in riot gear who slapped, pushed, and dragged them as they were transported to CECOT, where their heads were shaved.<sup>7</sup> In descriptions of their treatment inside the prison, the men described being beaten until they bled on a daily basis.<sup>8</sup>

The CECOT ordeal is just one part of “a dangerous and new extreme” in immigration enforcement wrought by the second Trump

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<sup>1</sup> Proclamation No. 10,903, 90 Fed. Reg. 13033 (Mar. 14, 2025). In actuality, the proclamation was signed in secret the day before, a move immigration advocates suspect was made to prevent swift court challenges. Zolan Kanno-Youngs et al., *Behind Trump's Deal to Deport Venezuelans to El Salvador's Most Feared Prison*, N.Y. TIMES (May 1, 2025), <https://www.nytimes.com/2025/04/30/us/politics/trump-deportations-venezuela-el-salvador.html> [<https://perma.cc/RH96-U8H9>].

<sup>2</sup> See, e.g., Leire Ventas, *Coming Face to Face with Inmates in El Salvador's Mega-Jail*, BBC (Feb. 14, 2024), <https://www.bbc.com/news/world-latin-america-68244963> [<https://perma.cc/3U6U-Z986>].

<sup>3</sup> See Kanno-Youngs et al., *supra* note 1.

<sup>4</sup> Ventas, *supra* note 2.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> See Philip Holsinger, *What the Venezuelans Deported to El Salvador Experienced*, TIME (Mar. 21, 2025, at 07:00 ET), <https://time.com/7269604/el-salvador-photos-venezuelan-detainees> [<https://perma.cc/M4XV-5LYG>].

<sup>8</sup> Gustavo Ocando, *“We Lived Through Hell,” Say Venezuelans Released from Mega-Prison in El Salvador*, BBC (July 25, 2025), <https://www.bbc.com/news/articles/czry5k52np20> [<https://perma.cc/5BVB-HPK3>].

Administration.<sup>9</sup> In other instances sounding in this trend of extremity, the Administration has removed noncitizens to patently unsafe third countries where they lack ties, like war-torn South Sudan,<sup>10</sup> and constructed domestic detention centers in inhospitable locations and with inadequate conditions of confinement.<sup>11</sup> The Administration has also ratcheted up the scale and force of traditional enforcement tools, including by deploying heavily armed Immigration and Customs Enforcement (ICE) officials to conduct often violent raids on workplaces and courthouses across the country.<sup>12</sup> To many, these policies — which have systematically burdened noncitizens' liberty rights far more than the typical deprivations that accompany apprehension and deportation — have gone beyond standard immigration enforcement; they have become state-issued punishment.<sup>13</sup>

This accelerating trend has raised a profound constitutional question: What liberty protections can be called upon when the executive seeks to punish? The answer to this question matters, not only for noncitizens who have faced the brunt of the second Trump Administration's enforcement discretion, but also for members of American society writ large. As immigration and border scholars have observed, relaxed constitutional protections that first develop in the realm of immigration law have a habit of being turned inward to ensnare even American citizens.<sup>14</sup> Moreover, the second Trump Administration has applied its

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<sup>9</sup> AM. IMMIGR. COUNCIL, MASS DEPORTATION: ANALYZING THE TRUMP ADMINISTRATION'S ATTACKS ON IMMIGRANTS, DEMOCRACY, AND AMERICA 53 (2025).

<sup>10</sup> *Id.* at 51.

<sup>11</sup> See, e.g., Gisela Salomon & Kate Payne, *Detained Immigrants at "Alligator Alcatraz" Say There Are Worms in Food and Wastewater on the Floor*, AP NEWS (July 11, 2025, at 17:40 ET), <https://apnews.com/article/alligator-alcatraz-immigration-detainees-florida-cc2fb9e34e760a50e97f13fe59cbf075> [<https://perma.cc/YC9G-G8MW>].

<sup>12</sup> See, e.g., *Noem v. Vasquez Perdomo*, No. 25A169, slip op. at 2–4 (U.S. Sep. 8, 2025) (Sotomayor, J., dissenting) (describing violent immigration raids conducted by masked ICE officers armed with assault rifles that have sparked “panic and fear” among citizens and noncitizens alike); José Olivares, *US Immigration Officers Ordered to Arrest More People Even Without Warrants*, THE GUARDIAN (June 4, 2025, at 07:00 ET), <https://www.theguardian.com/us-news/2025/jun/04/immigration-officials-increased-detentions-collateral-arrests> [<https://perma.cc/JY3L-82WX>] (“Senior US immigration officials . . . instructed rank-and-file officers to ‘turn the creative knob up to 11’ when it comes to enforcement . . . . Officers were also urged to increase apprehensions and think up tactics to ‘push the envelope’ . . .”).

<sup>13</sup> See, e.g., José H. Gomez, *Why We Need a New Conversation on Immigration*, ANGELUS (June 17, 2025), <https://angelusnews.com/voices/ice-raids-immigration-conversation> [<https://perma.cc/PW92-23PV>].

<sup>14</sup> See, e.g., Jennifer M. Chacón, *Border Exceptionalism in the Era of Moving Borders*, 38 FORDHAM URB. L.J. 129, 148–52 (2010) (discussing relaxed policing standards that apply at the border and its interior equivalents (like airports) that noncitizens and citizens alike are subject to, often on racialized bases); César Cuauhtémoc García Hernández, *Borders that Bend*, 2023 U. CHI. LEGAL F. 115, 116–17 (same); Jennifer M. Chacón, *Loving's Borders*, 115 CALIF. L. REV. 1079, 1087–88 (2025) (explaining how, when an immigration restriction is at issue, courts lower the standard of scrutiny that normally applies when constitutional rights are alleged to have been infringed).

aggressive law enforcement style to other areas as well, including by using military force to interdict narcotics trafficking<sup>15</sup> and police American cities.<sup>16</sup> Pulling back from the current moment reveals that this is a cross-partisan problem, with administrations of both parties increasingly turning to punitive actions to effectuate their policy goals.<sup>17</sup>

A version of this question has been alive in immigration law for at least the last century. In the late 1800s, the Supreme Court granted the political branches plenary power over noncitizens' entrance, presence, and movement in the country, but simultaneously prohibited criminal punishment absent trial for immigration violations.<sup>18</sup> Yet, while a few scholars have explored the implications of immigration law's historic prohibition on punitive policies,<sup>19</sup> courts have largely ignored the issue.<sup>20</sup> The second Trump Administration's immigration enforcement actions have begun to change this dynamic. Spurred by the CECOT removals, some immigration practitioners have begun to develop arguments for classifying the Administration's enforcement policies as punishment necessitating the criminal procedure protections of the Bill of Rights.<sup>21</sup> Those arguments import the legal analysis that delineates

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Other legal commentators have noted similar dynamics. See, e.g., Noah Feldman, Opinion, *The Supreme Court's ICE Raids Ruling is Shameful*, BLOOMBERG (Sep. 8, 2025, at 16:12 ET), <https://www.bloomberg.com/opinion/articles/2025-09-08/supreme-court-los-angeles-ice-immigration-raids-ruling-is-shameful> [<https://perma.cc/6JA6-22RR>] (commenting that a Supreme Court decision permitting the consideration of race in immigration enforcement threatens the constitutional rights of American citizens of any race).

<sup>15</sup> See, e.g., Charlie Savage & Helene Cooper, *Boat Suspected of Smuggling Drugs Is Said to Have Turned Before U.S. Attacked It*, N.Y. TIMES (Sep. 10, 2025, at 13:00 ET), <https://www.nytimes.com/2025/09/10/us/trump-drug-boat-venezuela-strike.html> [<https://perma.cc/6RG3-77XS>] (describing the military actions as "a startling departure" from traditional drug interdiction efforts).

<sup>16</sup> See, e.g., Tyler Pager & Devlin Barrett, *Trump's Show of Force Begins to Take Shape as Guard Troops Deploy in D.C.*, N.Y. TIMES (Aug. 12, 2025), <https://www.nytimes.com/2025/08/12/us/politics/dc-police-national-guard.html> [<https://perma.cc/WPN4-VNDH>]; Qasim Nauman & John Yoon, *Marines Deployed by Trump Over Newsom's Objections Arrive in L.A. Area*, N.Y. TIMES (June 10, 2025), <https://www.nytimes.com/2025/06/10/us/marines-los-angeles-newsom.html> [<https://perma.cc/SX8C-94UP>].

<sup>17</sup> See, e.g., Mica Rosenberg, *The Biden Administration Is Separating Families at the Border. It Doesn't Always Say Why.*, PROPUBLICA (Dec. 12, 2024, at 06:00 ET), <https://www.propublica.org/article/family-separations-biden-russian-immigrants> [<https://perma.cc/K4XM-ATBE>].

<sup>18</sup> *Wong Wing v. United States*, 163 U.S. 228, 235–37 (1896).

<sup>19</sup> See, e.g., DANIEL KANSTROOM, *DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY* 123 (2007); César Cuauhtémoc García Hernández, *Immigration Detention as Punishment*, 61 UCLA L. REV. 1346, 1355 (2014).

<sup>20</sup> See Daniel Kanstroom, *The Right to Deportation Counsel in Padilla v. Kentucky: The Challenging Construction of the Fifth-and-a-Half Amendment*, 58 UCLA L. REV. 1461, 1464 (2011).

<sup>21</sup> See Ahilan Arulanantham, *Deportation to CECOT: The Constitutional Prohibition on Punishment Without Charge or Trial*, JUST SEC. (Apr. 23, 2025), <https://www.justsecurity.org/110679/deportation-cecot-punishment> [<https://perma.cc/BTT7-B5LL>]; Raphael Goldman, *Trump's Agreement with El Salvador Violated the Constitution*, LAWFARE (July 30, 2025, at 10:15 ET),

between nonpunitive, civil sanctions and punitive, criminal ones — referred to here as “punishment doctrine.”<sup>22</sup> As these practitioners have recognized, an application of punishment doctrine to the novel, liberty-burdening immigration enforcement actions of the second Trump Administration can result in significant protections, including mandated rights to counsel and jury trial or even the wholesale prohibition of the harshest enforcement policies.<sup>23</sup>

However, for all the promise of deploying punishment doctrine to policies like the CECOT removals, its application is complicated in the immigration enforcement context.<sup>24</sup> Chiefly, it is far from clear if and how punishment doctrine, which historically developed to police legislative overreach,<sup>25</sup> can apply to executive actions. The Supreme Court has only ever applied the doctrine to executive action in the prison-management sphere,<sup>26</sup> a *sui generis* area of the law.<sup>27</sup> Indeed, the Court has consciously stopped short of expanding the analysis to other areas of executive action, leading lower courts to apply less rigorous protections in contexts where punishment doctrine appears apt.<sup>28</sup> In a further complication, punishment doctrine is focused in large part on governmental intent, and the Supreme Court has been hesitant to inquire into the motives of the President and other executive branch actors in recent cases.<sup>29</sup> To date, little scholarly attention has been paid to addressing these difficulties.

In light of the new immigration enforcement paradigm, with its devaluation of noncitizens’ liberty rights, the time to assess punishment doctrine’s application to executive action is now. This Note argues that punishment doctrine both can and should apply to executive branch action. It will begin to build the theoretical basis for importing punishment doctrine to the Article II sphere, showing that the rationales undergirding the legislature-focused framework apply just as appropriately — if not more so — to executive branch action. It will also rebut several counterarguments that typically doom the application of rights-protective frameworks to areas of executive discretion. Finally, this Note will illustrate how punishment doctrine can be effectively deployed in this context — focusing especially on the assessment of executive branch intent — and will draw out the legal ramifications of deploying

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<https://www.lawfaremedia.org/article/trump-s-agreement-with-el-salvador-violated-the-constitution> [<https://perma.cc/MDK3-EMQE>]; see also Petitioner’s Brief in Support of Granting the Writ at 20–25, *Zacarias Matos v. Venegas*, No. 25-CV-00057 (S.D. Tex. May 13, 2025).

<sup>22</sup> See sources cited *supra* note 21.

<sup>23</sup> See sources cited *supra* note 21.

<sup>24</sup> See Goldman, *supra* note 21.

<sup>25</sup> See *infra* notes 88–95 and accompanying text.

<sup>26</sup> See *infra* pp. 765–66.

<sup>27</sup> See Justin Driver & Emma Kaufman, *The Incoherence of Prison Law*, 135 HARV. L. REV. 515, 521–23 (2021).

<sup>28</sup> See *infra* notes 102–10 and accompanying text.

<sup>29</sup> See *infra* notes 144–54 and accompanying text.

punishment doctrine to the immigration enforcement context and beyond.

The argument proceeds in four parts. Part I provides a brief overview of the classical liberty rights framework applied to noncitizens. It shows that, while existing law grants largely unrestrained discretion to the political branches over noncitizens' liberty, the prohibition on punishment without trial provides a constitutional backstop — an apt dimension of the law to explore in the present moment. Part II surveys the extraordinary immigration enforcement actions of the second Trump Administration that may amount to punishment, which form the backdrop of this Note. Part III then presents the argument for extending the punishment analysis to executive action, first establishing the theoretical basis for doing so before addressing practical difficulties of application. It makes the case that punishment doctrine is a fitting legal response to severe, liberty-reducing executive action and that evidence of executive intent, while difficult to establish in some cases, is appropriate for judicial assessment in this context. Part IV draws out the consequences and implications of this Note's argument, namely the ways in which the Executive would be barred or restricted from imposing punitive deprivations of liberty on noncitizens and other individuals protected by the Constitution.

## I. CLASSICAL IMMIGRATION LAW AND PUNISHMENT

For the nation's first century, immigration regulation was mostly left to the states, which did little to practically mitigate the flow of people coming across the border.<sup>30</sup> That began to change in the late nineteenth century, however, when immigration from Asia generally and China specifically led to a rise in racial animus that spawned the country's first federal immigration regulations.<sup>31</sup> Shortly thereafter, courts adopted a restrictionist conception of noncitizens' liberty rights that was influenced heavily by international law and principles of sovereignty.<sup>32</sup> The legal regime that emerged from that era — “classical immigration law,” as it would come to be known<sup>33</sup> — understood the Constitution to grant the federal government the inherent power to determine nearly every bound of a noncitizen's presence in the country.<sup>34</sup> That power was further recognized as plenary — that is, unreviewable by the judiciary.<sup>35</sup>

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<sup>30</sup> See Gerald L. Neuman, *The Lost Century of American Immigration Law (1776–1875)*, 93 COLUM. L. REV. 1833, 1841–44 (1993).

<sup>31</sup> See ERIKA LEE, *AT AMERICA'S GATES: CHINESE IMMIGRATION DURING THE EXCLUSION ERA, 1882–1943*, at 24–27 (2003).

<sup>32</sup> See CÉSAR CUAUHTÉMOC GARCÍA HERNÁNDEZ, *WELCOME THE WRETCHED* 34–35 (2024); Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 5–7 (1984).

<sup>33</sup> See Schuck, *supra* note 32, at 3.

<sup>34</sup> See, e.g., *Chae Chan Ping v. United States (Chinese Exclusion Case)*, 130 U.S. 581, 606–07 (1889); *Fong Yue Ting v. United States*, 149 U.S. 698, 711–13 (1893).

<sup>35</sup> *Chae Chan Ping*, 130 U.S. at 609; see also *Fong Yue Ting*, 149 U.S. at 713.

But classical immigration law also featured tension between the federal government's plenary authority over noncitizens and the liberty rights guaranteed to all persons present in the United States, including noncitizens. A recurring concern centered on the bounds between immigration enforcement and criminal punishment. In *Fong Yue Ting v. United States*,<sup>36</sup> for instance, the Court addressed whether the significant liberty deprivation that is removal from the country constituted punishment that necessitated the criminal procedure protections of the Constitution.<sup>37</sup> Answering in the negative, the *Fong Yue Ting* Court held that deportation was neither banishment nor punishment for a crime, but rather a manner of repatriating noncitizens who were no longer welcome; no constitutional protections afforded to criminal defendants were required.<sup>38</sup>

*Wong Wing v. United States*,<sup>39</sup> a subsequent intervention into the relationship between immigration enforcement and punishment, produced some affirmative liberty protections for noncitizens while simultaneously affirming more power for the federal government over their movement. That case involved an immigration statute that provided for up to one year of imprisonment at hard labor for Chinese noncitizens unlawfully present in the United States.<sup>40</sup> The *Wong Wing* Court held that detention pursuant to the deportation process was permissible, as its purpose was nonpunitive.<sup>41</sup> In the Court's words, "detention . . . as part of the means necessary to give effect to the provisions for the exclusion or expulsion of aliens would be valid," as removal proceedings "would be vain if those accused could not be held in custody pending the inquiry into their true character and while arrangements were being made for their deportation."<sup>42</sup> However, the Court held that additional federal action seeking to punish noncitizens, absent a trial, for immigration violations transgressed the Due Process Clause<sup>43</sup>: "[W]hen Congress sees fit to . . . subject[] the persons of such aliens to infamous punishment at hard labor . . . such legislation, to be valid, must provide for a judicial trial to establish the guilt of the accused."<sup>44</sup>

The era's case law did not fully clarify the relationship between immigration enforcement and the protections against punishment. As scholars would come to observe, while *Wong Wing* "provide[d] little clear

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<sup>36</sup> 149 U.S. 698 (1893).

<sup>37</sup> *Id.* at 730; see also Nikolas Bowie & Norah Rast, *The Imaginary Immigration Clause*, 120 MICH. L. REV. 1419, 1473 (2022) (recounting the plaintiffs' arguments that Congress could deport noncitizens only as punishment for a crime).

<sup>38</sup> *Fong Yue Ting*, 149 U.S. at 730.

<sup>39</sup> 163 U.S. 228 (1896).

<sup>40</sup> Gerald L. Neuman, *Wong Wing v. United States: The Bill of Rights Protects Illegal Aliens*, in IMMIGRATION STORIES 31, 31–32 (David A. Martin & Peter H. Schuck eds., 2005).

<sup>41</sup> *Wong Wing*, 163 U.S. at 235.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 238.

<sup>44</sup> *Id.* at 237.

guidance,” it established a baseline that “incarceration and other possibly punitive aspects of deportation laws” must comply with the Bill of Rights.<sup>45</sup> But despite demarcating that constitutional line in *Wong Wing*, “the Supreme Court has rarely, if ever, seriously considered the basic analytical and normative questions raised by the civil/criminal dichotomy in the deportation context.”<sup>46</sup> Further complicating matters is that *Wong Wing* was decided well before the Court developed its robust punishment doctrine, leaving its due process analysis undertheorized and underinclusive relative to canonical punishment cases.<sup>47</sup> The current moment of immigration enforcement offers the opportunity to examine the applicability of punishment doctrine to immigration policies to realize the constitutional backstop provided by *Wong Wing*.

## II. EXTRAORDINARY IMMIGRATION ENFORCEMENT IN 2025

President Trump’s second term has featured a dramatic increase in the exclusion and removal of noncitizens from the country.<sup>48</sup> Many of the Administration’s actions, though larger in scale, fit within the traditionally understood precepts of the federal immigration power.<sup>49</sup> Other actions, however, impose novel and severe restrictions on the liberty rights of noncitizens. Most notably, the Administration has deported noncitizens directly to foreign prisons and removed noncitizens to third-countries that are among the most dangerous in the world. Other policies in this liberty-burdening vein emerge continuously — like the rushed construction of new, subpar domestic detention facilities. This Part will briefly detail a small slice of the 2025 immigration enforcement picture, focusing on those policies that appear most like punishment, and the language that the Administration has used to justify its actions. These policies and official statements serve as the backdrop for the Note’s central analysis applying punishment doctrine to the executive branch.

The CECOT removals have been a much-publicized — and criticized — element of the second Trump Administration’s novel

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<sup>45</sup> KANSTROOM, *supra* note 19, at 123.

<sup>46</sup> Kanstroom, *supra* note 20, at 1464.

<sup>47</sup> See García Hernández, *supra* note 19, at 1355.

<sup>48</sup> *Promises Made, Promises Kept: Border Security Achieved in Fewer Than 100 Days*, WHITE HOUSE (Apr. 28, 2025), <https://www.whitehouse.gov/articles/2025/04/promises-made-promises-kept-border-security-achieved-in-fewer-than-100-days> [https://perma.cc/J3RE-R4HS] (purporting to make good on campaign promises to seal the border and implement the largest mass deportation policy in history).

<sup>49</sup> See, e.g., Proclamation No. 10,949, 90 Fed. Reg. 24497 (June 4, 2025) (reinstating and expanding travel ban akin to one imposed during the first Trump Administration and upheld in *Trump v. Hawaii*, 138 S. Ct. 2392, 2404–06, 2423 (2018)); Exec. Order No. 14,159, 90 Fed. Reg. 8443 (Jan. 20, 2025) (setting policy of enforcing immigration laws against all excludable and removable noncitizens).

immigration enforcement approach.<sup>50</sup> The men removed to CECOT reportedly believed they were being returned to their home country of Venezuela, and discovered they were actually headed to CECOT only when their planes touched down in El Salvador.<sup>51</sup> The vast majority of the men had no criminal records, and, of the ones who did, only a handful of the men had violent criminal histories.<sup>52</sup> Instead of relying solely on criminal records or court findings of gang membership to determine which noncitizens to send to CECOT, the Administration relied on a point system that also considered factors like tattoos and social media posts with alleged Tren de Aragua members.<sup>53</sup> The men remained imprisoned for almost four months until they were exchanged in a prisoner swap with Venezuela, all the while having no contact with their families or attorneys.<sup>54</sup>

A related enforcement tactic of the Trump Administration has been the liberal use, or attempted use, of what is meant to be a legally confined process: third-country removals. Under U.S. law, a noncitizen is removable to a third country to which they have no prior ties only if removal to their countries of birth, residence, and citizenship would be “impracticable, inadvisable, or impossible.”<sup>55</sup> Despite Congress’s sharp limitations on the use of third-country removals,<sup>56</sup> the Administration has aggressively pursued the tactic. Third-country removals greatly accelerated in both speed and scope in 2025<sup>57</sup> after a reported ICE memo explained to officials that noncitizens can be removed to third countries with just twenty-four hours’ notice or, in “‘exigent’ circumstances,” with

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<sup>50</sup> See David Nakamura et al., *Trump’s Immigration Ratings Turn Negative, Post-ABC-Ipsos Poll Finds*, WASH. POST (Apr. 25, 2025), <https://www.washingtonpost.com/immigration/2025/04/25/trump-immigration-approval-ratings-drop-poll> [<https://perma.cc/QS9C-DMFM>] (describing Americans’ views on this “high-profile” issue).

<sup>51</sup> See Kanno-Youngs et al., *supra* note 1.

<sup>52</sup> Mica Rosenberg et al., *Trump Administration Knew Vast Majority of Venezuelans Sent to Salvadoran Prison Had Not Been Convicted of U.S. Crimes*, PROPUBLICA (May 30, 2025, at 06:00 ET), <https://www.propublica.org/article/trump-el-salvador-deportees-criminal-convictions-cecot-venezuela> [<https://perma.cc/VA4Y-DAPK>].

<sup>53</sup> See Verónica Egui Brito, *U.S. Uses Point System to Identify, Deport Venezuelans It Says Are Tren de Aragua Members*, MIA. HERALD (Apr. 1, 2025, at 10:34 ET), <https://www.miamiherald.com/news/local/immigration/article303160006.html> [<https://perma.cc/N5H2-G4AE>].

<sup>54</sup> Sergio Martínez-Beltrán & Manuel Rueda, “Hell on Earth”: Venezuelans Deported to El Salvador Mega-Prison Tell of Brutal Abuse, NPR (July 27, 2025, at 07:21 ET), <https://www.npr.org/2025/07/27/nx-s1-5479143/hell-on-earth-venezuelans-deported-to-el-salvador-mega-prison-tell-of-brutal-abuse> [<https://perma.cc/2959-N535>].

<sup>55</sup> 8 U.S.C. § 1231(b)(1)(C)(iv); see also *Jama v. Immigr. & Customs Enf’t Agency*, 543 U.S. 335, 341 (2005) (reciting statutory requirements for removal to third countries).

<sup>56</sup> See *DHS v. D.V.D.*, 145 S. Ct. 2153, 2154 (2025) (Sotomayor, J., dissenting).

<sup>57</sup> See Jacqueline Metzler, *What Are Third-Country Deportations, And Why is Trump Using Them?*, COUNCIL ON FOREIGN RELS. (Sep. 3, 2025, at 13:50 ET), <https://www.cfr.org/article/what-are-third-country-deportations-and-why-trump-using-them> [<https://perma.cc/B4DP-D3SK>].

as little as six-hours' notice.<sup>58</sup> Around the same time, the Administration initiated plans to send noncitizens with criminal histories to the African nations of Eswatini and South Sudan,<sup>59</sup> two countries in which the United States has documented significant and systemic human rights violations, including governmental violence against civilians, persecution of protected groups, and dangerous conditions in detention facilities.<sup>60</sup> As one immigrants' rights group put it, "third-country removals . . . are becoming a one-way ticket to indefinite detention or high-risk circumstances on foreign soil."<sup>61</sup>

The Administration has also encouraged the construction of new domestic detention facilities with inhumane conditions as part of its push to detain and deport as many noncitizens as possible. Consider, for instance, the construction of a new detention facility in the Everglades — an expansive wetland in Southern Florida — referred to by Administration officials and their supporters as "Alligator Alcatraz" after the dangerous wildlife that inhabit the surrounding area.<sup>62</sup> Erected and operated by the state of Florida under an ambiguous agreement with the federal government,<sup>63</sup> Alligator Alcatraz can house thousands of detainees in a "tent city" containing cage-like cells.<sup>64</sup> Shortly after the detention center opened, detainees complained of "sweltering heat" inside buildings, swarms of mosquitos inside cells, wastewater flooding the floors, twenty-four-hour interior fluorescent lights, inconsistent medical care, and worm-infested food.<sup>65</sup>

Administration officials have expressed that these immigration policies go beyond immigration enforcement and are instead measures to

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<sup>58</sup> Maria Sacchetti, Carol D. Leonnig & Marianne LeVine, *ICE Memo Outlines Plan to Deport Migrants to Countries Where They Are Not Citizens*, WASH. POST (July 13, 2025), <https://www.washingtonpost.com/immigration/2025/07/12/immigrants-deportations-trump-ice-memo/> [<https://perma.cc/E53V-3SWG>].

<sup>59</sup> Gerald Imray, Michelle Gumede & Rebecca Santana, *US Departs Immigrants from Jamaica, Cuba and Other Countries to the African Kingdom of Eswatini*, AP NEWS (July 16, 2025, at 15:44 ET), <https://apnews.com/article/deportees-trump-africa-eswatini-migrant-africa-8d10c5a1de7ba50cbea9712b6b5fbfbc> [<https://perma.cc/9ZRP-N6XR>].

<sup>60</sup> U.S. Dep't of State, Bureau of Democracy, H.R. and Lab., *Eswatini 2022 Human Rights Report 1–2, 7* (2023) [hereinafter *Eswatini Human Rights Report*]; U.S. Dep't of State, Bureau of Democracy, H.R. and Lab., *South Sudan 2023 Human Rights Report 1–3, 5, 46* (2023).

<sup>61</sup> AM. IMMIGR. COUNCIL, *supra* note 9, at 51.

<sup>62</sup> Chelsea Bailey, Isabel Rosales & Alaa Elassar, *"Alligator Alcatraz": What to Know About Florida's New Controversial Migrant Detention Facility*, CNN (July 13, 2025, at 18:03 ET), <https://www.cnn.com/2025/07/01/us/what-is-alligator-alcatraz-florida/> [<https://perma.cc/9UBL-LNQG>].

<sup>63</sup> See Ana Ceballos, Ana Claudia Chacin & Siena Duncan, *Who Runs Alligator Alcatraz? Florida or the Federal Government?*, TAMPA BAY TIMES (Aug. 8, 2025), <https://www.tampabay.com/news/florida-politics/2025/08/08/who-runs-alligator-alcatraz-florida-or-federal-government/> [<https://perma.cc/W6R7-37QH>].

<sup>64</sup> Bailey, Rosales & Elassar, *supra* note 62.

<sup>65</sup> *Id.*; see also Nicole Acevedo, *Detainees Held at Alligator Alcatraz Describe Cage-Like Units Swarmed by Mosquitoes*, NBC NEWS (July 22, 2025, at 18:51 ET), <https://www.nbcnews.com/news/us-news/alligator-alcatraz-florida-detainees-conditions-fungus-mosquitoes-rcna220205> [<https://perma.cc/B3A6-9RLS>].

deter future crime and impose retribution on noncitizens, what the Supreme Court has called “the traditional aims of punishment.”<sup>66</sup> For instance, standing before a CECOT jail cell on a visit to the facility in June 2025, Secretary of Homeland Security Kristi Noem leveraged the CECOT removals to promote deterrence: “I . . . want everybody to know, if you come to our country illegally, this is one of the consequences you could face.”<sup>67</sup> She went on to describe CECOT as “one of the tools in our toolkit that we will use if you commit crimes against the American people.”<sup>68</sup> Secretary Noem also suggested that the deportees “should stay there for the rest of their lives.”<sup>69</sup> In another instance, Secretary of State Marco Rubio emphasized the Administration’s retributivist goal while describing the third-country removal policy: “[W]e are working with other countries to say, ‘we want to send you some of the most despicable human beings . . . , will you do that as a favor to us?’ And the further away from America the better, so they can’t come back across the border.”<sup>70</sup> Summing up the Administration’s motivations across several of its major, novel enforcement policies, DHS spokeswoman Tricia McLaughlin expressed a sentiment of retribution and criminal deterrence: “Whether it is CECOT, Alligator Alcatraz, Guantanamo Bay or another detention facility, these dangerous criminals will not be allowed to terrorize U.S. citizens.”<sup>71</sup>

### III. PREVENTING EXECUTIVE PUNISHMENT

That many of the Administration’s novel immigration enforcement policies “constitute[] punishment may seem obvious at first blush,” as one commentator put it.<sup>72</sup> However, establishing as a matter of law what may seem obvious as a matter of fact is complicated in this context. To police the line between civil penalties and punishment — which could be imposed only pursuant to a conviction — courts deploy what this Note terms “punishment doctrine.”<sup>73</sup> However, the doctrine is

<sup>66</sup> *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 (1963).

<sup>67</sup> Clarissa-Jan Lim, *Sec. Kristi Noem Uses Inmates of Notorious Salvadoran Prison in Photo Op*, MSNBC (Mar. 27, 2025, at 16:30 ET), <https://www.msnbc.com/top-stories/latest/kristi-noem-el-salvador-prison-cecot-video-rcnar98394> [<https://perma.cc/L5MP-J4UW>] (quoting Secretary Noem).

<sup>68</sup> *Id.* (quoting Secretary Noem).

<sup>69</sup> Julie Turkewitz et al., “*Alien Enemies*” or *Innocent Men*? Inside Trump’s Rushed Effort to Deport 238 Migrants, N.Y. TIMES (Apr. 16, 2025), <https://www.nytimes.com/2025/04/15/world/americas/trump-migrants-deportations.html> [<https://perma.cc/KQ9T-6M2L>] (quoting Secretary Noem).

<sup>70</sup> NEWSWEEK, *Rubio Working To Send “The Most Despicable” People to Other Countries*, at 00:06 (YouTube, Apr. 30, 2025), <https://www.youtube.com/watch?v=34wtFjf974U> [<https://perma.cc/YYG6-Y599>].

<sup>71</sup> Camilo Montoya-Galvez, *Trump Administration Using Guantanamo to Detain Foreigners from 26 Countries, Including Criminal Detainees*, CBS NEWS (July 8, 2025, at 08:56 ET), <https://www.cbsnews.com/news/trump-guantanamo-detain-foreigners-from-26-countries> [<https://perma.cc/BRD5-STV8>] (quoting Assistant Secretary McLaughlin).

<sup>72</sup> Goldman, *supra* note 21.

<sup>73</sup> *See, e.g., United States v. Salerno*, 481 U.S. 739, 746–47 (1987); *see also supra* p. 756.

regularly described as one focusing on “legislative intent,”<sup>74</sup> and the Supreme Court has yet to apply punishment doctrine to executive branch action outside the context of prison management. That raises two distinct problems: first, whether the analysis can be applied to additional executive action at all, and second, how that analysis, with its focus on intent, can be conducted in the Article II context. The latter is a particularly thorny issue given the Supreme Court’s reluctance to read much legal meaning into public statements of executive branch officials in recent cases.

This Part provides solutions to both of these problems by establishing the theoretical foundation for applying punishment doctrine to executive action and ascertaining executive intent. It begins by surveying modern punishment doctrine before presenting its primary arguments.

### A. Punishment Doctrine

Under the Fifth and Fourteenth Amendments, all individuals have a substantive liberty right to be free from punitive state action absent a valid criminal conviction.<sup>75</sup> However, not all state action that burdens the individual right to liberty constitutes punishment necessitating criminal protections.<sup>76</sup> In the landmark case *Bell v. Wolfish*,<sup>77</sup> for instance, the Supreme Court distinguished “punitive measures that may not constitutionally be imposed prior to a determination of guilt”<sup>78</sup> from civil detention that may be imposed “so long as [its] conditions and restrictions do not amount to punishment, or otherwise violate the Constitution.”<sup>79</sup> Where restrictions on liberty do not amount to criminal punishment, courts treat them as civil penalties and employ the classic due process framework from *Mathews v. Eldridge*<sup>80</sup> to assess what protections are required.<sup>81</sup>

The key punishment inquiry centers around determining what constitutes “punishment in the constitutional sense of that word.”<sup>82</sup> Often, distinguishing whether an act imposes a civil penalty or criminal

<sup>74</sup> *Salerno*, 481 U.S. at 747.

<sup>75</sup> See *Ingraham v. Wright*, 430 U.S. 651, 671 n.40 (1977) (“[T]he State does not acquire the power to punish . . . until after it has secured a formal adjudication of guilt in accordance with due process of law. Where the State seeks to impose punishment without such an adjudication, the pertinent constitutional guarantee is the Due Process Clause of the Fourteenth Amendment.”).

<sup>76</sup> E.g., *Salerno*, 481 U.S. at 746 (“[T]he mere fact that a person is detained does not inexorably lead to the conclusion that the government has imposed punishment.”).

<sup>77</sup> 441 U.S. 520 (1979).

<sup>78</sup> *Id.* at 537.

<sup>79</sup> *Id.* at 536–37.

<sup>80</sup> 424 U.S. 319 (1976).

<sup>81</sup> See *id.* at 335; see also Hallie Ludsin, *Frozen in Time: The Supreme Court’s Outdated, Incoherent Jurisprudence on Congressional Plenary Power over Immigration*, 47 N.C. J. INT’L L. 433, 441–42 (2022) (discussing *Mathews* balancing in civil detention context).

<sup>82</sup> *Wolfish*, 441 U.S. at 538.

punishment is “extremely difficult and elusive.”<sup>83</sup> As scholars have observed, the line is not always clear<sup>84</sup> and many government actions that function like punishment — including, some have argued, immigration detention and removal<sup>85</sup> — are considered to be civil restrictions.<sup>86</sup> Nonetheless, the Supreme Court has explicated a standard, centering on the government’s motivation for imposing a penalty, for determining when official actions rise to the level of punishment necessitating a full criminal process.<sup>87</sup> Over time, the Court’s punishment standard developed to be focused on legislative acts,<sup>88</sup> but — as the next section explores — its theoretical underpinnings translate just as well to executive actions.

The punishment analysis is twofold, containing an initial inquiry into whether Congress, in establishing a penalty, intended to impose a criminal punishment or civil regulation and a secondary inquiry into whether the “purpose or effect”<sup>89</sup> of the penalty is so punitive as to negate any civil-regulatory intention.<sup>90</sup> The initial inquiry looks to whether Congress “indicated either expressly or impliedly a preference for [the] label” of criminal punishment or civil penalty.<sup>91</sup> In traditional punishment analysis of legislative penalties, the Court has often described the initial inquiry as “a matter of statutory construction,”<sup>92</sup> and it has drawn on familiar tools to answer it. For instance, in *Kennedy v. Mendoza-Martinez*,<sup>93</sup> the Court relied on legislative history that reflected a congressional intent to exact retribution on and make an example of war deserters to conclude that a denaturalization provision was intended as a punitive measure.<sup>94</sup> In another case, the Court relied on Congress’s labeling of a challenged provision as civil and its separation of that provision from other express criminal penalties to hold that Congress acted pursuant to a nonpunitive intent.<sup>95</sup>

If a court finds that Congress was not acting pursuant to a punitive intent, it will move to the secondary inquiry where “only the clearest proof [will] suffice to establish the unconstitutionality of a statute on”

<sup>83</sup> *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 (1963).

<sup>84</sup> See, e.g., Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1890, 1925–26 (2000).

<sup>85</sup> See, e.g., García Hernández, *supra* note 19, at 1349; Juliet P. Stumpf, *Civil Detention and Other Oxymorons*, 40 QUEEN’S L.J. 55, 57–58 (2014); René Lima-Marín & Danielle C. Jefferis, *It’s Just Like Prison: Is a Civil (Nonpunitive) System of Immigration Detention Theoretically Possible?*, 96 DENV. L. REV. 955, 963–65 (2019).

<sup>86</sup> See, e.g., Stumpf, *supra* note 85, at 57–58.

<sup>87</sup> See, e.g., *United States v. Ward*, 448 U.S. 242, 248 (1980).

<sup>88</sup> See, e.g., *United States v. Salerno*, 481 U.S. 739, 747 (1987).

<sup>89</sup> *Ward*, 448 U.S. at 248.

<sup>90</sup> *Id.* at 248–49.

<sup>91</sup> *Id.* at 248.

<sup>92</sup> *Id.*

<sup>93</sup> 372 U.S. 144 (1963).

<sup>94</sup> See *id.* at 180–84.

<sup>95</sup> *Ward*, 448 U.S. at 249.

the ground that it is impermissible punishment.<sup>96</sup> Typically, that secondary inquiry hinges on “whether an alternative purpose” apart from punishment can be imputed onto the penalty and whether the penalty is proportionate to that alternative purpose.<sup>97</sup>

To aid its review at both stages, the Court has explicated factors that act as “useful guideposts in determining whether particular restrictions . . . amount to punishment in the constitutional sense of that word.”<sup>98</sup> Those factors, laid out in *Mendoza-Martinez*, consist of:

[1] Whether the sanction involves an affirmative disability or restraint, [2] whether it has historically been regarded as a punishment, [3] whether it comes into play only on a finding of *scienter*, [4] whether its operation will promote the traditional aims of punishment — retribution and deterrence, [5] whether the behavior to which it applies is already a crime, [6] whether an alternative purpose to which it may rationally be connected is assignable for it, and [7] whether it appears excessive in relation to the alternative purpose assigned . . . .<sup>99</sup>

These factors “are all relevant to the inquiry, and may often point in differing directions.”<sup>100</sup>

#### B. *Extending Punishment Doctrine to Other Executive Actions*

The Supreme Court has applied punishment doctrine to a certain, circumscribed set of executive actions: those of prison officials in the administering of pretrial or other civil detentions. Indeed, one of the most important cases on punishment doctrine, *Wolfish*, involved a challenge to detention conditions by pretrial detainees.<sup>101</sup> However, the Supreme Court has seemingly never applied the punishment doctrine to executive action outside the detention context. In fact, the Court has more or less explicitly stopped short of doing so, producing uncertainty on whether the doctrine can be stretched to cover additional types of executive actions.

The 1977 case *Ingraham v. Wright*<sup>102</sup> and the legal landscape it produced are illustrative. There, the Supreme Court reviewed whether corporal punishment in public schools violated the Eighth Amendment or procedural due process under the Fourteenth Amendment.<sup>103</sup> The case centered on a policy of the Dade County School Board and the school district’s superintendent — the Board’s “executive agent”<sup>104</sup> — and one

<sup>96</sup> *Id.* (quoting *Flemming v. Nestor*, 363 U.S. 603, 617 (1960)); *cf.* *Int’l Union, United Mine Workers v. Bagwell*, 512 U.S. 821, 838 (1994) (“[T]his Court generally has deferred to a legislature’s determination whether a sanction is civil or criminal . . .”).

<sup>97</sup> *Schall v. Martin*, 467 U.S. 253, 269 (1984) (quoting *Mendoza-Martinez*, 372 U.S. at 168).

<sup>98</sup> *Bell v. Wolfish*, 441 U.S. 520, 538 (1979).

<sup>99</sup> *Mendoza-Martinez*, 372 U.S. at 168–69 (footnotes omitted).

<sup>100</sup> *Id.* at 169.

<sup>101</sup> *Wolfish*, 441 U.S. at 523.

<sup>102</sup> 430 U.S. 651 (1977).

<sup>103</sup> *Id.* at 653.

<sup>104</sup> DADE CNTY., FLA., SCH. BD. RULES ch. 6GX13-2A-1.02 (1977) (repealed 2011).

school's principal and assistant principals were named as defendants.<sup>105</sup> The Court ultimately sided with the officials,<sup>106</sup> but *Ingraham* is relevant here for what it did not decide. Also presented to the Court for review in the case was the question of whether corporal punishment violated the students' substantive due process rights.<sup>107</sup> The Court declined to grant certiorari on that issue,<sup>108</sup> bypassing an opportunity to apply punishment doctrine to regulate the imposition of executive punishment, as it did two years later in *Wolfish*.<sup>109</sup> In the years since, most circuit courts have not supplied the punishment analysis missing from *Ingraham*, instead opting to apply the less protective "shock[s]-the-conscience" test to assess claims of substantive liberty deprivations resulting from similar instances of corporal punishment.<sup>110</sup>

Moreover, punishment doctrine may seem like a less natural fit for executive action in certain respects. Under longstanding separation of powers principles, the legislature determines when to punish, and the Executive is simply supposed to carry out the legislature's commands.<sup>111</sup> From this perspective, asking whether the Executive seeks to punish might be awkward outside the prison management context, which typically involves executive oversight over prior legislatively mandated punishment. Moreover, the Supreme Court applies distinct tests to executive actions and to statutes to assess other substantive due process violations.<sup>112</sup> As a result, it cannot be taken for granted that punishment doctrine would apply in a similar manner to executive action outside the context of prison management, if at all.

Ultimately, however, the Court's prior decisions establish the basis for applying a robust form of the doctrine in additional contexts of executive action. As the Court has recognized many times over, individuals have a substantive right to not be punished absent criminal trial.<sup>113</sup> Functionally, it would be odd if an individual can assert that right only against the legislative branch, but not the executive branch — which practically exercises state power and thus the imposition of official

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<sup>105</sup> *Ingraham*, 430 U.S. at 654–57. While there was also a state statute "authoriz[ing] limited corporal punishment" in schools "by negative inference," *id.* at 655, the plaintiffs did not challenge the statute; only the school board's policy and individual actions of schoolteachers working in the named plaintiffs' school were challenged, *id.* at 653–54, 654 n.2.

<sup>106</sup> *See id.* at 683.

<sup>107</sup> *See id.* at 659 n.12.

<sup>108</sup> *Id.*

<sup>109</sup> *See Bell v. Wolfish*, 441 U.S. 520, 538 (1979).

<sup>110</sup> Courtney Mitchell, *Corporal Punishment in the Public Schools: An Analysis of Federal Constitutional Claims*, 73 LAW & CONTEMP. PROBS. 321, 324 (2010).

<sup>111</sup> *See Daniel Epps, Checks and Balances in the Criminal Law*, 74 VAND. L. REV. 1, 3 (2021); Frank H. Easterbrook, *The Case of the Speluncean Explorers: Revisited*, 112 HARV. L. REV. 1913, 1913–14 (1999).

<sup>112</sup> *See Lee Farnsworth, Conscience Shocking in the Age of Trump*, 2020 WIS. L. REV. 805, 811.

<sup>113</sup> *See, e.g., Ingraham*, 430 U.S. at 671 n.40; *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 164–66 (1963).

punishment.<sup>114</sup> Doctrinally, the Court has identified the Due Process Clauses as the source of the right against punishment absent conviction.<sup>115</sup> Those clauses apply to any government-induced “depriv[ation] of life, liberty, or property”<sup>116</sup> and their availability as bulwarks against adverse action by any branch of government is not in doubt.<sup>117</sup> In fact, due process has a particular concern for unlawful executive action, having been developed in England to rein in the Crown’s abuses.<sup>118</sup> The universality of punishment protections and due process’s peculiar concern with executive overreach counsel in favor of subjecting executive action to punishment doctrine.

Related arguments suggest not just that punishment doctrine should extend to executive action, but also that it should apply in a less deferential manner. When assessing the punitive nature of a legislative action, the “Court generally has deferred to a legislature’s determination whether a sanction is civil or criminal.”<sup>119</sup> However, in the rare instances in which the Court has applied the punishment analysis beyond legislative action, it has suggested that such deference is less apt. For instance, in one case involving the distinction between civil and criminal contempt of court, the Supreme Court stated that “[w]here a single judge, rather than a legislature, declares a particular sanction to be civil or criminal, such deference is less appropriate.”<sup>120</sup> While the Court did not explain its hesitation to defer to judicial determinations, the authority it relied on for its point<sup>121</sup> highlighted crucial differences between judicial pronouncements and legislative enactments.<sup>122</sup> Those differences included that legislative enactments represent democratic “choice[s] regarding the promotion of particular societal interests” while judicial decrees do not, and that judicial decrees “carry greater risks of censorship and discriminatory application.”<sup>123</sup> According to the Court,

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<sup>114</sup> See THE FEDERALIST NO. 78, at 522–23 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

<sup>115</sup> *Bell v. Wolfish*, 441 U.S. 520, 535 (1979).

<sup>116</sup> U.S. CONST. amend. V; *id.* amend. XIV, § 1.

<sup>117</sup> See Rosalie Berger Levinson, *Reining in Abuses of Executive Power Through Substantive Due Process*, 60 FLA. L. REV. 519, 524–35 (2008) (describing successful substantive due process challenges to actions of all three branches of government); BRANDON L. GARRETT, *DEFENDING DUE PROCESS* 37 (2025) (tracing the history of due process to the 1215 Magna Carta and explaining how “the concept of due process was understood to constrain the monarch and the government in a variety of ways, as judges interpreted it in civil and criminal cases”).

<sup>118</sup> See Randy E. Barnett & Evan D. Bernick, *No Arbitrary Power: An Originalist Theory of the Due Process of Law*, 60 WM. & MARY L. REV. 1599, 1606–12 (2019).

<sup>119</sup> *Int’l Union, United Mine Workers v. Bagwell*, 512 U.S. 821, 838 (1994); see also *Flemming v. Nestor*, 363 U.S. 603, 617 (1960) (cautioning against “[j]udicial inquiries into Congressional motives”).

<sup>120</sup> *Bagwell*, 512 U.S. at 838.

<sup>121</sup> *Id.* (citing *Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753 (1994)).

<sup>122</sup> *Madsen*, 512 U.S. at 764–65.

<sup>123</sup> *Id.* at 764.

such differences warranted a “more stringent application” of constitutional protections.<sup>124</sup>

Similar differences between legislative and executive actions also warrant heightened judicial skepticism of actions alleged to constitute punishment. Of course, unlike a federal judge, the President and Vice President are elected officials.<sup>125</sup> However, in the vast majority of cases, executive actions are much like judicial decrees in that they represent the decision of just one or a couple unelected officials within a single branch.<sup>126</sup> And in all cases, executive actions bypass the democratic fixtures of the legislative process, including bicameralism and certain supermajority rules, that provide practical constraints on the power to impose controversial policies.<sup>127</sup> Also like judicial decisions (and unlike legislative action, which ideally sets generally applicable law<sup>128</sup>), executive action is prone to “greater risks of censorship and discriminatory application”<sup>129</sup> — as the second Trump Administration’s selective immigration enforcement against student activists demonstrates.<sup>130</sup> As a result, executive branch decisionmaking appears to fall well short of the principles that warrant deference to legislative determinations on punishment.<sup>131</sup>

### *C. Punishment Doctrine as a Counter to Narrow Judicial Review of the Executive*

Extending punishment doctrine to additional contexts of executive action survives many of the arguments that doom other attempts to restrict executive power. First, it is able to overcome courts’ general deference toward and reluctance to review immigration and national

<sup>124</sup> *Id.* at 765.

<sup>125</sup> Compare U.S. CONST. art. II, § 1, cl. 1 (providing that the President and Vice President of the United States of America “be elected”), and *id.* amend. XII (explaining how the President and Vice President are elected), with *id.* art. II, § 2, cl. 2 (providing that federal judges shall be appointed by the President “with the Advice and Consent of the Senate”), and *id.* art. III, § 1 (providing that federal “Judges . . . shall hold their Offices during good Behaviour”).

<sup>126</sup> See, e.g., ADAM B. COX & CRISTINA M. RODRÍGUEZ, *THE PRESIDENT AND IMMIGRATION LAW* 10 (2020) (“Low-level executive branch officials . . . 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.”); *FCC v. Consumers’ Rsch.*, 145 S. Ct. 2482, 2538 (2025) (Gorsuch, J., dissenting) (“Lower level officials, unknown to the public and sometimes even to the White House, now make many of the rules we live by.”).

<sup>127</sup> See Neomi Rao, *Why Congress Matters: The Collective Congress in the Structural Constitution*, 70 FLA. L. REV. 1, 45–46, 61–62 (2018).

<sup>128</sup> See *id.* at 14–15.

<sup>129</sup> *Madsen*, 512 U.S. at 764.

<sup>130</sup> See *Am. Ass’n of Univ. Professors v. Rubio*, No. 25-10685, 2025 WL 2777659, at \*39 (D. Mass. Sep. 30, 2025).

<sup>131</sup> *Cf. Int’l Union, United Mine Workers v. Bagwell*, 512 U.S. 821, 838 (1994).

security policies.<sup>132</sup> The one area of executive action to which punishment doctrine is already applied, the management of prisons and detention centers, is precisely one of those areas of law where judicial review is at its lowest.<sup>133</sup> Judicial deference in the prison management context is often justified with arguments that allege “that prisoners’ rights are more limited than those in the free world,” “that the separation of powers counsels against judicial interference,” and “that judges lack the expertise needed to monitor correctional facilities and ensure that they remain safe and secure.”<sup>134</sup> Those justifications are virtually identical to the ones deployed in the contexts of immigration and national security deference, where the prevailing view is “that Congress may make rules as to [noncitizens] that would be unacceptable if applied to citizens”<sup>135</sup> and “that the Constitution allocates foreign relations and national security judgments to the ‘political branches[,]’ . . . [with] judges lack[ing] the competence to second-guess executive judgments.”<sup>136</sup> As such, if judicial intrusion is warranted in one context where deference to executive actions is rampant, there is little to justify not applying judicial review to others.

Punishment doctrine is also a match for the weighty national security and foreign affairs interests that typically justify executive action when raised, even once doctrines of deference have been overcome.<sup>137</sup> That is because the rights to liberty and to be free from punishment provide strong bulwarks against government action as well. Application of the doctrine to legislative action in the immigration sphere proves the point. In *Wong Wing*, even while the Court recognized Congress’s absolute power to exclude and remove noncitizens in the name of national security, it erected a constitutional backstop to prevent the punishment of noncitizens through immigration law.<sup>138</sup> The Court spoke more clearly in *Mendoza-Martinez*, which involved a denaturalization provision of the immigration laws, when justifying its application of the punishment doctrine: “It is fundamental that the great powers of Congress to conduct war and to regulate the Nation’s foreign relations are subject to

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<sup>132</sup> See *Trump v. Hawaii*, 138 S. Ct. 2392, 2418–20 (2018) (discussing the low standard of judicial review applied in immigration cases, particularly those that implicate national security); *Ziglar v. Abbasi*, 582 U.S. 120, 142–43 (2017) (describing the deference courts pay to the political branches’ determinations of national security).

<sup>133</sup> See, e.g., Wynne Muscatine Graham, *The Forgotten History of Prison Law: Judicial Oversight of Detention Facilities in the Nation’s Early Years*, 138 HARV. L. REV. 1715, 1722–25 (2025) (“Judicial deference to prison administrators serves as the backdrop for contemporary prison law.” *Id.* at 1722.).

<sup>134</sup> *Id.* at 1718.

<sup>135</sup> *Demore v. Kim*, 538 U.S. 510, 522 (2003).

<sup>136</sup> Shirin Sinnar, *A Label Covering a “Multitude of Sins”: The Harm of National Security Deference*, 136 HARV. L. REV. F. 59, 69 (2022).

<sup>137</sup> See, e.g., *id.* at 69–70.

<sup>138</sup> See *Wong Wing v. United States*, 163 U.S. 228, 237–38 (1896).

the constitutional requirements of due process.”<sup>139</sup> As such, unlike classical immigration law, where noncitizens’ liberty rights fold under the pressure of the government’s security and foreign policy concerns,<sup>140</sup> punishment doctrine provides an apt tool to rein in harsh immigration enforcement policies.

*D. Utilizing Statements of Executive Officials  
as Evidence of Punitive Intent*

Extending punishment doctrine, which is concerned largely with legislative intent, to executive action poses a second-order difficulty in application. Since the doctrine focuses, in part, on explicit or implicit evocations of punitive intent from the legislature, it is unclear whether courts will consider the many public statements made by executive officials concerning punitive executive policies as evidence. This section addresses, and overcomes, that potential difficulty.

Utilizing the statements of executive branch officials as evidence of the Executive’s intent has both an intuitive appeal and a historical pedigree. As Professor Katherine Shaw remarked in a study of the use of presidential speech in federal courts, “where the conduct in question is executive action, statements by executive branch officials supply the most relevant evidence of intent.”<sup>141</sup> That intuition is particularly true where governmental intent is a component of the relevant legal test, as is the case in the punishment analysis.<sup>142</sup> The Supreme Court has recognized as much and has used the statements of executive actors as evidence — occasionally dispositive evidence — of an inappropriate government purpose.<sup>143</sup> However, the efficacy of basing legal claims on statements of executive officials has been called into partial question in two recent cases: *Trump v. Hawaii*<sup>144</sup> and *DHS v. Regents of the University of California*.<sup>145</sup>

In *Trump v. Hawaii*, the Court reviewed the constitutionality of the first Trump Administration’s travel ban from seven countries, including five with Muslim-majority populations.<sup>146</sup> The plaintiffs in the case presented evidence of then-candidate Trump’s statements disparaging the Muslim community as evidence that the ban was impermissibly

<sup>139</sup> *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 164–65 (1963).

<sup>140</sup> *See, e.g., Kleindienst v. Mandel*, 408 U.S. 753, 765–70 (1972).

<sup>141</sup> Katherine Shaw, *Beyond the Bully Pulpit: Presidential Speech in the Courts*, 96 TEX. L. REV. 71, 138 (2017).

<sup>142</sup> *See id.* at 137.

<sup>143</sup> *See, e.g., Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n*, 138 S. Ct. 1719, 1729–30 (2018) (pointing to statements made by agency commissioners as evidence that the Colorado Civil Rights Commission acted with impermissible antireligious animus); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 540–42 (1993) (pointing, in part, to statements of “city officials,” *id.* at 541, as evidence that the city acted with impermissible hostility to a particular religion).

<sup>144</sup> 138 S. Ct. 2392 (2018).

<sup>145</sup> 140 S. Ct. 1891 (2020).

<sup>146</sup> 138 S. Ct. at 2406, 2421.

motivated by animus, but the Court refused to hold that the statements outweighed the facial neutrality of the policy.<sup>147</sup> In *Regents*, the Court was faced with answering whether the first Trump Administration's rescission of the Deferred Action for Childhood Arrivals immigration-relief program was motivated by impermissible anti-Latino bias.<sup>148</sup> Much like in *Trump v. Hawaii*, the plaintiffs presented evidence of President Trump's statements that allegedly expressed anti-Latino sentiment, but this time the Court held that, regardless of the statements, the President was not the relevant actor for purposes of the analysis; the Acting Secretary of Homeland Security and the Attorney General were.<sup>149</sup>

Whatever the merits were of excluding the public statements as relevant evidence in those cases, neither of the two expounds principles barring the use of the statements of executive officials in the punishment analysis. Taking *Regents* first, the Court there mostly refused to consider President Trump's statements as evidence because he was purportedly far removed from the relevant government action<sup>150</sup> — a circumstance-specific rationale that counsels litigants simply to ensure that they supply statements from the appropriate official (in the immigration context, that is typically the Secretary of Homeland Security and the Attorney General<sup>151</sup>). Moving to *Trump v. Hawaii*, the Court in that case was primarily concerned with the security and foreign affairs interests that the plaintiffs' claims implicated, and its review was muted as a result.<sup>152</sup> As discussed prior, the punishment analysis has been deployed, and not been watered down, in the context of national security and foreign affairs.<sup>153</sup> As a result, courts' general concern with intruding on the Executive's national security or foreign affairs prerogatives should not prevent them from acknowledging the statements of executive officials expressing the penal intent behind immigration policies. Finally, to the extent that the *Regents* or *Trump v. Hawaii* Courts were instead, or additionally, motivated by a "blinkered approach" to the President's racially charged comments,<sup>154</sup> punishment doctrine is facially nonracial in a manner that discrimination claims are not,

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<sup>147</sup> *Id.* at 2417–18, 2421.

<sup>148</sup> *Regents*, 140 S. Ct. at 1915.

<sup>149</sup> *Id.* at 1916.

<sup>150</sup> *See id.*

<sup>151</sup> *See id.*

<sup>152</sup> 138 S. Ct. at 2418–20.

<sup>153</sup> *See, e.g., Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 164–65 (1963).

<sup>154</sup> *Regents*, 140 S. Ct. at 1917 (Sotomayor, J., concurring in part, concurring in the judgment in part, and dissenting in part) (quoting *Trump v. Hawaii*, 138 S. Ct. at 2438 n.3 (Sotomayor, J., dissenting)); cf. Angela Onwuachi-Willig, *The Supreme Court, 2022 Term — Comment: Roberts's Revisions: A Narratological Reading of the Affirmative Action Cases*, 137 HARV. L. REV. 192, 208 (2023) (noting how Chief Justice Roberts has "den[ie]d the existence of anything other than Jim Crow separate-but-equal racism").

permitting courts to analyze punitive executive action in a largely race-neutral manner.

#### IV. CONSEQUENCES AND IMPLICATIONS OF EXTENDING THE PUNISHMENT ANALYSIS TO THE EXECUTIVE'S IMMIGRATION ENFORCEMENT ACTIONS

##### A. *Applying the Analysis*

As shown in Part II, it is possible to establish legally what is “self-evident” in reality — that many of the second Trump Administration’s immigration policies constitute punishment.<sup>155</sup> Deploying the punishment doctrine analysis to many of the Administration’s most liberty-burdening immigration enforcement actions would doom the policies. As Professor Ahilan Arulanantham and practitioner Raphael Goldman have convincingly argued, the deportation of noncitizens to CECOT readily fails to pass constitutional muster under both of punishment doctrine’s inquiries.<sup>156</sup> In its statements, the Administration manifested an express desire to exact retribution on the individuals subject to the policy and deter future immigration violations — to highlight just one example, recall that the Secretary of Homeland Security said the removed men “should stay there for the rest of their lives”<sup>157</sup> and threatened other noncitizens with prosecution and deportation.<sup>158</sup> In any event, transferring noncitizens to indefinite detention in one of the most notorious prisons on the planet is wholly disproportionate to any alternative purpose that the government might try to assign to it.<sup>159</sup>

Other novel immigration policies that likewise significantly burden noncitizens’ liberty falter under a similar punishment analysis. Take the third-country removal policy to patently unsafe places like South Sudan and Eswatini.<sup>160</sup> In announcing or justifying these policies, members of the Administration manifested a subjective intent to punish noncitizens by invoking principles of retribution and deterrence. Secretary of State Rubio, who negotiated with the receiving third countries, hit on both when he described the noncitizens subject to those removals as “the most despicable human beings” who needed to be as “[far] away from America” as possible to ensure they would not return.<sup>161</sup> More objective markers, guided by the *Mendoza-Martinez* factors, likewise support a

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<sup>155</sup> Arulanantham, *supra* note 21.

<sup>156</sup> See sources cited *supra* note 21.

<sup>157</sup> Turkewitz et al., *supra* note 69 (quoting Secretary Noem). This sentiment is manifestly at odds with the legal rationale for immigration detention, which holds that it is constitutional if temporary. See, e.g., *Banyee v. Garland*, 115 F.4th 928, 932–33 (8th Cir. 2024).

<sup>158</sup> See Lim, *supra* note 67 (quoting Secretary Noem’s remarks that “if you come to our country illegally, [CECOT] is one of the consequences you could face”).

<sup>159</sup> See *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168–69 (1963).

<sup>160</sup> See *supra* notes 55–61 and accompanying text.

<sup>161</sup> NEWSWEEK, *supra* note 70, at 00:06.

finding that the third-country removal policy is punishment. Removal to a country where one is vulnerable to “extrajudicial killing[,] torture[,] and cruel, inhuman, or degrading treatment or punishment by the government”<sup>162</sup> should qualify as an affirmative restraint on liberty under traditional understandings of due process.<sup>163</sup> Moreover, the Administration represented that many of the noncitizens removed to unsafe third countries were “convicted criminals,”<sup>164</sup> suggesting, under *Mendoza-Martinez*, that “the behavior” targeted by the policy was “already a crime.”<sup>165</sup> Even if courts had to move to the secondary punishment inquiry, the removal to third countries with extensive, U.S.-recognized records of human rights violations is wholly disproportionate to the alternative aim of immigration enforcement, further indicating that punishment was the point.<sup>166</sup>

The punishment analysis of the Administration’s expansion of domestic detention centers to subpar facilities in inhospitable locations might follow a similar path.<sup>167</sup> Much like with the CECOT and third-country removal policies, courts would have substantial evidence of the Administration’s punitive intent through the many statements of officials justifying the policy on the grounds of retribution and deterrence.<sup>168</sup> Many of the *Mendoza-Martinez* factors likewise indicate at least an “implied[] . . . preference” for the label of punishment.<sup>169</sup> For example, detention is the quintessential affirmative restraint on liberty the law is concerned with,<sup>170</sup> and the Administration’s focus on purportedly criminal noncitizens suggests it is seeking to repunish individuals for activity that is already a crime.<sup>171</sup> Finally, even under the secondary punishment inquiry, the horrid conditions of domestic detention centers, especially Alligator Alcatraz, call to mind some of the conditions in

<sup>162</sup> Eswatini Human Rights Report, *supra* note 60, at 1.

<sup>163</sup> See *DHS v. D.V.D.*, 145 S. Ct. 2153, 2162 (2025) (Sotomayor, J., dissenting) (deploying due process analysis to underscore the significant liberty deprivations presented by third-country removals).

<sup>164</sup> Imray, Gumede & Santana, *supra* note 59.

<sup>165</sup> *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 (1963).

<sup>166</sup> See Imray, Gumede & Santana, *supra* note 59 (quoting immigrants’ rights advocates as stating, in reference to the third-country removal policy, that “cruelty is the point” and that the policy “send[s] a message that people could be punished by being sent to ‘far-flung countries’”).

<sup>167</sup> Conditions of purportedly civil confinement are familiar terrain for punishment doctrine. See, e.g., *Bell v. Wolfish*, 441 U.S. 520, 535–37 (1979). The reportedly horrid conditions in Alligator Alcatraz and the explicit evocations of punitive intent from the Administration help make a claim against that facility stronger compared to prior challenges. Contrast *id.* at 525–26 (describing the conditions in the detention center at issue and characterizing them as “differ[ing] markedly from the familiar image of a jail; there are no barred cells, dank, colorless corridors, or clanging steel gates,” *id.* at 525), with *Salomon & Payne*, *supra* note 11 (describing conditions inside Alligator Alcatraz, including “sweltering heat” and “rows of bunkbeds [that] are surrounded by chain-link cages”).

<sup>168</sup> See sources cited *supra* notes 70–71.

<sup>169</sup> *United States v. Ward*, 448 U.S. 242, 248 (1980).

<sup>170</sup> See *United States v. Salerno*, 481 U.S. 739, 755 (1987).

<sup>171</sup> See *Bailey, Rosales & Elassar*, *supra* note 62.

CECOT<sup>172</sup> and indicate that the policy is disproportionate to the targeted wrong — a violation of the civil immigration laws.<sup>173</sup>

### B. Consequences and Implications

The consequences of a court applying the punishment analysis along the lines described would be immense, as the Executive would be prohibited from implementing the punitive policy either writ large or only after extensive criminal procedures.

First, the Executive cannot punish absent statutory authorization. Punishment can be doled out only after criminal due process,<sup>174</sup> and traditionally only the legislature has been recognized as having the authority to define what is and is not a crime.<sup>175</sup> Thus, if sending individuals to CECOT or unsafe third countries, or imprisoning them in substandard domestic detention facilities constitutes punishment, the executive branch would need to point to some sort of congressional authorization for its imposition.<sup>176</sup> It is possible that the Administration could argue that the statutes undergirding some of its actions, like the CECOT and third-country removal policies, provide the requisite legislative authorization to impose punishment. But nothing in the statutes relied upon for those policies indicates that to be the case.<sup>177</sup> Rather, both statutes *only* provide means of removing noncitizens from the country and do not evince any intent that such removal may also be punitive.<sup>178</sup> As such, applying the punishment analysis to the Executive's immigration agenda and classifying its most severe policies as punishment might eliminate those policies as "tools in [its] toolkit."<sup>179</sup>

Even if the punishment analysis does not prevent the Administration from imposing severe deprivations of liberty through immigration enforcement outright, a successful application of the doctrine would still mandate some of the most protective legal procedures known to American law. Punishment doctrine is designed to ensure that punishment is not inflicted on individuals without the constitutional protections to

<sup>172</sup> Compare Acevedo, *supra* note 65 (describing round-the-clock fluorescent lights, unsanitary conditions, lack of food, and policies prohibiting detainees from leaving their cells), with Martínez-Beltrán & Rueda, *supra* note 54 (describing eerily similar conditions in CECOT).

<sup>173</sup> See Alina Das, *The Law and Lawlessness of U.S. Immigration Detention*, 138 HARV. L. REV. 1186, 1194 (2025) (explaining Congress's intent to "ensure civil — that is, humane and nonpunitive — conditions of immigration detention").

<sup>174</sup> See, e.g., *Salerno*, 481 U.S. at 746.

<sup>175</sup> See, e.g., Epps, *supra* note 111, at 3; Easterbrook, *supra* note 111, at 1913–14.

<sup>176</sup> See Goldman, *supra* note 21.

<sup>177</sup> See *id.* ("The [Alien Enemies Act] is directed toward a single potential end: the removal of alien enemies. Nothing in the statute purports to permit the president to punish 'alien enemies' or to imprison them . . .").

<sup>178</sup> See 50 U.S.C. § 21 (providing that "alien enemies" "shall be liable to be apprehended, restrained, secured, and removed"); 8 U.S.C. § 1231(b)(1)(C)(iv) (providing for the "removal" of noncitizens to third countries only in limited circumstances).

<sup>179</sup> Lim, *supra* note 67 (quoting Secretary Noem).

which criminal defendants are entitled.<sup>180</sup> Those protections include the Fifth Amendment right against self-incrimination, the Sixth Amendment right to a public trial before a jury of one's peers, the requirement of proof beyond a reasonable doubt, and more.<sup>181</sup> As others have noted, there is little chance that this Administration, which has already expressed frustration with the far lesser process afforded to noncitizens under classical immigration law,<sup>182</sup> is willing to go through those lengthy processes.<sup>183</sup> Nonetheless, a strict judicial commitment to ensuring that punishment is not issued without adequate constitutional protection can force the Administration to shift its immigration enforcement away from punitive policies and back toward more traditional policies that impose a far lesser burden on noncitizens' liberty.<sup>184</sup>

### CONCLUSION

Dissenting from the Supreme Court's recent opinion in *Trump v. CASA, Inc.*,<sup>185</sup> Justice Jackson wrote: "[I]t is indisputable that the Executive's power to leverage physical force in a manner that directly threatens to deprive people of life, liberty, or property creates uniquely harmful risks when unconstrained by law."<sup>186</sup> The second Trump Administration's immigration enforcement policies cause those words to ring true. Yet concerned jurists and advocates are not relegated to standing idly by while the executive branch imposes punishment on a marginalized community. Punishment doctrine is up to the task of constraining a presently unconstrained area of public law. The reverberations of pushing the law in this direction will be felt outside the borders of immigration law, as the universality of punishment doctrine expounded here allows any individual experiencing executive punishment to call upon its protections.

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<sup>180</sup> See, e.g., *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 166 (1963) ("Our forefathers 'intended to safeguard the people of this country from punishment without trial by duly constituted courts. . . . And even the courts to which this important function was entrusted were commanded to stay their hands until and unless certain tested safeguards were observed.'" (quoting *United States v. Lovett*, 328 U.S. 303, 317 (1946))).

<sup>181</sup> See *United States v. Ward*, 448 U.S. 242, 248 (1980).

<sup>182</sup> AM. IMMIGR. COUNCIL, *supra* note 9, at 53.

<sup>183</sup> Arulanantham, *supra* note 21.

<sup>184</sup> See GARRETT, *supra* note 117, at 58 ("[D]ue process can provide the pressure test necessary to get the government to abandon its action altogether . . .").

<sup>185</sup> 145 S. Ct. 2540 (2025). In *CASA*, the Court partially stayed a universal injunction against President Trump's executive order withholding birthright citizenship from children born to unauthorized migrants, *id.* at 2549, because universal injunctions "likely exceed[ed] the equitable authority that Congress has granted to federal courts," *id.* at 2548.

<sup>186</sup> *Id.* at 2604 (Jackson, J., dissenting).