# REMEDIES FOR A CONSTITUTIONAL CRISIS

*William Baude*,[*] *Samuel L. Bray*[**] & *Marin K. Levy*[***]

## INTRODUCTION

In a constitutional showdown with the executive branch, the courts may seem to have limited remedial options. Once we reach a point where courts conclude that the Executive is violating the law, what can they do but order compliance? And what can we do but hope that the Executive feels compelled to comply, whether by conscience or political forces?

Today, that compliance is hard to take for granted. Indeed, the risk is that the executive branch will blow off the judiciary, ignoring its judgments, refusing to obey its decrees, courting contempt, accusing judges of fictitious wrongdoing, and tacitly encouraging retaliation against them. And indeed, there is evidence that this is what is happening.[1]

The upshot is that we are slipping into a crisis of judicial authority — what one could call a "constitutional crisis." We use the phrase here reluctantly, for it is overused and vague. And we use it without knowing what will come next, and even though we might need a new word if things get worse. (It was called the "Cuban Missile Crisis," even though it ended fine, and even though it could have gotten much worse, and even though we would have needed a new term for what happened if it did.) The phrase "constitutional crisis" at least captures the sense that the courts face an unusual challenge today, and that the precedents, such as they are, are not reassuring.[2] Call it what you will, it is not good.

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[*] Harry Kalven, Jr. Professor of Law, University of Chicago Law School.

[**] Professor of Law, University of Chicago Law School.

[***] Melvin Shimm Distinguished Professor of Law, Duke University School of Law. We are grateful for comments from Josh Chafetz, Daniel Deacon, Michael Dreeben, Jack Goldsmith, Jamal Greene, Bert Huang, Leah Litman, Jed Purdy, Richard Re, and from anonymous members of the Article III branch. We are also grateful for comments at a workshop at Duke University School of Law and the *Harvard Law Review* Symposium. This piece was presented at the Symposium in October 2025 and reflects legal decisions and developments up until that time.

[1] *See, e.g.*, Daniel T. Deacon & Leah M. Litman, *Legalistic Noncompliance*, 75 DUKE L.J. (forthcoming 2026) (manuscript at 9–45), https://ssrn.com/abstract=5241936 [https://perma.cc/D32A-BM56]; Thomas P. Schmidt & Gillian E. Metzger, *Some Realism About Constitutional Remedies*, 139 HARV. L. REV. 1834 (2026). For a contrary view, see Adrian Vermeule, Opinion, *Someone Is Defying the Supreme Court, But It Isn't Trump*, N.Y. TIMES (July 31, 2025), https://www.nytimes.com/2025/07/31/opinion/supreme-court-trump-judges-defiance.html [https://perma.cc/8F46-ZDLX].

[2] *See generally* Sanford Levinson & Jack M. Balkin, *Constitutional Crises*, 157 U. PA. L. REV. 707 (2009); Keith E. Whittington, *Yet Another Constitutional Crisis?*, 43 WM. & MARY L. REV. 2093 (2002); Arthur Bestor, *The American Civil War as a Constitutional Crisis*, 69 AM. HIST. REV. 327 (1964).

What courts can do to enforce their decisions in such a crisis is the inquiry at the heart of this Essay. If courts cannot assume that the Executive will simply accept their decisions, what options are open to the least dangerous branch? Do the federal courts have choices that will coax the executive branch into more law-abiding behavior? Or will those choices hasten the slide toward an equilibrium in which the Executive acts contemptuously but escapes contempt? Do the federal courts have choices that will provide an effective resistance to lawbreaking by the Executive, shoring up the rule of law? Or will those choices merely accelerate and heighten the conflict between the branches, precipitating a battle that the judiciary can start but not win?

Our central claim is that the range of remedial options available to courts is broader than it may seem at first — and that the best path is not always obvious. Even when it is clear that the executive branch has acted unlawfully, it is not necessarily clear what courts can do about it. Even if we are in a crisis, and the choice of judicial response is very important, that does not make obvious the *correct* choice. We recognize that our readers will assess the risks associated with each option in various and varying ways, and that our own assessments may change as the world changes.[3] (Indeed, much has changed since this Essay was presented in October 2025.) So this Essay does not attempt to crown any one choice as the right one. Nor do we claim that any of these remedial choices will be enough to avert or undo a constitutional crisis. They are not remedies in that sense.

Our aim is more modest: We will lay out the menu of options that are available to federal judges, highlighting the tradeoffs among them. But we recognize that we do not have the burden of choice, which belongs instead to the judges — and, we should acknowledge, to the President and the other executive officers and employees, as well as to the members of Congress. In every separation of powers crisis, and in every averted separation of powers crisis, the decisive decisions are not made by law professors:

> Bullfight critics ranked in rows
> Crowd the enormous Plaza full;
> But only one is there who *knows*
> And he's the man who fights the bull.[4]

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[3] Judges might also derive wisdom from experiences around the world, though with the usual caveats about translating lessons from other institutions to ours. *See generally, e.g.*, JEFFREY K. STATON, CHRISTOPHER REENOCK & JORDAN HOLSINGER, CAN COURTS BE BULWARKS OF DEMOCRACY? JUDGES AND THE POLITICS OF PRUDENCE (2022); Benjamin Garcia-Holgado, *Overruling the Executive: Judicial Strategies to Resist Democratic Erosion*, 13 J.L. & CTS. 274 (2025); Fortunato Musella & Luigi Rullo, *Constitutional Courts in Turbulent Times*, 25 EUR. POL. & SOC'Y 461 (2024).

[4] Poem attributed to Domingo Ortega by Robert Graves, *in* ROBERT GRAVES, OXFORD ADDRESSES ON POETRY 4 (1962).

## I. Remedial Tensions

### *A. The Weakness of Judicial Decrees*

It is a basic principle of constitutional law that the judicial power includes the power to decide cases and issue rulings that bind the parties.[5] But, when the government is one of the parties, this principle becomes more complicated in practice — it has been questioned, challenged, and even sometimes defied or ignored.

These challenges have been especially apparent in the second Trump Administration. When a federal court ordered the return of a wrongly deported man named Kilmar Abrego Garcia, the executive branch tried to evade or defy the order. Even after the Supreme Court ruled that the district court had "properly require[d] the Government to 'facilitate' Abrego Garcia's release from custody in El Salvador and to ensure that his case [be] handled as it would have been had he not been improperly sent to El Salvador,"[6] high-ranking officials repeatedly stated that he was "not coming back to our country."[7]

In other immigration litigation, under the Alien Enemies Act,[8] officials may have violated a court order not to deport or deplane the plaintiffs while a federal court emergency hearing and decision were ongoing.[9] In another case involving the same statute, officials were found to have violated a court order requiring people to have a "meaningful opportunity" to challenge their deportations.[10] Half a year into the second Trump presidency, a story in the Washington Post concluded "that the administration is accused of defying or frustrating court oversight in 57" out of 165 lawsuits it had lost.[11] While some of the specific accusations are matters of interpretation, we are convinced they are directionally correct.

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[5] William Baude, *The Judgment Power*, 96 GEO. L.J. 1807, 1809 (2008).

[6] Noem v. Abrego Garcia, 145 S. Ct. 1017, 1018 (2025).

[7] Alison Durkee & Antonio Pequeño IV, *Here's How Many Times the White House Insisted Abrego Garcia Wouldn't Be Brought Back to the U.S.*, FORBES (June 6, 2025, at 18:16 ET), https://www.forbes.com/sites/alisondurkee/2025/06/06/heres-how-many-times-the-white-house-insisted-abrego-garcia-wouldnt-be-brought-back-to-the-us [https://perma.cc/949E-CZXT].

[8] 50 U.S.C. §§ 21–24.

[9] *Compare* J.G.G. v. Trump, 147 F.4th 1044, 1051 (D.C. Cir. 2025) (Katsas, J., concurring) (concluding that order was ambiguous and so government officials did not violate it), *with id.* at 1086 (Pillard, J., dissenting) (concluding that government officials violated an unambiguous order). Incidentally there is also precedent, not discussed by the D.C. Circuit, for holding a litigant in contempt "for performing otherwise legal actions that frustrate the potential efficacy of future orders the court may enter." Michael T. Morley, *Erroneous Injunctions*, 71 EMORY L.J. 1137, 1185 (2022); *see* Hugh B. Cox, *The Void Order and the Duty to Obey*, 16 U. CHI. L. REV. 86, 101–03 (1948). This description seems to fit the *J.G.G.* case.

[10] D.V.D. v. U.S. DHS, No. 25-10676, 2025 WL 1453640 (D. Mass. May 21, 2025), *declared unenforceable sub nom.*, DHS v. D.V.D., 145 S. Ct. 2627, 2629 (2025).

[11] Justin Jouvenal, *Trump Officials Accused of Defying 1 in 3 Judges Who Ruled Against Him,* WASH. POST (July 21, 2025), https://www.washingtonpost.com/politics/2025/07/21/trump-court-orders-defy-noncompliance-marshals-judges [https://perma.cc/A3V9-4RWN].

The problem is not altogether new. After the decision in *Worcester v. Georgia*,[12] President Andrew Jackson did nothing to enforce the Court's decree (to which the federal government was not a party), and commented privately that "[t]he decision of the supreme court has fell still born, and they find that it cannot coerce Georgia to yield to its mandate."[13] In *Ex parte Merryman*,[14] officials in the Lincoln Administration refused to cooperate with habeas proceedings in front of Chief Justice Roger Taney.[15] In the twentieth century, several of the Supreme Court's rulings in favor of the Franklin Delano Roosevelt Administration are thought to have been shaped in part by a perception that a ruling against the Administration would not have been enforceable.[16]

These problems arise because of a fundamental remedial uncertainty. Even if it is true that the President is required to follow or even enforce binding judgments, what can courts do if he or she does not?[17]

An ordinary litigant would likely face contempt proceedings. But when a significant executive official is involved, the threat of criminal contempt may be chimerical. The standard procedure, outlined in Rule 42 of the Federal Rules of Criminal Procedure, rests on the expectation that the court can refer the contempt to the U.S. Attorney for criminal prosecution[18] — an expectation that seems fanciful if the government has taken a unified position of defiance. And while the Rule contemplates such a concern — Rule 42(a)(2) provides that the court may appoint a nongovernmental attorney if "the interest of justice requires" — this part of the Rule has proved controversial.[19] And the

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[12] 31 U.S. (6 Pet.) 515 (1832).

[13] Letter from President Andrew Jackson to Brigadier-General John Coffee (Apr. 7, 1832), *reprinted in* 4 CORRESPONDENCE OF ANDREW JACKSON 429, 430 (John Spencer Bassett ed., 1929); *accord* Barry Friedman & Erin F. Delaney, *Becoming Supreme: The Federal Foundation of Judicial Supremacy*, 111 COLUM. L. REV. 1137, 1155 (2011); Curtis A. Bradley & Neil S. Siegel, *The Supreme Court Under Threat: Early Lessons in Judicial Self-Protection*, 139 HARV. L. REV. 1769, 1783 (2026).

[14] 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9487) (Taney, C.J.).

[15] Seth Barrett Tillman, *Ex parte* Merryman*: Myth, History, and Scholarship*, 224 MIL. L. REV. 481, 487–93 (2016).

[16] *See* Gerard N. Magliocca, *The* Gold Clause Cases *and Constitutional Necessity*, 64 FLA. L. REV. 1243, 1247, 1258–67 (2012); David J. Danelski, *The Saboteurs' Case*, 1996 J. SUP. CT. HIST. 61, 68, 80; Jerry Kang, *Denying Prejudice: Internment, Redress, and Denial*, 51 UCLA L. REV. 933, 970–75 (2004).

[17] Baude, *supra* note 5, at 1835–36. Professors Daniel Deacon and Leah Litman also note the Court adjusting its course when faced with a lack of compliance following its decision in *Brown v. Board of Education*. *See* Deacon & Litman, *supra* note 1 (manuscript at 47–49).

[18] FED. R. CRIM. P. 42(a)(2).

[19] *Compare* Young v. United States *ex rel.* Vuitton et Fils S.A., 481 U.S. 787, 793–801 (1987) (permitting judicial appointment of private prosecutors for criminal contempt), *with* Donziger v. United States, 143 S. Ct. 868, 868–69 (2023) (Gorsuch, J., joined by Kavanaugh, J., dissenting from the denial of certiorari) (criticizing such appointment). *See generally* Aditya Bamzai & Samuel L. Bray, *Prosecuting Contempt* (forthcoming) (on file with the Harvard Law School Library) (analyzing the history and lawfulness of such appointment).

pardon power can still be employed to undo whatever criminal contempt a court might impose.[20] This leaves courts with the option of civil contempt for violations of judicial orders. But this option, too, is fraught and difficult. Among other concerns, it could lead to an escalation between branches from which higher courts may ultimately retreat (leaving lower courts defeated) — as shown by examples from Depression-era stock seizures to housing desegregation in Yonkers to the Iran-Contra scandal.[21]

Other options for enforcing judgments against resistant officials are even more mysterious. Attorney General Edward Bates once wrote: "The right of the courts to call out the whole power of the county to enforce their judgments, is as old as the common law . . . ."[22] This is a reference to the "*posse comitatus*," the summoning of ordinary citizens to enforce the law.[23] But do federal courts still have such a power, and what would this even mean today? Whatever the answers, they do not provide firm ground for courts in the present.

### *B. The Power of Judicial Decrees*

And yet, in June of 2025, Kilmar Abrego Garcia was in fact brought back to the United States, to stand trial on criminal charges in the Middle District of Tennessee.[24] The plausibility and legitimacy of those charges are questionable, resulting in subsequent litigation across multiple districts, and as of this writing Abrego Garcia's future remains unclear.[25] But the surprising fact is that the executive branch eventually acquiesced to bringing Abrego Garcia back, just like the courts instructed.

Similarly, continuing litigation against the executive branch reveals the persistent power of judicial rulings. Despite many accusations, and indeed examples, of resistance to judicial rulings, the Trump Administration has not taken a stance of persistent defiance. To wit, in a recent misconduct complaint against Chief Judge Boasberg, a DOJ official insisted that "the Trump administration has always complied with all

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[20] *Ex parte* Grossman, 267 U.S. 87, 115, 122 (1925).

[21] See, respectively, *Land v. Dollar*, 341 U.S. 737, 748–50 (1951) (opinion of Jackson, J.) (dissenting from denial of motion to vacate stay of lower court's contempt order), *granting cert. and denying motion to vacate stay*, 190 F.2d 623 (D.C. Cir. 1951); *Spallone v. United States*, 493 U.S. 265, 273, 280 (1990); and *Armstrong v. Executive Office of the President*, 1 F.3d 1274, 1288–90 (D.C. Cir. 1993). These examples, and the general problem, are discussed in Nicholas R. Parrillo, *The Endgame of Administrative Law: Governmental Disobedience and the Judicial Contempt Power*, 131 HARV. L. REV. 685, 705–06, 718–21, 746–57 (2018).

[22] Suspension of the Privilege of the Writ of Habeas Corpus, 10 Op. Att'ys Gen. 74, 80 (1861).

[23] Baude, *supra* note 5, at 1835–36.

[24] *See* United States v. Abrego Garcia, 787 F. Supp. 3d 830, 838 (M.D. Tenn. 2025).

[25] *See, e.g.*, United States v. Abrego Garcia, 792 F. Supp. 3d 869, 874 (M.D. Tenn. 2025); Letter Order, Abrego Garcia v. Noem, No. 25-cv-2780 (D. Md. filed Aug. 27, 2025), Dkt. No. 20.

court orders."[26] Even though this appears to be a gross overstatement, this is evidence that openly defying court orders is conceded to be improper. Before the Supreme Court in *Trump v. CASA, Inc.*,[27] the Solicitor General of the United States pledged in response to the questions of five different Justices that the government would respect Supreme Court judgments and opinions — perhaps the broadest formal concession in history by the federal executive branch to Supreme Court authority.[28]

And, despite historical examples of executive resistance or defiance to court orders, there are equally notable examples where the Executive did *not* resist despite surely wanting to. Consider, for instance, President Truman's compliance with the Supreme Court's ruling against the seizure of the steel mills in *Youngstown Sheet & Tube Co. v. Sawyer*,[29] which Truman privately denounced but obeyed;[30] or President Nixon's compliance with the Supreme Court's decision in *United States v. Nixon*,[31] which proximately caused his resignation from the presidency.[32] In short, past administrations and even the current one have consistently recognized the power of judicial judgments and decrees — and have largely acquiesced to them — even at moments when it has not been in their seeming interest to do so.

### *C. The Tension for the Rule of Law*

The current realities of judicial power reflect a tension. The executive branch has not always obeyed judicial rulings against it — and certainly not always promptly and to the letter.[33] Yet neither the executive branch nor the judiciary thinks that judicial rulings are irrelevant, or costless to violate. Indeed, the executive branch and judiciary expect the rulings to be followed routinely, that is, at least in the routine case.

This tension is familiar to scholars of public remedies. It resembles Professor Nicholas Parrillo's account of contempt cases against agency officials.[34] He describes court orders as potentially "just the beginning

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[26] Letter from Chad Mizelle, Chief of Staff, Off. of the Att'y Gen., U.S. DOJ, to Sri Srinivasan, Chief Judge, U.S. Ct. of Appeals for D.C. at 1 (July 2025), https://www.courthousenews.com/wp-content/uploads/2025/07/FINAL-Misconduct-Complaint-7.28.pdf [https://perma.cc/TGG2-LFDD]; *see* Vermeule, *supra* note 1; Ilan Wurman, *Trump v. the Courts,* CITY J., Summer 2025, at 90, 90 ("[President Trump's] lawyers . . . have at times approached the line but never crossed it.").

[27] 145 S. Ct. 2540 (2025).

[28] *See* Jack Goldsmith, *The Supreme Court, 2024 Term — Essay: Interim Orders, the Presidency, and Judicial Supremacy*, 139 HARV. L. REV. 86, 121–24 (2025).

[29] 343 U.S. 579 (1952); *see id.* at 587.

[30] William Baude, Youngstown (forthcoming) (manuscript at 11–12), https://ssrn.com/abstract=6283738 [https://perma.cc/G2WC-EZPK]; Michael Stokes Paulsen, Youngstown *Goes to War*, 19 CONST. COMMENT. 215, 218 (2002).

[31] 418 U.S. 683 (1974).

[32] *See* Paul J. Mishkin, *Great Cases and Soft Law: A Comment on* United States v. Nixon, 22 UCLA L. REV. 76, 91 (1974).

[33] *See supra* notes 12–16 and accompanying text.

[34] *See generally* Parrillo, *supra* note 21.

of a long and delicate negotiation between the judge and the agency, in which the agency returns to court, in many cases repeatedly, warning that it badly needs more latitude (especially more time) to comply."[35] Judges, wary of allowing executive branch disobedience yet conscious of their own institutional limitations, feel themselves to be in what Parrillo calls a "predicament" — although they try to enforce their orders against agency officials, sometimes even with contempt, they "quite often proceed cautiously, hold back, and relent."[36]

These propositions also track what Professors Richard Fallon and Daniel Meltzer described as the basic constitutional requirement of some effective remedies: "demand[ing] a general structure of constitutional remedies adequate to keep government within the bounds of law," even while "sometimes tolerat[ing] situations in which individual victims receive no effective redress."[37] In individual cases, sometimes there is no effective remedy against an executive official who disobeys the law; but the system as a whole (so far) demands that the government generally stay "within the bounds of law."

In this sense, the current lack of clarity about the power of courts to compel the executive branch may seem to just replicate a long-standing tension. And yet it is also a more disquieting, more existential, threat today. One might imagine Parrillo's and Fallon & Meltzer's analyses to rest against a backdrop assumption that the law of remedies could be otherwise — that remedial powers could be narrower or broader and that whatever choice is made about those remedial powers, that choice would become the law of the system. The fact that this same tension runs all the way down to the basic question of whether the courts can issue efficacious rulings at all exposes the fragility and conventionality of judicial power.

## II. JUDICIAL OPTIONS

In light of this tension, judges face a series of critical choices. These choices include: whether to demand perfect compliance from the Executive or instead to tolerate — and even paper over — resistance; and whether to strategize about how the Executive will respond or instead to pointedly "play it straight," eschewing strategy. They also include how different groups of judges (and different levels of the judiciary) should treat one another, and what judges should *say* about all of this. This Part will highlight and analyze these choices, among others.

Of course, such choices echo more general ones present in public law, including the choice "between institutional formalism and realism"

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[35] *Id.* at 688.

[36] *Id.* at 689.

[37] Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1736 (1991).

framed by Professor Richard Pildes,[38] as well as the case for the "passive virtues" famously put forward by Professor Alexander Bickel.[39] We owe much to them and to others.[40] We reiterate that our focus here is on remedial choices, broadly construed. *Whatever* the answer to how judges should interpret federal laws and judge executive compliance, the question ". . . and then what" cannot be an afterthought. No matter how formalist, judges cannot assume that the answer is simply "so ordered." No matter how functionalist, judges cannot assume that formalist remedies will never work. And, in many cases, formalism and functionalism and all of the other -isms assigned to our judges simply do not resolve the questions before them.

And, before we go further, a few caveats are in order. One is that the options outlined below will look different depending upon where in the judicial hierarchy the choice is located. The interests of a district judge might be quite different from those of the members of the Supreme Court — a point we note when we think it particularly relevant. Another caveat is that, not unlike Congress, courts are more of a "they" than an "it." What we describe below are particular dynamics that may become more complex if there is no consensus around a particular choice on a multimember court — something we note as we proceed. A final caveat is that we describe each choice as a selection between two alternatives. In reality, many of these choices are a matter of degree, as we will sometimes — but only sometimes — note in the analysis that follows.

### *A. Forecast Executive Behavior Versus Don't Forecast Executive Behavior*

An initial choice for the courts in considering how to rule on various matters is whether they should attempt to forecast the behavior of the Executive. Specifically, courts must decide whether to predict if the Executive will comply with a future order.[41]

There are good reasons not to undertake this forecasting. Judges may not be very good at it,[42] particularly in a time when the Executive acts, well, less predictably than past administrations. Moreover, predictions of future behavior may depend heavily on the predictor's degree

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[38] Richard H. Pildes, *Institutional Formalism and Realism in Constitutional and Public Law*, 2013 SUP. CT. REV. 1, 5 (2014).

[39] *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 111–98 (1962).

[40] *See, e.g.*, Deacon & Litman, *supra* note 1 (manuscript at 46–72).

[41] One can see the presumption of regularity for executive action as depending on a kind of forecast about the government's licit reasons for acting. On the history of that presumption, see generally, for example, Note, *The Presumption of Regularity in Judicial Review of the Executive Branch*, 131 HARV. L. REV. 2431 (2018).

[42] *Cf.* Marin K. Levy, *Judging the Flood of Litigation*, 80 U. CHI. L. REV. 1007, 1073–75 (2013) (doubting judges' ability to accurately predict whether a decision will open the floodgates of subsequent litigation).

of ideological alignment with the Executive. That is, a judge who thinks "the Executive is terrible" may be more likely to forecast lawless behavior by the Executive, while a judge who thinks "not such a bad guy" may be inclined to predict law-abiding behavior.

On the other hand, there are good reasons for judges, including the Justices, to try to think several moves ahead.[43] One is that the efficacy of their rulings may require it. If the courts give rulings without consideration of how the Executive will respond, they may allow easy evasion. That is an example of "no forecasting means undershooting." Conversely, by failing to think of the next moves the Executive will take, the courts may ignore the risk that their judgments will not be followed — a risk that perhaps could be avoided with a more modest remedial demand. In other words, it can also be that "no forecasting means overshooting."

There are intermediate positions as well. One is no forecasting in "normal" times or when "normal" Presidents occupy the White House, but forecasting otherwise. Such a position comes with line-drawing problems, however, and perhaps the difficulty of "ratcheting down" if judges become accustomed to such forecasting. Another intermediate position is no forecasting abroad, that is, in military or diplomatic matters, but forecasting at home. That position would draw on the courts' reticence to scrutinize executive motivation within a country mile of foreign affairs.[44] Yet another intermediate position would be to forecast executive responses for equitable remedies and not (or less) for legal remedies. That would be consistent with equity's general practice of taking into account what is "workable"[45] when deciding whether to give an equitable remedy, and what its contours and intensity should be.

A peek at the future does not require any particular judicial response. But this modest choice will frame a number of other choices described below.

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[43] Note that this choice is presented as a binary one, but a judge could have a rule of thinking only $x$ moves ahead, where $x$ is more than zero and less than an infinite number of foreseeable moves.

[44] *See, e.g.*, Trump v. Hawaii, 138 S. Ct. 2392, 2419 (2018) (quoting Ziglar v. Abbasi, 582 U.S. 120, 142 (2017)). But of course this prompts the obvious question of who decides whether a case implicates foreign affairs. *See* Mariano-Florentino Cuéllar & Aziz Z. Huq, *The Hidden Judicial Springs of U.S. Foreign Policy*, 2022 SUP. CT. REV. 243, 246–47 (2023); *see also* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952) ("Even though 'theater of war' be an expanding concept, we cannot with faithfulness to our constitutional system hold that the Commander in Chief of the Armed Forces has the ultimate power as such to take possession of private property in order to keep labor disputes from stopping production.").

[45] Lemon v. Kurtzman, 411 U.S. 192, 200 (1973) (plurality opinion) ("[I]n constitutional adjudication as elsewhere, equitable remedies are a special blend of what is necessary, what is fair, and what is workable." (footnote omitted)). Note this is "the other *Lemon*."

### *B. Give and Take Versus Play It Straight*

The first choice — to forecast or not to forecast — imagines a court at a single point in time looking forward to the future. But we can also think of a more dynamic picture, with the court making adjustments in real time. The court might not only "game it out," but also "play the game."

In this Bayesian view of the courts, they are updating and changing and shifting — not that far off from the model of adjudication familiar from Professor Abram Chayes.[46] There are various ways to play the game, but one is considered here: a strategy of give and take. In other words, the courts could "give" some wins to the Executive, and "take" some losses from the Executive, calibrating their responses to ensure a balance that does not lean so much to either side.[47] Thus, the choice discussed here is between give and take, on the one hand; and not playing the game — playing it straight — on the other.

Perhaps the Supreme Court has been employing a give-and-take strategy so far in dealing with the second Trump Administration. The strategic logic would be straightforward: A Court that hands out both wins and losses may seem quite literally evenhanded — and hope to avoid at least some claims of partisanship and perhaps escalation with another branch.[48]

Yet one immediate problem with the give-and-take strategy is coordination. Intercourt bargaining is not permissible, or at the very least not customary, in the federal courts — a fact that impedes any ability for the federal judiciary as a whole to engage in a give-and-take strategy. Such a strategy can really only be carried out by a single court, though in a divided Supreme Court only one or two fulcrum members need to pursue this strategy to make it effective for the Court as a whole.

But, in addition to the coordination problem, there are several other serious problems with the give-and-take strategy. Consider four.

First, strictly as a matter of mechanics, it is hard to make the strategy work in a politically polarized society. Where the judges are politically polarized, as is true in the United States now to a higher degree than in the past,[49] that polarization will impede agreement among the Justices about what is an acceptable amount of give and take. What you would give and take from an ideological compatriot is going to look quite different from what you would give and take from what you see as A Grave Threat to America. The give-and-take strategy combined with political

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[46] *See* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1288–89 (1976).

[47] As in ZACHARY S. PRICE, CONSTITUTIONAL SYMMETRY: JUDGING IN A DIVIDED REPUBLIC 36 (2024).

[48] *Cf. id.*

[49] *See* Adam Bonica & Maya Sen, *Estimating Judicial Ideology*, J. ECON. PERSPS., Winter 2021, at 97, 110 (2021).

polarization — which means the "give" and the "take" have an "our side" and "the other side" correlation — creates a tit-for-tat problem.

Second, a formalist would argue that adopting a give-and-take strategy means (of course) not deciding cases strictly according to law. The response (of course) is a complicated one. Surely these kinds of strategic considerations are permissible for certain kinds of judicial decisions. These include decisions to grant certiorari and to grant interim relief before certiorari; remedial decisions; merits decisions according to a certain kind of prudentialism; and the decisions to follow, reverse, narrow, or expand precedent.[50] What ties all of these decisions together is the density of judicial discretion — usually explicit discretion — to consider prudential issues that go beyond the application of a legal rule or standard.

Third, the give-and-take strategy could encourage executive extremism. That is, if the President catches on that he or she is going to "win some," and desires wins that would require an aggressive and legally marginal interpretation of the Constitution or other legal authorities, then the President has an incentive to take positions that are completely indefensible as a matter of law, just to ensure wins on the legally marginal positions.[51] In other words, these "losses" would help ensure "wins" where it matters most to the administration — encouraging more extreme position-taking along the way.

Fourth, a promised give-and-take strategy can too easily slide toward "give and give." Indeed, as we wrote this Essay in the late summer and fall of 2025, the Court had rarely ruled against the Trump Administration, and when it had the ruling was usually partial, minor, or ambiguous.[52] Even apart from this ephemeral scorekeeping, there is a systematic problem with give and take in a world in which the Court frequently entertains the Executive's appeals for interim relief. It might seem that the possibility of interim orders increases the Court's ability to pursue this strategy, because each give or take can be smaller, or less precedential, allowing a smoother rebalancing of gains and losses for the Executive. But that advantage is dominated by a disadvantage, which is that the administration gets to choose the cases in which it seeks interim relief from the Supreme Court.

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[50] *See* Cass R. Sunstein, *The Supreme Court, 1995 Term — Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 7 (1996); Richard M. Re, *Precedent as Permission*, 99 TEX. L. REV. 907, 919–22 (2021).

[51] *See* Cass R. Sunstein, *Trimming*, 122 HARV. L. REV. 1049, 1076 (2009).

[52] *See* Nat'l Insts. of Health v. Am. Pub. Health Ass'n, 145 S. Ct. 2658, 2660 (2025); Noem v. Nat'l TPS All., 145 S. Ct. 2728, 2728–29 (2025) (mem.) ("This order is without prejudice to any challenge to Secretary Noem's February 3, 2025 vacatur notice insofar as it purports to invalidate EADs, Forms I-797, Notices of Action, and Forms I-94 issued with October 2, 2026 expiration dates. See 8 U.S.C. § 1254a(d)(3)." *Id.* at 2729.); DHS v. D.V.D., 145 S. Ct. 2627, 2630 (2025) ("'Assuming as we do' that the District Court will now conform its order to our previous stay . . . , we have no occasion to reach the Government's other requests for relief." (quoting Deen v. Hickman, 358 U.S. 57, 58 (1958) (per curiam))).

Of course, if the Court were completely committed to give and take above any actual position on the merits — game theory over law — then the Executive's agenda control might be exerted in a counterintuitive way, appealing only its *weakest* cases (for example, appealing the merits of birthright citizenship, but not the universal injunction[53]). Then the Supreme Court would "give" in a considerable portion of its clear legal losers. This is the dynamic extremism problem noted above.

What may be more realistic is that the Court is at best fainthearted about the give-and-take strategy. It will always be tugged by its jurisprudential and ideological commitments — and that is an opening the Executive can exploit, securing "wins" by picking its *strongest* cases to appeal for interim orders. Instead of appealing its least favorable cases (the extremism problem), the executive branch can appeal for interim relief only in its most favorable cases (the agenda-control problem), thus unraveling the success of the Court's give-and-take strategy.

Yet even that loss of agenda control and victory for the Executive may not be what it seems. If the Supreme Court adopts "give and give" *on a small set of the administration's best cases*, which are the ones in which the administration seeks interim relief, the response of the judiciary as a whole to the Executive may still be "give and take." Indeed, so far the current Administration has had both a remarkable winning streak in its interim relief requests, as well as a larger pattern of losing in the district courts and courts of appeals, with no request for intervention by the Supreme Court.[54]

### *C. Choosing Remedies that Allow the Court to Manage the Executive (Equity) Versus Remedies that Declare Legal Rights but Do Not Control the Executive (Law)*

The two previous choices involved judges deciding whether to step into a realm that seems a bit more "prudential" or even "political" — consider the Executive's next moves, play give and take with the Executive. The present choice is different because it is entirely internal to the legal system. It is a choice, sometimes framed by the litigants but other times made by the courts, between legal and equitable remedies. That choice is generally between remedies that are less controlling of a defendant's behavior and remedies that are more controlling.[55]

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[53] For the reverse, see Trump v. CASA, Inc., 145 S. Ct. 2540, 2548–49 (2025).

[54] *See* Jonathan H. Adler, *Looking for Partisan Patterns in the Shadow Docket*, VOLOKH CONSPIRACY (Sep. 14, 2025, at 15:41 ET), https://reason.com/volokh/2025/09/14/looking-for-partisan-patterns-in-the-shadow-docket [https://perma.cc/XKG5-KLGP].

[55] *See* Samuel L. Bray, *The System of Equitable Remedies*, 63 UCLA L. REV. 530, 533 (2016). Equity also offers especially limited remedies. *See* Mark P. Gergen, *Equity's System of Open-Ended Wrongs and Limited Remedies*, 11 TEX. A&M L. REV. 541 (2024).

That choice is particularly important when the defendant whose behavior is being controlled is the President. Given the judiciary's reluctance to control the President's conduct — manifested, for example, in the authority suggesting that the President may not be enjoined[56] — the courts may want to opt for decisions that state what the law is, without specifying the steps that need to be taken to give it effect. This is paradigmatically true of the declaratory judgment, and in *Powell v. McCormack*[57] — although the branch the Court did not want to control was the legislature — the declaratory judgment was chosen precisely so the Court could get in, state the law, and get out.[58] A similar advantage may hold for mandamus ("do your prespecified duty") and *quo warranto* ("you're the *de jure* officeholder"), both of which are legal writs.[59]

On the other hand, the obvious question (and problem) is ". . . what happens next?" If a federal court gives a declaratory judgment and the defendant then acts inconsistently with it, the court can go on to issue an injunction.[60] If the court will not take that step, why take the first one? But if a court will take the second step, why the nervous choice to space things out? Is this just another instance of remedial failure in public law, where rights get lauded on Constitution Day but the remedies so often fall short?

### *D. Make Judicial Orders [Specific/Vague] to [Prevent/Allow] Executive Noncompliance at the Margins*

If a court chooses an equitable remedy, it has the option to be specific and control the Executive's behavior more precisely (or at least attempt to).[61] But this is not the only option. In fact, a court has at least four options related to specificity and noncompliance.

First, the court could make its decrees *specific* in order to *prevent* executive noncompliance. This is an obvious choice: When a court enjoins a defendant, it can tie that defendant down with a very precise and detailed injunction. It might attempt the same in suits against the Executive.

Second, the court could make its decrees *vague* in order to *prevent* executive noncompliance. Here the idea is that a specific and detailed injunction might be easier for the defendant to get around. By raising

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[56] *See* Mississippi v. Johnson, 71 U.S. (4 Wall.) 475, 501 (1866); Thomas P. Schmidt, *Presidential Immunity: Before and After* Trump, 79 VAND. L. REV. (forthcoming 2026) (manuscript at 117–21), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5187348 [https://perma.cc/FMP7-UFL8].

[57] 395 U.S. 486 (1969).

[58] *See id.* at 517 ("We need express no opinion about the appropriateness of coercive relief in this case, for petitioners sought a declaratory judgment . . . .").

[59] *See* Samuel L. Bray & James E. Pfander, Essay, *Remedies in the First Hundred Days of Trump II: A Gently Adversarial Collaboration*, 78 STAN. L. REV. ONLINE 89, 95–96 (2025).

[60] *See* 28 U.S.C. § 2202. On the infrequent use of § 2202, see Samuel L. Bray, *The Myth of the Mild Declaratory Judgment*, 63 DUKE L.J. 1091, 1111–13 (2014).

[61] Specificity is *required* for equitable remedies, but the requirement leaves ample choice for the judge in deciding how specific to be. *See* Bray, *supra* note 55, at 579–80.

the level of generality — to a principle instead of a rule, to something more vague and less specific — the court can make it harder for the defendant to evade the injunction.

Third, the court could make its decrees *specific* in order to *allow* executive noncompliance with their spirit. The idea of allowing noncompliance may seem odd — and, indeed, extraordinarily reckless. But whether it is reckless depends on whether judges are forecasting executive responses and choosing to emphasize the appearance of compliance. That is, if a court fears executive resistance, it may choose to draft injunctions very specifically, to ensure compliance with the letter of the law while still not fully restraining the Executive, thus avoiding a head-on collision.[62]

Fourth, and rounding out the possibilities, the court could make its decrees *vague* in order to *allow* executive noncompliance. Such a strategy might be employed when a different sort of executive resistance is feared. (Indeed, this strategy maps onto the requirement that the executive branch "facilitate" the return of Abrego Garcia.[63])

### *E. Keep Your Own House in Order Versus Guard the Guards*

Another strategic choice for the courts is whether to prioritize ensuring the legality of the courts' own behavior, or the legality of the Executive's behavior. Each choice can be grounded in the role morality of judges, but they point in different directions. They also have different implications for the appellate courts (especially the Supreme Court) than for district courts.

One choice is "keep your own house in order." This reflects a concern with judges first ensuring the constitutional propriety of their own actions; judges should not slight justiciability and jurisdictional doctrines in order to prevent unconstitutional behavior by another branch. This strategy is not only grounded in the Constitution's grant of "judicial Power,"[64] but it also has prudential advantages. It allows the federal courts to counter charges of constitutional hypocrisy and, more speculatively, could be a way to build capital with the executive branch or with the public.[65]

Each court can apply this requirement reflexively, as an instruction for each court to attend to its own rule-following. But, for the appellate courts and especially the Supreme Court, "keep your house in order" can be a governance priority: The Court could make its first priority ensuring that the lower courts stay within their own bounds. Indeed, a partial

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[62] This would be a tactical allowance of "legalistic noncompliance." Deacon & Litman, *supra* note 1 (manuscript at 2). To be sure, what is being described here is a judicial decision to prioritize the appearance of compliance in some form and in some case, not necessarily of all kinds and in all cases.

[63] Noem v. Abrego Garcia, 145 S. Ct. 1017, 1018 (2025).

[64] U.S. CONST. art. III, § 1.

[65] *Cf.* Goldsmith, *supra* note 28, at 124 (describing a similar strategy).

dissent and concurrence by Justice Gorsuch in *National Institutes of Health v. American Public Health Ass'n*[66] (*APHA*) can be read in exactly this light: It was a warning shot fired at the lower courts, who were accused of defying the Supreme Court, as it had expressed its will in grants of interim relief.[67] Similarly, the D.C. Circuit's fractured decision reversing Chief Judge Boasberg's contempt finding shows a much higher degree of concern with judicial action than executive action.[68] And some of the Supreme Court's grants of interim relief in spending cases and immigration cases suggest a pattern of concern with the lower courts' attention to jurisdictional and procedural propriety.[69]

But there are drawbacks to prioritizing self-policing. For one thing, prudential gains with the Executive and public may never materialize. (Indeed, there can be losses if the "in-house scolding" produces demoralization among lower federal courts.) For another, why is it so hard to ask the courts to do two things at once — stay within their jurisdiction, and also enforce the constitutional rights of citizens and noncitizens who appear before them? And finally, it seems to shy away from reality — from speaking "home truths" — to discern a pattern of egregious disrespect for legal norms and a transgression of the letter and spirit of the Constitution by one federal branch and think that branch is . . . the judiciary. Especially after the rejection of the universal injunction in *CASA*,[70] it has become substantially harder to see the federal lower courts as being out of their lane in any meaningful sense compared to the Executive. And the jurisdictional issues are far from obvious.[71] This is not to say that the Supreme Court and the appellate courts should not be scrupulous in insisting that lower courts keep within their jurisdiction, only that a rhetoric of invidious comparison against the lower federal courts is hard to justify.[72]

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[66] 145 S. Ct. 2658 (2025) (order granting in part and denying in part of stay of district court's judgments).

[67] *Id.* at 2663 (Gorsuch, J., concurring in part and dissenting in part) ("Lower court judges may sometimes disagree with this Court's decisions, but they are never free to defy them."). In a shocking turn of events, the district court judge who drew the ire of Justices Gorsuch and Kavanaugh, Judge William G. Young, apologized to them by name. *See* Zach Montague, *Judge Apologizes to Conservative Justices in Case over N.I.H. Cuts*, N.Y. TIMES (Sep. 2, 2025), https://www.nytimes.com/2025/09/02/us/politics/judge-apology-conservative-justices.html [https://perma.cc/7DSB-ZFS5].

[68] *See* J.G.G. v. Trump, 147 F.4th 1044, 1046 (D.C. Cir. 2025) (Katsas, J., concurring); *id.* at 1064 (Rao, J., concurring).

[69] *See, e.g.*, Trump v. J.G.G., 145 S. Ct. 1003, 1006 (2025); Dep't of Educ. v. California, 145 S. Ct. 966, 968 (2025); DHS v. D.V.D., 145 S. Ct. 2627, 2630 (2025); Dep't of State v. AIDS Vaccine Advoc. Coal., 146 S. Ct. 19, 19 (2025) (mem.).

[70] 145 S. Ct. 2540, 2550 (2025).

[71] *See J.G.G.*, 145 S. Ct. at 1007 (Sotomayor, J., dissenting); *id.* at 1011–12, 1013–14 (portion of dissent joined by Justice Barrett); *Dep't of Educ.*, 145 S. Ct. at 969 (Kagan, J., dissenting); *id.* at 969 ("THE CHIEF JUSTICE would deny the application.").

[72] *Compare APHA*, 145 S. Ct. at 2663 (Gorsuch, J., concurring in part and dissenting in part) ("Lower court judges may sometimes disagree with this Court's decisions, but they are never free

The alternative strategy is "guard the guards," with the federal courts keeping a close eye on the executive branch. It is the job of each branch to be a sentinel watching over the others, and nothing about Congress's retreat from its responsibilities means that the courts should retreat from theirs. In fact, the reverse is easy to argue. The challenge is of course how to do this in a way that is attuned to judicial capabilities and is actually effective — the concern of this entire Essay.

Note that this strategy could be adopted at the level of substance or at the level of rhetoric, or both. In terms of substance, as discussed above, the Supreme Court could devote itself to the task of keeping the judicial house in order, or it could set itself to be a sentinel against executive transgression of the Constitution. At the level of rhetoric, it could talk tough to the lower courts but speak to the President in dulcet tones. Or it could be gentle with the district courts, not breaking the bruised reed — knowing the threats they receive and the pressure they face[73] — while the Court could sternly expect the President to lead by example in "tak[ing] [c]are that the [l]aws be faithfully executed."[74] Or the Supreme Court could adopt the same tone for the President and the lower courts, harsh or gentle. The choices involved here include the underlying issue of keeping one's own house or protecting others, as well as the Court's assessment of the conduct of the different actors and its assessment of its own ability to control those different actors.

It should be emphasized that dangers abound. Rough handling of the lower courts will lead to demoralization among federal judges, as suggested above. Indeed, our perception is that this is already occurring.[75] Simultaneously, any disappointment of the Executive may lead

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to defy them."), *with D.V.D.*, 145 S. Ct. at 2630 ("'Assuming as we do' that the District Court will now conform its order to our previous stay and cease enforcing the April 18 injunction through the May 21 remedial order, we have no occasion to reach the Government's other requests for relief." (quoting Deen v. Hickman, 358 U.S. 57, 58 (1958) (per curiam))).

[73] For judicial recognition of these threats and pressure, see Judge Cullen's reference to the "concerted effort by the Executive to smear and impugn individual judges who rule against it[, which] is both unprecedented and unfortunate." United States v. Russell, 797 F. Supp. 3d 552, 560 n.2 (D. Md. 2025); *see also* Deacon & Litman, *supra* note 1 (manuscript at 42).

[74] U.S. CONST. art. II, § 3.

[75] *See, e.g.*, Mattathias Schwartz & Zach Montague, *Federal Judges, Warning of "Judicial Crisis," Fault Supreme Court's Emergency Orders*, N.Y. TIMES (Oct. 11, 2025), https://www.nytimes.com/2025/10/11/us/politics/judicial-crisis-supreme-court-trump.html [https://perma.cc/8ER9-N9UT]; Justin Wise & Jacqueline Thomsen, *Justices' Emergency Orders for Trump Sow Cracks in Judiciary (1)*, BLOOMBERG L. (Sep. 10, 2025, at 15:43 ET), https://news.bloomberglaw.com/us-law-week/supreme-court-emergency-orders-for-trump-sow-cracks-in-judiciary [https://perma.cc/E3BF-D256]; Steve Vladeck, *174. Justice Gorsuch's Attack on Lower Courts*, ONE FIRST (Aug. 25, 2025), https://www.stevevladeck.com/p/174-justice-gorsuchs-attack-on-lower [https://perma.cc/YV6K-UAGP]; Lawrence Hurley, *In Rare Interviews, Federal Judges Criticize Supreme Court's Handling of Trump Cases*, NBC NEWS (Sep. 4, 2025, at 05:00 ET), https://www.nbcnews.com/politics/supreme-court/supreme-court-trump-cases-federal-judges-criticize-rcna221775 [https://perma.cc/F4T3-RA4A]; Josh Gerstein & Kyle Cheney, *Appeals Court Judges Publicly Admonish Supreme Court Justices: "We're Out Here Flailing*," POLITICO (Sep. 11, 2025, at 15:12 ET), https://www.politico.com/news/2025/09/11/supreme-court-emergency-rulings-judges-00558058 [https://perma.cc/E8BU-MK2R].

him to new resentments, which he might express in all manner of destructive ways. Already against other former and current government officials his enmity has manifested itself in a train of abuses — calls for resignations, FBI raids, selective prosecutions, removal of security clearances, and cancellation of security details that leave people vulnerable to assassination attempts.[76] In terms of rhetoric, then, there are real costs from the Court "punching down" at the lower courts, already beleaguered by executive pressure; and real risks from "punching sideways" at the President and his advisers, who may be itching for a fight.

Nor is it really possible for the Court to acoustically separate the executive and judicial audiences for its decisions. That is, the Court cannot credibly assure all the federal judges that it is backing them up as against the Executive while also credibly assuring the President that it is scrupulously keeping the lower federal courts "in line." It feels zero sum, and if the Court is distrusted — by the lower federal judges and also the President — the available options may be worse than zero sum.

### *F. Empower District Courts or Restrain Them?*

A related question is about institutional division of labor. As we have noted, different courts might choose different remedial approaches based on their institutional position. District court judges sit on the front lines and often adjudicate alone; appellate judges travel in packs and speak in groups; Supreme Court Justices occupy a political spotlight. And so on.

For instance, one possibility is that district court judges should be especially drawn to a strategy of playing it straight, ordering a lawbreaking executive branch to comply with the law, while letting appellate courts sort out any need for more complicated machinations. That view would see the district court's law as the law of rules,[77] with Bickel-style political considerations being second-order,[78] something that comes into play only after the purely legal answer has been worked out. This possibility would reduce the coordination problem for the give-and-take strategy, for that problem is sharpest at the level of the district courts.

Another possibility is that district court judges should act *aggressively*, going out of their way to send a message, while appellate courts should be the ones to "play it straight," reining in the overzealous district courts. On this model, the district courts award "sanctions," and sometimes the appellate courts reduce them to "prices,"[79] based on all the

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[76] Indeed, federal judges have recently had to worry about what would happen if judicial security was pulled back. *See* Mattathias Schwartz & Emily Bazelon, *Judges Worry Trump Could Tell U.S. Marshals to Stop Protecting Them*, N.Y. TIMES (Apr. 25, 2025), https://www.nytimes.com/2025/04/25/us/politics/trump-judges-marshals-threats.html [https://perma.cc/FJ8G-MXXQ].

[77] *See* Antonin Scalia, Essay, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1178–80 (1989).

[78] BICKEL, *supra* note 39, at 131–33.

[79] For this distinction, see Robert Cooter, *Prices and Sanctions*, 84 COLUM. L. REV. 1523 (1984).

kinds of institutional concerns raised in this Essay. (Unfortunately, the exact same behavior could be characterized in either fashion, depending on which court one thinks is getting the law "right.")

Theoretically, there could even be differentiation in the opposite direction, with district courts being lax toward the executive branch and appellate courts stepping in to provide more rigorous accountability for the Executive to follow the law. The rationale here would be the greater power and institutional security the further up the judicial chain one goes. We should not expect to find this pattern, however. Appellate courts can order action by district courts, but it is easier for them to require nonaction. (It is not a coincidence that what an appellate court issues is called a "stay," not a "go.")

Indeed, descriptively we do observe exactly one of these patterns in much compliance litigation with the executive branch. And that was true well before the current Administration. As Parrillo documents, in a number of cases where a lower court attempted to hold agency officials in contempt, a higher court eventually stepped in to alleviate the consequences.[80] The lower court was more likely to serve the "bad cop" role. The recent contempt litigation in the D.C. Circuit seems to repeat the pattern. After Chief Judge Boasberg found "probable cause exists to find the Government in criminal contempt,"[81] a motions panel of the D.C. Circuit reversed him by a 2–1 vote, with the two reversing judges unable to agree on why the district court had erred.[82]

These patterns highlight the institutional division of labor. Should doctrine empower district judges more, or restrain them more? In the past year, the Supreme Court may have chosen the latter course. *CASA* restricted the ability of all courts to issue universal relief beyond the parties to the lawsuit, but in practical effect it weakened the powers of the lower courts much more than those of the Supreme Court, as Justice Kavanaugh highlighted.[83] The Supreme Court's recent emphasis that its interim orders should be given some form of quasi-precedential status, informing a court's exercise of "equitable discretion," is another institutional move restraining lower courts.[84] Professor Jack Goldsmith

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80 *See* Parrillo, *supra* note 21, at 745–53.

81 J.G.G. v. Trump, 778 F. Supp. 3d 24, 30 (D.D.C. 2025).

82 *Contrast* J.G.G v. Trump, 147 F.4th 1044, 1051 (D.C. Cir. 2025) (Katsas, J., concurring) ("[T]he TRO was insufficiently clear to support criminal contempt."), *with id.* at 1069 (Rao, J., concurring) ("[T]he district court's order impermissibly encroaches on the Executive's conduct of foreign affairs.").

83 *See* 145 S. Ct. 2540, 2567–70 (2025) (Kavanaugh, J., concurring).

84 *See* Trump v. Boyle, 145 S. Ct. 2653, 2654 (2025) (grant of application for stay). For pre-*Boyle* analysis, see generally Bert I. Huang, *The Foreshadow Docket*, 124 COLUM. L. REV. 851 (2024) (reviewing PHILOSOPHICAL FOUNDATIONS OF PRECEDENT (Timothy Endicott, Hafsteinn Dan Kristjánsson & Sebastian Lewis eds., 2023)); Trevor N. McFadden & Vetan Kapoor, *The Precedential Effects of the Supreme Court's Emergency Stays*, 44 HARV. J.L. & PUB. POL'Y 827 (2021).

argues that these phenomena are part of the Court's bid to secure executive compliance with the judiciary as a whole.[85] By constraining the powers of the district courts, the Supreme Court helps to manage its relationship to the executive branch.

Yet this strategy comes at a cost. The district courts are, as we said, on the front lines and many of their remedial decisions have traditionally received legal deference. They may be disheartened or disturbed if appellate courts and the Supreme Court seem half-hearted in their defense.[86] An atmosphere of mistrust between different levels of the judiciary may turn out to be bad for all of them; in a time of crisis, hang together, or else.

For instance, in a recent interim order in *APHA*, the district court both disagreed with and attempted to distinguish an earlier Supreme Court interim order.[87] The district court's position garnered 4.5 votes at the Supreme Court.[88] Yet, as noted earlier, that did not stop Justice Gorsuch (joined by Justice Kavanaugh) from scolding the district court — and district courts generally — for being insufficiently faithful agents of the Supreme Court's precedents.[89] The Supreme Court's power depends on whether lower courts faithfully implement its rulings, even when the rulings are ambiguous and could be distinguished. If district court judges feel as though the Supreme Court does not support them, the Justices should not be surprised if the favor is returned.

### *G. Say the Sky Is Falling or Keep Calm and Carry On?*

Another question: If judges think we are in the midst of a constitutional crisis, should they say the sky is falling or simply carry on?

In the first half of the first year of the second Trump Administration, we already saw examples of what appear to be the former choice. Judge J. Harvie Wilkinson's stirring opinion for a panel of the Fourth Circuit in the Abrego Garcia case quickly comes to mind, stating that if the Administration were to continue down its current path, "law in time will sign its epitaph."[90] Other recent examples include dissents from Justice Jackson, which state, inter alia, that we are facing "an existential threat

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[85] *See* Goldsmith, *supra* note 28, at 123–24. In the reverse vein, Professor Adrian Vermeule recently argued that the President should disobey district court orders and that by doing so he would actually be vindicating the Supreme Court. *See* Vermeule, *supra* note 1.

[86] *See* sources cited *supra* note 75.

[87] Massachusetts v. Kennedy, 783 F. Supp. 3d 487, 496–99 (D. Mass. 2025).

[88] *See APHA*, 145 S. Ct. 2658, 2661–62 (2025) (Barrett, J., concurring in the partial grant of the application for stay) (agreeing with the district court regarding guidance documents, but not grant terminations); *id.* at 2662 (Roberts, C.J., concurring in part and dissenting in part, joined by Sotomayor, Kagan & Jackson, JJ.).

[89] *Id.* at 2663, 2665 (Gorsuch, J., concurring in part and dissenting in part, joined by Kavanaugh, J.).

[90] Abrego Garcia v. Noem, No. 25-1404, 2025 WL 1135112, at *3 (4th Cir. Apr. 17, 2025).

to the rule of law."[91] It is harder to know if we have seen examples of the "simply carry on" choice. When judges and Justices do not engage in alarm-raising, are they expressing serenity in public or do they not believe that any threat exists?

If one does perceive such a threat, there are a number of reasons to say so. A judge may want to convey to the public the state of things — either out of a sense that judges should be forthcoming or a desire to galvanize the public in some way.[92] The first motivation feels almost deontological in nature and rests on a duty of candor: a duty that might feel particularly important if, for example, the court's perception of the threat has affected the court's decisions.[93] The second motivation is about consequences, as judges presumably hope that sounding the alarm will stir the public to increase political pressure on the executive branch (and *in extremis*, to summon "the whole power of the county,"[94] indeed perhaps of the whole country).

And then there are the reasons not to say the sky is falling. The first set, once again, sounds in duty and role. To wit, a judge might think that the judicial role requires calm, not unlike the manager of a bank — who has a duty not to contribute to a run on the bank. Indeed, if judges contribute to the view that we are in a constitutional crisis or that the rule of law is truly threatened, this may risk further noncompliance and aggressive self-help — not only by the Executive but also by other parties.[95] Other motivations are more consequentialist. Judges might express calm in an effort to "wait it out" — that is, acquiesce (and keep quiet) in wartime in the hopes of avoiding a precedent for peacetime.[96]

There are attendant considerations. For any judge who is contemplating whether to say the sky is falling, there is the matter of his or her

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[91] Trump v. CASA, Inc., 145 S. Ct. 2540, 2597 (2025) (Jackson, J., dissenting); *see also, e.g.*, Trump v. United States, 144 S. Ct. 2312, 2383 (2024) (Jackson, J., dissenting) ("[B]ecause the risks (and power) the Court has now assumed are intolerable, unwarranted, and plainly antithetical to bedrock constitutional norms, I dissent.").

[92] *See generally* Marin K. Levy & Trevor W. Morrison, *Raising the Judicial Alarm* (2026) (unpublished manuscript) (on file with the Harvard Law School Library).

[93] On judicial reason-giving, see Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 387–88 (1978).

[94] Suspension of the Privilege of the Writ of Habeas Corpus, 10 Op. Att'ys Gen. 74, 80 (1861).

[95] Senator Chuck Grassley held a town hall in the spring of 2025, which elicited pointed questions from constituents following the Trump Administration's resistance to securing the return of Abrego Garcia. *See* Michael Gold, *Grassley Draws Jeers from Constituents at Raucous Town Hall*, N.Y. TIMES (Apr. 15, 2025), https://www.nytimes.com/2025/04/15/us/politics/chuck-grassley-town-hall-iowa.html [https://perma.cc/MN98-KHRC]. Specifically, one constituent asked the Senator, "So if I get an order to pay a ticket for $1,200, and I just say, 'No,' does that stand up?" Tom Ley, *Angry Interjections from Chuck Grassley's Chippy Town Hall Meeting, Ranked*, DEFECTOR (Apr. 16, 2025, at 14:35 ET), https://defector.com/angry-interjections-from-chuck-grassleys-chippy-town-hall-meeting-ranked [https://perma.cc/PSW5-A4NE].

[96] *See* William H. Rehnquist, Lecture, *Remarks of the Chief Justice of the United States*, 47 DRAKE L. REV. 201, 208 (1999).

own positioning. There can be no doubt that Judge Wilkinson's opinion carried the particular weight that it did, and reverberated the way that it did,[97] because of who he is known to be within the judiciary — a highly regarded conservative judge.[98] Another judicial declaration of constitutional alarm by Judge William Young[99] — the judge whose order had been under review in the earlier *APHA* case — does not appear to have landed the same way.[100]

There are also particular choices for judges who sit on multimember courts when the court is fractured with regard to a particular decision. The significance of speaking up or staying silent changes when another colleague is making a statement. For example, when other members of the brethren raise concerns about the health of the democracy, sticking to a default position of silence may seem like making a statement that all is well.

And one final question under this heading comes into view. In our earlier discussion we had been imagining choices strictly within the judicial role — that is, how might judges think through their decisions and fashion relief. But the choice of "see something, say something" can extend beyond the formal judicial space. A judge or Justice might make a comment at a circuit conference or in an interview to the press. And, though this would presumably violate judicial canons for lower court judges,[101] other countries have even seen judges participating in rallies in support of the courts against the executive branch.[102] These instances

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[97] *See, e.g.*, Editorial, *Judge Wilkinson's Sage Advice on Abrego Garcia*, WALL ST. J. (Apr. 18, 2025, at 17:35 ET), https://www.wsj.com/opinion/j-harvie-wilkinson-opinion-abrego-garcia-el-salvador-deportation-4e72f464 [https://perma.cc/S2AC-EC39]; *Read Conservative Judge's Full Opinion Rebuking Trump Administration over Abrego Garcia Case*, TIME (Apr. 18, 2025, at 01:00 ET), https://time.com/7278774/judge-harvie-wilkinson-opinion-read-full-text-trump-abrego-garcia [https://perma.cc/Z55F-GCMU]; Erica Orden, *Conservative Judge Blasts Trump Administration's "Shocking" Conduct in Abrego Garcia Case*, POLITICO (Apr. 17, 2025, at 20:20 ET), https://www.politico.com/news/2025/04/17/abrego-garcia-appeal-wilkinson-00298063 [https://perma.cc/225Q-7VPX].

[98] *See* Alan Feuer & Adam Liptak, *Who Is J. Harvie Wilkinson, The Judge Behind a Scathing Rebuke of the White House?*, N.Y. TIMES (Apr. 18, 2025), https://www.nytimes.com/2025/04/18/us/politics/harvie-wilkinson-conservative-judge.html [https://perma.cc/M7J4-YKRZ] (noting that part of the reason there was "an uproar" around Judge Wilkinson's opinion was because of its author — "a conservative Reagan appointee").

[99] *See* Am. Ass'n of Univ. Professors v. Rubio, 802 F. Supp. 3d 120, 194–99 (D. Mass. 2025).

[100] *See, e.g.*, Katelyn Polantz, *Legal Opinions Usually Aren't Exciting. This One Has Everyone Talking*, CNN (Oct. 1, 2025, at 11:36 ET), https://www.cnn.com/2025/10/01/politics/william-young-legal-opinion-everyone-talking [https://perma.cc/XA3X-H8ZY] (discussing the import of the Judge's opinion but then asking if the writing went "too far").

[101] Specifically, Canon 5 states that "Judge[s] Should Refrain From Political Activity." CODE OF CONDUCT FOR U.S. JUDGES Canon 5 (JUD. CONF. OF THE U.S. 2019). Canon 2(A) speaks to the "appearance of impropriety," and marching in a rally or engaging in similar activities might cause someone to think that the given judge or Justice would be predisposed to rule against the administration. *See id.* Canon 2(A) cmt.

[102] *See, e.g.*, Anita Komuves & Krisztina Fenyo, *Hungarian Judges, Court Staff Rally for Judicial Independence*, REUTERS (Feb. 22, 2025, at 09:19 ET), https://www.reuters.com/world/europe/

of "say the sky is falling" carry their own dangers. As a judge steps further and further from the courthouse when making such remarks, there is a sharply increased risk that the judge will be seen as just one more partisan actor — a perception that is its own threat to judicial legitimacy.

## CONCLUSION

Judge Silberman once wrote that if the President were "to encourage bald disobedience of judicial orders," then "[a]t that point, [judges] would be headed, in accordance with our temperament, either to the basement or the barricades."[103] Yet, as we hope to have shown, the matter is more complicated. There are many things judges might do from the bench, and not only from the basement or the barricades. These options include questions of how and whether to strategize about executive behavior, about whether to push against or give back to the Executive, about the internal structure of the judiciary, and about what the judiciary should do and what it should say.

Whatever answers judges give to these questions, we hope we have shown that they are complicated, reflecting tradeoffs, uncertainty, and institutional judgment. That fact helps for understanding the judiciary's reaction to crisis. Because the correct remedial approach is so contestable, two judges can disagree profoundly about what their duties as a judge may require — whether with respect to contempt enforcement, appropriate judicial rhetoric, or the Supreme Court's exercise of discretion about staying lower court decisions — even as they agree on both the legal merits and the larger constitutional picture. Therefore, one cannot easily say in every instance "if the court really recognized this was illegal, it would ___"; or "if the court really understood what was going on, it would ___." Because the remedial choices are complicated and nonobvious, disagreement about them need not be a sign of ignorance or bad faith.

Indeed, our hope in making the range of options explicit is that we can make it easier for judges and others to come together — at least in understanding and articulating the tradeoffs they face, rather than hiding those tradeoffs behind unarticulated assumptions. Perhaps each judge and each lawyer already knows the choices we put forward here. Now we can all know them together.

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hungarian-judges-court-staff-rally-judicial-independence-2025-02-22 [https://perma.cc/XS5U-5R36]; Christian Davies, *Judges Join Silent Rally to Defend Polish Justice*, THE GUARDIAN (Jan. 12, 2020, at 02:17 ET), https://www.theguardian.com/world/2020/jan/12/poland-march-judges-europe-protest-lawyers [https://perma.cc/P93P-XSSQ].

[103] Swan v. Clinton, 100 F.3d 973, 989 (D.C. Cir. 1996) (Silberman, J., concurring).