Judicial Acquiescence to Presidential Immigration

Abandoning Administrative Law in a Crisis

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Mahmoud Khalil, Kilmar Ábrego García, and Rumeysa Ozturk are just a few of the people against whom the second Trump Administration has openly engaged in alarming forms of immigration enforcement. In addition, President Trump seems undeterred by U.S. federal court orders that he stop commanding the administrative state to implement unlawful immigration punishments. Unfortunately, the U.S. Supreme Court seems to have the Trump Administration's back vis-à-vis the lower courts. Arguably, the Court has "reward[ed]" the Trump Administration's immigration "lawlessness" outright. And indeed, the Court's recent erosion of an important tool of judicial constraint – the nationwide injunction – will further empower President Trump to terrorize noncitizens and their American-born children.

But there is another, underappreciated way in which the Court has defanged the judiciary's systemic ability to confront the executive branch's illegal immigration behavior: the Court has failed to draw on U.S. administrative law to constrain the President's most egregious immigration initiatives. In doing so, it has diminished a vital structural judicial check on presidential power – one that lower courts, and even a future Supreme Court less permissive of illegitimate "presidential immigration," may find increasingly difficult to deploy.

Understanding "presidential immigration"

In a nutshell, presidential control over agencies' immigration actions may be understood as "presidential immigration," a variation on the well-known concept of "presidential administration." "Presidential immigration" means that the President may issue directives to or otherwise wield control over a large and powerful administrative apparatus in order to meet his immigration objectives. As a result, however, the President can neither intensify immigration enforcement in the first instance nor violate a court decree proscribing his immigration efforts without harnessing the bureaucracy itself – in other words, without drawing on the discretionary authority and capacity of administrative agencies in order to further his immigration goals.

In addition to their responsiveness to the President, administrative agencies are also governed by U.S. administrative law – in particular, the Administrative Procedure Act (APA). Therefore, the restrictions imposed on federal agencies by the APA should be applied to curb unsubstantiated, let alone illegal, immigration actions initiated by the President and carried out by the bureaucracy. Put another way, safeguards maintained by the APA have the potential to restrain the exercise of Executive power by checking the mechanism – that is, the administrative state – that the President must use to wield his preferences in the enforcement of immigration law. While the President is not directly governed by the APA, the APA empowers the judiciary to ensure that administrative procedures and policymaking justifications are adequate, including in situations where agencies are implementing presidential directives.

Troubling presidential immigration

In recent months, constitutional and procedural deficiencies have not stymied the Trump Administration's attacks on noncitizens. For instance, the Administration has intensified immigration enforcement, including against those with documented immigration status, in order to chill noncitizens' lawful political speech. This is not unlike previous government efforts to limit noncitizens'

access to constitutional rights, including as accomplished by surveillance. These examples fit overall with the role of immigration enforcement and national security mechanisms in "permit[ting] the government to oppress people who are deemed risky."

During this time, the Trump Administration also started sending Venezuelan immigrants (and others) to a foreign prison in El Salvador "without any due process of law, under the auspices of the Alien Enemies Act [AEA], a 1798 law designed for times of war." The Administration has justified its farfetched use of the AEA to deport noncitizens who pose no threat to the U.S. by attaching a "criminal" label to them; nonetheless, most of these people have not, in fact, been accused of committing or convicted of any crimes.

Notably, these detentions and deportations are the result of administrative decisions bereft of process. As an initial matter, no notice or information has been made available to targeted noncitizens regarding what has triggered more intense forms of immigration enforcement, which is particularly concerning because many targets are legal permanent residents or otherwise in the U.S. with valid documentation. In addition, the underlying procedure for determining that a noncitizen is "criminal" and therefore should be arrested or deported has been opaque and inconsistent at best and nonexistent at worst, resulting in the wrongful treatment of documented immigrants without criminal records.

Further complicating matters, the President has been resistant to judicial orders limiting his –and ,by extension, the immigration bureaucracy's – commitment to speedy and cruel immigration punishment. For example, a district court required the Trump Administration to effectuate the immediate return of Kilmar Ábrego García from El Salvador back to the U.S., which the Supreme Court then affirmed. Nonetheless, even though the White House admitted this deportation was the result of an "administrative error," it vehemently failed to comply until recently, and then only in order to impose unsubstantiated human smuggling charges on Mr. Ábrego García.

In *J.G.G. v. Trump*, a federal court judge in Washington, D.C. issued a temporary restraining order barring the use of the AEA to deport the plaintiffs named in the case; this order was soon amended to include a larger class of plaintiffs nationwide. The oral order made clear that any planes in the air must be returned to U.S. airspace and that custody of these plaintiffs must not be relinquished to a foreign government. Despite this judicial command, two planes that had already departed U.S. airspace but that had not yet arrived in El Salvador continued en route. In response to the court's request for information to determine whether its order had been observed, the Administration characterized the judicial inquiry as "a picayune dispute over the micromanagement of immaterial factfinding" and ultimately "evaded its obligations" to follow the court's order.

Administrative law constraints on presidential immigration

The Supreme Court drew on the APA to constrain the immigration excesses of the first Trump presidency. It deployed APA section 706(2)(A), which allows courts to review most agency actions to ensure that it is not "arbitrary" or "capricious." In two cases, "the Supreme Court evolved the arbitrary and capricious standard into an accountability-forcing mechanism for censuring pretextual, or otherwise unethical, agency justifications for policies that [were implemented only to] further the President's [immigration] interests."

For example, in *DHS v. Regents*, the Court invalidated the Trump-directed rescission of the Deferred Action for Childhood Arrivals (DACA) policy. This program allowed certain undocumented immigrants who were seen as favorable and a low priority for deportation to apply for a two-year deferral of deportation. Those granted this relief were also eligible for work authorization and various federal benefits. According to the Court's decision, the agency acted in an arbitrary and capricious manner because it did not adequately justify its action and instead acted quickly in order to achieve the Attorney General's (and, by extension, the President's) interest in eradicating the program as quickly as possible.

In *Department of Commerce v. N.Y.*, "the Court reinvigorated arbitrary and capricious review as a means for sniffing out pretextual justifications for policies developed at the President's request." Indeed, "[c]onsistent with hard look doctrine, the Court sought to consider 'what role political judgments can and should play' in the administration of the Census." In doing so, the Court found that the agency's decision to add a question to the Census inquiring about citizenship status was unsubstantiated—a cover for mere responsiveness to the White House's policy position. Ultimately, the majority opinion determined that the Secretary of the agency lied to meet the President's objectives, rendering the new Census policy arbitrary and capricious.

Finally, the judiciary also recognized reliance interests that require the President and agencies to display forbearance in immigration enforcement. At the time of the Regents case, 700,000 people had applied for and received deferral of deportation under DACA. Accordingly, the Supreme Court found reliance interests present when evaluating DACA's protection against deportation. In doing so, the Court rendered it more difficult for the first Trump Administration to revoke the entire DACA program.

This set of cases set a precedent for judicial review under the APA that limits the range and impact of presidential immigration by compelling enforcement officials to provide adequate justifications for their actions. Despite presidential pressure, immigration agencies were forced to implement better policies by shoring up the rationales underlying those policies. As a result, these cases reduced the detrimental effects of presidential immigration by checking the administrative apparatus that the President relies on to pursue his immigration goals.

Today's eroded application of administrative law

Had the Roberts Court maintained its commitment to applying the APA, it could have set better boundaries for the second Trump Administration's immigration actions, and perhaps even reduced immigration agencies' incentives to defy judicial orders. Instead, as of late, the Court has relinquished its use of the APA to constrain presidential immigration. This, in turn, has provided implicit judicial support for the consolidation of presential power, which may further fuel Executive defiance of judicial authority.

In *Noem v. Nat'l TPS Alliance*, the Court chose not to reaffirm the district court's recent decision asserting reliance interests implicated by the Temporary Protected Status (TPS) program, which the second Trump Administration has stripped from 350,000 Venezuelan nationals, thus subjecting them to deportation back to "a country[] rife with economic and political upheaval and danger." And in *Trump v. J.G.G.*, the Court said that people who are detained and deported under the AEA have no recourse under the APA. Instead, it declared that "[c]hallenges to removal under the AEA, a statute which largely 'preclude[s] judicial review,' must be brought in habeas."

A writ of habeas corpus is used to bring a prisoner or other detainee before the court to determine if the person's imprisonment or detention is lawful. It is commonly used to determine whether people ensconced in the criminal legal system have been illegally held by the government. In regard to immigration matters, which are civil (not criminal) and administrative in nature, the APA offers an important, appropriate form of judicial review (in addition to habeas, if necessary). Nonetheless, Justice Kavanaugh's concurrence makes the Court's unfortunate decision clear: The Court determined that the question of whether a person has been lawfully detained for a civil immigration offense "turns on whether these transfer claims belong in habeas corpus proceedings or instead may be brought under the Administrative Procedure Act. I agree with the Court's analysis that the claims must be brought in habeas."

The dissent has been mourning these developments. Per Justice Sotomayor, habeas corpus is the wrong tool: "The plaintiffs in this case sued not to challenge their detention, but to protect themselves from summary deportation." And per Justice Jackson's "lament," the Court "appears to have embarked on a new era of procedural variability" in a "casual, inequitable, and, in [her] view, inappropriate manner." This suggests that the Court's willingness to dispense

with applying the APA is a departure from the orthodox judicial approach to overseeing the administrative state.

By relegating judicial review of a consequential pathway of immigration enforcement to the limited domain of habeas corpus claims, the Court has relinquished an important tool for limiting the Trump Administration's deportation crackdown. This shift cuts against the interests of economically marginalized noncitizens. As Justice Sotomayor observes, "[i]ndividuals who are unable to secure counsel, or who cannot timely appeal an adverse judgment rendered by a habeas court, face the prospect of removal directly into the perilous conditions of El Salvador's [high security prison], where detainees suffer egregious human rights abuses." Moving forward, the Administration is perhaps more likely to detain noncitizens in jurisdictions that are favorable to the administration's goals. And noncitizens, particularly those who are targeted because of their engagement in protest and advocacy activity, neither have the political power to fight these detentions and deportations as a collective nor command the electoral influence required to sway these policies from the top down.

Shockingly, the Trump Administration may not understand – or may be willfully ignoring – the constitutional, if minimal, protection offered by habeas review, which allows an individual to challenge their detention by the government. When asked at a Senate hearing to define this right, the Secretary of DHS described habeas corpus as "a constitutional right that the president has to be able to remove people from this country." The Secretary's confusion implies a reduced interest in ensuring that the government is not, in fact, unconstitutionally imprisoning people. And her assertion "that the president of the United States has the authority under the Constitution to decide if [habeas corpus protections] should be suspended or not" suggests that new dangers of presidential aggrandizement may be unfolding.

This post draws from Shah's recent symposium remarks and forthcoming article on presidential control over administrative discretion. A version of this piece was originally posted on the Law and Political Economy Project blog.

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