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REMEDIES FOR A CONSTITUTIONAL CRISIS

It is a basic principle of constitutional law that judicial power includes the power to decide cases and issue rulings that bind the parties. However, 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 are especially apparent today. When a federal court ordered the return of a wrongly deported man, the executive branch tried to evade the order. Even after the Supreme Court ruled that the district court had properly required the Government to “facilitate” his release from custody, officials refused to comply. In another immigration case, under the Alien Enemies Act, officials may have violated a court order not to deport or deplane the plaintiffs while a federal court emergency hearing was ongoing. 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.

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, accusing judges of fictitious wrongdoing, and tacitly encouraging retaliation against them. And indeed, there is evidence that this is what is happening. The upshot is that we are slipping into a crisis of judicial authority—what one could call a “constitutional crisis.”

What can courts do to enforce their decisions in such a crisis? 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 might 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?

Our central claim is that the range of remedial options available to courts is broader than it may seem at first. 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 the correct choice obvious. 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.