IMMIGRATION ENFORCEMENT, STRATEGIC ENTRENCHMENT, AND THE DEAD HAND OF THE TRUMP PRESIDENCY

Anil Kalhan[*]

INTRODUCTION

Hours after taking office, President Joe Biden began dismantling the immigration restrictionist policies of his predecessor. Emphasizing that immigrants "strengthen America's families, communities, businesses and workforce, and economy"—and that "enforcing the immigration laws is complex and requires setting priorities to best serve the national interest"—the new president rescinded a number of signature immigration directives issued under former President Donald Trump's presidency, including the executive order on interior immigration enforcement that the Trump presidency had issued almost exactly four years earlier. Biden directed officials to "reset" enforcement policies and practices and to align them with his own administration's values and priorities—including not only security- and safety-based purposes, but also the objectives of responding effectively to "humanitarian challenges" at the U.S.-Mexico border, "ensur[ing] public health and safety," "adher[ing] to due process of law," and "safeguard[ing] the dignity and well-being of all families and communities."[1]

That same day, the new Acting Secretary of Homeland Security, David Pekoske, ordered a comprehensive, 100-day review of all immigration enforcement policies and practices.[2] He rescinded a raft of Trump-era guidance documents and instituted new interim enforcement priorities pending completion of

* Professor of Law, Drexel University Kline School of Law; Visiting Scholar, Center for the Study of Law and Society, University of California, Berkeley, School of Law. Many thanks to Jennifer Chacón for helpful comments on an earlier draft, and especially to Jason Mazzone, Kat Walton, Yongli Yang, and the editors of the *University of Illinois Law Review*.

1. Exec. Order No. 13,993, §§ 1–2, 86 Fed. Reg. 7051 (Jan. 20, 2021) (revoking Exec. Order No. 13,768, 3 C.F.R § 268 (Jan. 25, 2017)); *see* Muzaffar Chishti & Sarah Pierce, *Biden Sets the Stage for a Remarkably Active First 100 Days on Immigration*, MIGRATION POLICY INST. (Jan. 27, 2021), https://www.migrationpolicy.org/article/biden-immigration-reform-agenda [https://perma.cc/5KKV-4KSU].

2. Memorandum from David Pekoske, Acting Sec'y of Homeland Sec. to Troy Miller, Senior Officer Performing the Duties of the Comm'r, U.S. Customs & Border Prot., Tae Johnson, Acting Dir., U.S. Immigr. & Customs Enf't, & Tracey Renaud, Senior Off. Performing the Duties of the Dir., U.S. Citizenship & Immigr. Servs. (Jan. 20, 2021), https://www.dhs.gov/publication/memorandum-acting-secretary-pekoske-immigration-enforcement-policies [https://perma.cc/URB2-6MPR].

that DHS-wide review, noting that "[d]ue to limited resources, DHS cannot respond to all immigration violations or remove all persons unlawfully in the United States." To allocate enforcement resources based on "sensible priorities and changing circumstances," the memorandum directed the department to prioritize enforcement activities for three categories of individuals—(1) individuals believed to present threats to national security, (2) individuals who recently arrived in the United States without authorization, and (3) individuals deemed to present risks to public safety—at each stage of the enforcement process where officials make various discretionary decisions.[3]

To facilitate the new administration's review and realignment of priorities—and to fulfill a pledge that Biden and other candidates had made during the campaign—Pekoske also ordered an immediate, partial moratorium on deportation of certain noncitizens with final orders of removal for 100 days.[4] The memorandum expressly tied the need for the 100-day "pause" to the new administration's policy review and shift in priorities, stating that the partial moratorium was necessary to "focus[] the Department's resources where they are most needed." Stressing "significant operational challenges" at the U.S.-Mexico border—particularly as DHS "confront[ed] the most serious global public health crisis in a century"—Pekoske stated that

> [DHS] must surge resources to the border in order to ensure safe, legal and orderly processing, to rebuild fair and effective asylum procedures that respect human rights and due process, to adopt appropriate public health guidelines and protocols, and to prioritize responding to threats to national security, public safety, and border security. . . . [W]e must ensure that our removal resources are directed to the Department's highest enforcement priorities.[5]

The memorandum did not institute a blanket moratorium on all enforcement activities, all enforcement activities against individuals with final orders of removal, or even all executions of final removal orders. Rather, it identified categories of individuals whose removal would be prioritized during the 100-day period, including individuals who presented dangers to national security, were not physically present in the United States before November 1, 2020, or had validly waived rights to remain in the United States, and provided that any other individuals could still be removed if "the Acting Director of ICE . . . makes an individualized determination that removal is required by law." The memorandum

3. *Id.* at 2 ("These priorities shall apply not only to the decision to issue, serve, file, or cancel a Notice to Appear, but also to a broad range of other discretionary enforcement decisions, including deciding: whom to stop, question, and arrest; whom to detain or release; whether to settle, dismiss, appeal, or join in a motion on a case; and whether to grant deferred action or parole.").

4. *Id.*; *see* Melissa Gomez, *Biden Commits to Moratorium on Deportations of Immigrants*, L.A. TIMES (Mar. 15, 2020, 7:24 PM), https://www.latimes.com/politics/story/2020-03-15/joe-biden-bernie-sanders-deportations-coronavirus-healthcare [https://perma.cc/PV6X-ECPB]; Aaron Sánchez-Guerra, *At Latino Community Forum, Elizabeth Warren Says She's Open to Suspending Deportations*, MIA. HERALD (Nov. 8, 2019, 3:25 PM), https://www.miamiherald.com/news/politics-government/election/article237157504.html [https://perma.cc/HLF7-Y5K5].

5. Pekoske, *supra* note 2, at 1, 3.

also directed the creation of processes for "individualized review and consideration of the appropriate disposition for individuals who have been ordered removed for 90 days or more, to the extent necessary to implement this pause," and to assess other enforcement measures that might be appropriate alternatives to removal.[6]

Republican opponents wasted no time in attacking these measures. Two days after the inauguration, the Attorney General of Texas, Ken Paxton, filed suit to block the Biden administration's initiatives.[7] As he did six years earlier when suing to block the Obama administration's 2014 deferred action initiatives, Paxton filed suit in an outlying division of the Southern District of Texas in order to guarantee the case's assignment to a reliably sympathetic adjudicator—in this case, U.S. District Judge Drew Tipton, who had long been active in Republican Party political and legal circles and had been rewarded with a swift, party-line confirmation to the bench by the Republican-controlled Senate only five months before Biden's election as president.[8]

Remarkably, the seeds of this effort to subvert the new administration's immigration agenda were planted weeks before Biden's inauguration by the Trump presidency itself. It is not altogether uncommon for outgoing presidential administrations to take actions intended to tie the hands of their successors in various ways.[9] However, the efforts by the outgoing Trump presidency and its

6. *Id.* at 3–4. A month later, DHS issued further guidance to implement Pekoske's interim enforcement priorities. Memorandum from Tae D. Johnson, Acting Dir., U.S. Immigr. & Customs Enf't to All ICE Emps. (Feb. 18, 2021), https://www.ice.gov/doclib/news/releases/2021/021821_civil-immigration-enforcement_interim-guidance.pdf [https://perma.cc/CBN5-XFNE].

7. Complaint at 15–16, Texas v. United States (S.D. Tex. Jan. 22, 2021) (No. 21-cv-00003), ECF No. 1, https://www.courtlistener.com/docket/37251318/1/state-of-texas-v-united-states-of-america/ [https://perma.cc/8YT5-EZSG]; Motion for Temporary Restraining Order Texas v. United States (S.D. Tex. Jan. 22, 2021) (No. 21-cv-00003), ECF No. 2, https://www.courtlistener.com/docket/37251318/2/state-of-texas-v-united-states-of-america/ [https://perma.cc/4QNC-8N4U]. In 2015, Paxton was indicted on felony state securities fraud charges, and he continues to await trial on those charges. The FBI reportedly has also been investigating Paxton for charges of bribery, abuse of office, and other crimes. Jake Bleiberg, *AP Sources: FBI Is Investigating Texas Attorney General*, ASSOCIATED PRESS (Nov. 17, 2020), https://apnews.com/article/ken-paxton-austin-texas-crime-f8413d14842d848e69cf81bb4d2e87e2 [https://perma.cc/GMG7-AB4M].

8. Andrew Kragie, *Divided Senate Confirms Baker Hostetler Atty For Texas Court*, LAW360 (Jun. 3, 2020, 6:37 PM), https://www.law360.com/articles/1278842/divided-senate-confirms-bakerhostetler-atty-for-texas-court [https://perma.cc/TH27-4ZCP]; Harsh Voruganti, *Drew Tipton – Nominee to the U.S. District Court for the Southern District of Texas*, THE VETTING ROOM (Feb. 20, 2020), https://vetting-room.org/2020/02/20/drew-tipton/ [https://perma.cc/BSW8-SCXC] ("Tipton has . . . serv[ed] as a member of the Republican National Lawyers Association and of the Federalist Society. He's also been a frequent donor to Republicans, giving over $8000 to Cornyn and approximately $3000 to Cruz."); *see also* Joshua Eaton, Ilana Marcus & Ed Timms, *Cashing in on Justice*, ROLL CALL (Mar. 3, 2020, 5:00 AM), https://www.rollcall.com/2020/03/03/cashing-in-on-justice/ [https://perma.cc/F9GC-DWKS] (discussing "significant campaign contributions" by federal judicial nominees to Senate Judiciary Committee members and their home state senators, and noting that Trump appointees "were at least twice as likely to have contributed to a Judiciary Committee member as judges appointed by Obama," with Sens. Cruz, Cornyn, and Graham receiving "more money than the rest of the Judiciary Committee combined"). On Paxton's successful effort to steer the lawsuit challenging the Obama administration's deferred action initiatives to U.S. District Judge Andrew Hanen, see Anil Kalhan, *Deferred Action, Supervised Enforcement Discretion, and the Rule of Law Basis for Executive Action on Immigration*, 63 UCLA L. REV. DISC. 58 (2015).

9. *See, e.g.*, Nina A. Mendelson, *Agency Burrowing: Entrenching Policies and Personnel Before a New President Arrives*, 78 N.Y.U. L. REV. 557 (2003).

allies to stymie the new administration's immigration agenda have been unusually irregular and aggressive. Paxton's lawsuit relied principally on an agreement that Texas officials entered with the outgoing, lame-duck Trump presidency—signed by Ken Cuccinelli, purportedly in the capacity of "Senior Official Performing the Duties of the Deputy Secretary of Homeland Security" but with contested legal authority to serve in that role—less than two weeks before Biden was inaugurated.[10] Cuccinelli's agreement pledged that DHS would (1) entrench the Trump presidency's immigration policies and priorities into place, and (2) provide Texas 180 days' written notice, an opportunity to object, and "a detailed written explanation" if it departed from Texas's preferred policies before finalizing any action that might be understood, among other things, to "reduce, redirect, reprioritize, relax, or in any way modify" immigration enforcement or "increase, expand, extend, or in any other way change" the availability of immigration benefits.[11]

Cuccinelli signed similar entrenchment agreements with Republican officials in other jurisdictions, and according to an unnamed Trump administration official, "[t]he whole point [was] 110 percent to screw the incoming administration from doing anything for six months."[12] Nor were these agreements Cuccinelli's only irregular efforts to kneecap the incoming administration and entrench the Trump presidency's own policies. In a formal complaint charging Cuccinelli with "gross mismanagement, gross waste of government funds, and abuse of authority," a whistleblower revealed that the day before Biden's inauguration, Cuccinelli signed agreements with the union representing ICE's employees—which formally endorsed Trump in 2016 and 2020—that purport to give the union broad powers to veto or delay changes to Trump-era immigration enforcement policies. Reports indicate that Cuccinelli signed the agreements himself after several acting ICE directors (with at least somewhat less doubtful legal claims to their offices than Cuccinelli) resisted pressure to do so and resigned.[13]

10. In August 2020, the Government Accountability Office concluded that Cuccinelli's service in this role was invalid, since he had been appointed pursuant to an invalid order of succession—thereby raising questions about the legal validity of actions taken while he purported to serve in that role. U.S. Gov't Accountability Off., Department of Homeland Security; Legality of Service of Acting Secretary of Homeland Security and Service of Senior Official Performing the Duties of Deputy Secretary of Homeland Security, B–331650, August 14, 2020, https://www.gao.gov/products/B-331650 [https://perma.cc/MVM5-X7H3].

11. Agreement Between Department of Homeland Security and the State of Texas (Jan. 8, 2021), *reprinted in* Complaint at Ex. A, Texas v. United States, No. 21-cv-00003 (Jan. 22, 2021), ECF No. 1, https://www.courtlistener.com/docket/37251318/1/1/state-of-texas-v-united-states-of-america/ [https://perma.cc/9X98-WFGB].

12. Jacob Soboroff & Julia Ainsley, *Trump Administration Trying to Sabotage Biden Immigration Plans with Last-Minute Deals, Say Official*, NBC NEWS (Jan. 20, 2021, 4:00 AM), https://www.nbcnews.com/politics/immigration/trump-administration-trying-sabotage-biden-immigration-plans-last-minute-deals-n1254733 [https://perma.cc/6KAC-GQX5]; *see* Hamed Aleaziz, *The DHS Has Signed Unusual Agreements With States That Could Hamper Biden's Future Immigration Policies*, BUZZFEED NEWS (Jan. 15, 2021, 4:59 PM), https://www.buzzfeednews.com/article/hamedaleaziz/dhs-states-agreements-biden [https://perma.cc/7FBH-4XKE].

13. Letter from David Z. Zeide, Gov't Accountability Project, to U.S. House of Representatives, Comm. on Homeland Sec., et al. (Feb. 1, 2021), https://int.nyt.com/data/documenttools/whistleblower-complaint-on-cuccinelli-and-ice-union-employment-agreements/1ace69fe8ae349e1/full.pdf [https://perma.cc/X2PD-W2WD]; *see* Zolan Kanno-Youngs & Charlie Savage, *Last-Day ICE Union Deal Aimed to Tie Biden's Hands, Whistle-*

Tipton swiftly gave effect to Paxton's maneuvers by issuing a temporary restraining order within days, and a preliminary injunction within weeks, that blocked the Biden administration from implementing its partial moratorium on a nationwide basis. For the time being, he declined to rest his rulings on the lame-duck Cuccinelli-Paxton entrenchment agreement, although he did signal interest in eventually reaching the merits of the potentially far-reaching claims arising from that agreement. Rather, Tipton scraped from the bottom of Paxton's initial court filings to conclude that, even in the absence of the lame-duck Cuccinelli-Paxton agreement, the Biden administration's 100-day pause likely (1) violated the Immigration and Nationality Act and (2) constituted an arbitrary and capricious departure from existing policies in violation of the Administrative Procedure Act.[14]

At one level, the lasting significance of Tipton's decrees is limited. While Paxton sought to block the Biden administration's implementation of new policies and priorities altogether, Tipton did not immediately purport to go any further than to block the Biden administration's 100-day partial moratorium on removals. Nor did Tipton's decrees directly limit DHS from using its longstanding, pre-Biden authority to exercise enforcement discretion in various ways with respect to individuals subject to final orders of removal, although blocking the 100-day moratorium may have impeded the ability of supervisory officials to effectively ensure that rank-and-file agency officials actually do so.[15] The new administration's first hundred days have now come and gone, and even without its moratorium, it has nevertheless made genuine (if uneven) progress in chipping away at the sweeping immigration policies and practices instituted by its predecessor.

At another level, however—and especially in the wake of a violent, anti-democratic insurrection evidently fueled in significant part by hostility towards immigrants—Paxton's lawsuit and Tipton's judicial decrees validating that lawsuit constitute a more ominous sign of what may lie ahead.[16] Paxton's more expansive claims remain pending before the court, and Republican officials across

Blower Says, N.Y. TIMES (Feb. 1, 2021), https://www.nytimes.com/2021/02/01/us/politics/cuccinelli-biden-ice.html [https://perma.cc/RRT9-AQQB]. The Biden administration subsequently rescinded the ICE union agreements. Nicole Sganga & Camilo Montoya-Galvez, *Homeland Security Officials Scrap Trump-Era Union Deal That Could Have Stalled Biden's Immigration Policies*, CBS NEWS (Feb. 16, 2021, 5:41 PM), https://www.cbsnews.com/news/ice-officers-union-agreement-trump-homeland-security/ [https://perma.cc/U62C-KN9C].

14. Texas v. United States, No. 21-cv-00003, 2021 WL 247877 (S.D. Tex. Jan. 26, 2021) (hereinafter *Texas I*) (granting temporary restraining order); Texas v. United States, No. 21-cv-00003, 2021 WL 723856 (S.D. Tex. Feb. 23, 2021) (hereinafter *Texas II*) (granting preliminary injunction). In February 2021, Pekoske notified Paxton and officials in other jurisdictions that the entrenchment agreements were "void, not binding, and unenforceable," as the government had argued in court, but in any event that DHS also had "rescind[ed], withdraw[n], and terminat[ed]" those agreements effective immediately. Letter from David Pekoske, Acting Secretary of Homeland Sec., to Ken Paxton, Att'y Gen., State of Texas (Feb. 2, 2021), *reprinted in* Motion for Preliminary Injunction at Ex. 16, *Texas II*, 2021 WL 723856 (S.D. Tex. Jan. 22, 2021) (No. 21-cv-00003), ECF No. 63, https://www.courtlistener.com/docket/
37251318/63/16/state-of-texas-v-united-states-of-america/ [https://perma.cc/499P-X6HT].

15. *Cf.* Kalhan, *supra* note 8, at 85–97.

16. Robert A. Pape, *What an Analysis of 377 Americans Arrested or Charged in the Capitol Insurrection Tells Us*, WASH. POST (Apr. 6, 2021, 9:58 AM), https://www.washingtonpost.com/opinions/2021/04/06/capitol-

the country have filed other lawsuits to block the Biden administration's immigration initiatives in various ways. In claiming power to entrench the Trump presidency's immigration policies, these lawsuits echo the deeper, continuing refusal of many Republicans to accept the outcome of the 2020 election or the legitimacy of the new administration, including its authority to establish immigration policies and priorities that depart from those of its predecessor.[17] By immediately giving even limited effect to the lawsuit's claims—and holding open the possibility that he might eventually endorse even broader claims arising from the Cuccinelli-Paxton entrenchment agreement—Tipton's decrees offer a window into the methods that a federal judiciary aggressively packed with Trump appointees may use to become an eager, active collaborator in those partisan efforts to undermine the new administration's policy agenda.[18] The potential implications extend far beyond the fate of the 100-day removal moratorium itself.

I.

The core of Tipton's January 26, 2021 TRO decision is seductive in its simplicity. On Tipton's reasoning, the Biden administration's temporary, partial moratorium "is clearly not in accordance with, or is in excess of, the authority" conferred by the immigration statute because 8 U.S.C. § 1231(a)(1)(A) contains what Tipton concludes to be "unambiguous," "mandatory language" stating that when a noncitizen is "ordered removed," the government "shall" remove that individual "within a period of 90 days."[19] Relying on stray, out of context dicta from a Fifth Circuit decision addressing a different issue, Tipton blithely declares—in a conclusory, four-word sentence, without any analysis or further discussion—that the word "shall" in that provision necessarily and unambiguously means "*must*."[20] On that basis alone, Tipton concludes that § 1231(a)(1)(A)

insurrection-arrests-cpost-analysis/ [https://perma.cc/B5L9-2KVV]; Alan Feuer, *Fears of White People Losing Out Permeate Capitol Rioters' Towns, Study Finds*, N.Y. TIMES (Apr. 6, 2021), https://www.nytimes.com/2021/04/
06/us/politics/capitol-riot-study.html [https://perma.cc/Y6FB-NQVZ].

17. Kevin Arceneaux & Rory Truex, *Republican Voters Are Deeply Divided Over Trump. So Why Do Most Republican Lawmakers Still Support Him?*, WASH. POST (Feb. 17, 2021, 6:00 AM), https://www.washingtonpost.com/politics/2021/02/17/republican-voters-are-deeply-divided-over-trump-so-why-do-most-republican-lawmakers-still-support-him/ [https://perma.cc/FY54-TSK5]; James Oliphant & Chris Kahn, *Half of Republicans Believe False Accounts of Deadly U.S. Capitol Riot—Reuters/Ipsos Poll*, REUTERS (Apr. 6, 2021, 5:06 AM), https://www.reuters.com/article/us-usa-politics-disinformation-idUSKBN2BS0RZ [https://perma.cc/UA9Q-5LHU].

18. Rebecca R. Ruiz, Robert Gebeloff, Steve Eder & Ben Protess, *A Conservative Agenda Unleashed on the Federal Courts*, N.Y. TIMES (Mar. 14, 2020), https://www.nytimes.com/2020/03/14/us/trump-appeals-court-judges.html [https://perma.cc/D9W6-JA9D]; Josh Marshall, *Democracy vs the Corrupt Federal Judiciary: Which Side Are You On?*, TALKING POINTS MEMO (Oct. 31, 2020, 2:53 PM), https://talkingpointsmemo.com/edblog/democracy-vs-the-corrupt-federal-judiciary-which-side-are-you-on/sharetoken/SkKaIGSKxXzA [https://perma.cc/Z3RG-L4HQ].

19. *Texas I*, 2021 WL 247877, at *3 (quoting 8 U.S.C. § 1231(a)(1)(A)).

20. *Id.* ("Here, shall means *must*." (citing Tran v. Mukasey, 515 F.3d 478, 481–82 (5th Cir. 2008))). *Tran* involved the legality of a noncitizen's indefinite detention under a different statutory provision, 8 U.S.C. § 1231(a)(6). While the Fifth Circuit in *Tran* briefly referred to and paraphrased the language of § 1231(a)(1)(A)

"clearly accords no discretion to [DHS] to blatantly disregard the 90-day removal rule without finding that an enumerated exception applies," and that the 100-day pause is therefore beyond the government's discretion because it "completely disregard[s]" the requirements of § 1231(a)(1)(A). This interpretation suffers from a number of major flaws.

First, Tipton's four-word conclusion, resting entirely on the unexamined appearance of the word "shall" in § 1231(a)(1)(A), perfectly illustrates what Victoria Nourse calls "petty textualism": an approach to statutory interpretation that "picks out one word from a statute, adds a canon of construction, and ends there."[21] As a threshold matter, his opinion is flatly incorrect in suggesting that use of the word "shall" unambiguously and necessarily means "must." There is an "important distinction" in statutory language, a leading treatise explains, between *mandatory* provisions, which "either invalidate[] the transaction or subject[] the noncomplier to . . . consequences stated in the statute," and *directory* provisions, "[whose] violation . . . is attended with no consequences, since there is a permissive element."[22] While courts frequently invoke a canon of statutory construction providing that "shall" typically imposes a mandatory obligation, "[n]o simple, mechanical, universal test exists to distinguish directory provisions from mandatory ones":

> Courts and commentators routinely use "mandatory" and "directory" to describe certain types of statutes, provisions, and individual words. . . . However, such attributions indicate merely that courts more often than not in the past have found that certain types of laws or phrases have a mandatory or directory effect.
>
> Perhaps most notable in this respect, for example, is the idea that the word "shall" is mandatory. Centuries of common law, as well as common sense, indicate that is likely to be true in the future, as well. But the difference between a mandatory and a directory statute . . . always is one of effect only. In certain circumstances, then, "shall" very well might be direc-

in passing, it did not purport to interpret the meaning of that provision at all, much less to conclude, authoritatively, that the provision is mandatory, rather than directory. The passing statement in *Tran* also was more qualified than Tipton implies, stating that "when a final order of removal has been entered," the government "must facilitate that alien's removal" within the removal period specified by § 1231(a)(1)(A). *Tran*, 515 F.3d at 481. Tipton effectively rewrites that discussion to state instead that the government "must remove" individuals within that period. *Texas I*, 2021 WL 247877, at *3.

21. VICTORIA NOURSE, MISREADING LAW, MISREADING DEMOCRACY 10, 108–11 (2016); *see also* Victoria Nourse, *Textualism 3.0: Statutory Interpretation After Justice Scalia*, 70 ALA. L. REV. 667, 680–82 (2019) ("Textualism has within it an internal methodological tension. On the one hand, textualists insist that they look to context to find meaning. But the actual process of analyzing text amounts to slicing the text into smaller and smaller units.").

22. 1A NORMAN J. SINGER & SHAMBIE SINGER, SUTHERLAND STATUTES & STATUTORY CONSTRUCTION § 25:3 (7th ed. 2009 & Supp. 2020) ("Although directory provisions are not intended by the legislature to be disregarded, the seriousness of noncompliance is not considered so great that liability automatically attaches for failure to comply.").

> tory. . . [N]o law, provision, or term ever is intrinsically mandatory or directory . . . . In the end, whether a law is mandatory or directory is a matter of statutory construction.[23]

Other commentators caution that the statutory use of "shall" is particularly "slippery" and "chameleon-hued."[24] In their book, Antonin Scalia and Bryan Garner describe the statutory use of "shall" as "notoriously sloppy" and "a semantic mess." As a result, they observe, "courts have treated *shall* as having variegated meanings," thereby "resulting in a morass of confusing decisions" on how to interpret the word in different contexts.[25]

Indeed, several "counter-canons" concerning the word "shall" point in the opposite direction of Tipton's conclusion.[26] Almost 150 years ago, for example, the Supreme Court stated that "[a]s against the government, the word 'shall,' when used in statutes, is to be construed as 'may,' unless a contrary intention is manifest."[27] A related counter-canon emphasizes that when statutes regulating the conduct of public officials "are designed merely to secure order and dispatch in public officer," they should be understood as directory, not mandatory.[28] Still a third counter-canon provides that "statutes that regulate the duties of public officers and state the time for their performance" typically are also directory—especially when they lack "any language denying performance after a specified time."[29]

23. 3 SHAMBIE SINGER, SUTHERLAND STATUTES & STATUTORY CONSTRUCTION § 57:1 (8th ed. 2020 & Supp. 2020); *see also id.* § 57.10 (noting that "[a] term such as 'shall' or 'may' does not have an exclusive, fixed, or inviolate connotation"). As the Seventh Circuit has emphasized:

> That the legislature may have used the word "shall" or "must," rather than "may," in directing the discharge of a specified duty does not require that the statute be construed as mandatory rather than directory. A variety of factors should be considered in determining the effect to be given the statute, including whether a mandatory construction would yield harsh or absurd results.

Bartholomew v. United States, 740 F.2d 526, 531 (7th Cir. 1984).

24. BRYAN A. GARNER, DICTIONARY OF LEGAL USAGE 952 (3d ed. 2011) ("[P]erhaps every lawyer has heard that ['shall' is] mandatory, but very few consistently use it in that way. And as a result, courts in virtually every English-speaking jurisdiction have held—by necessity—that *shall* means *may* in some contexts, and vice versa.").

25. ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 112–15 (2012). For that matter, even the use of the word "may" in a statutory provision "is not necessarily conclusive of congressional intent to provide for a permissive or discretionary authority." Cortez Byrd Chips, Inc. v. Bill Harbert Const. Co., 529 U.S. 193, 198–99 (2000).

26. On "counter-canons," see NOURSE, *supra* note 21, at 124–25; Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes Are to Be Construed*, 3 VAND. L. REV. 395 (1950).

27. Railroad Co. v. Hecht, 95 U.S. 168, 170 (1877).

28. 3 SINGER, *supra* note 23, § 57:12.

29. *Id.* § 57:17; *see, e.g.*, Barnhart v. Peabody Coal Co., 537 U.S. 149, 152 (2003) (statutory language providing that the Social Security Commissioner "shall, before October 1, 1993," take certain action is directory, not mandatory); Brock v. Pierce County, 476 U.S. 253, 256 (1986) (statutory language providing that the Secretary of Labor "shall" take certain action "not later than 120 days after receiving the complaint" is directory, not mandatory); Gottlieb v. Peña, 41 F.3d 730, 733–34 & n.5 (D.C. Cir. 1994) (statutory language providing that "the Secretary of Transportation shall" amend agency regulations "to ensure . . . that final action . . . is taken within 10 months of its receipt" is directory, not mandatory, especially since Congress "did not specify any consequences . . . for missing the ten-month deadline"); Ralpho v. Bell, 569 F.2d 607, 626 (D.C. Cir. 1977) (statutory language providing that Micronesian Claims Commission "shall wind up its affairs as expeditiously as

These maxims have particular force in contexts, like immigration enforcement, in which the exercise of enforcement discretion is pervasive. In *Town of Castle Rock v. Gonzales*, for example, the Court concluded that language in a Colorado statute stating that "[a] peace officer shall enforce a valid restraining order" did not "truly [make] enforcement of restraining orders *mandatory*," since a "well established tradition of police discretion has long coexisted with apparently mandatory arrest statutes." Writing for a 7-2 majority, Justice Scalia emphasized that because of the "deep-rooted nature of law-enforcement discretion, even in the presence of seemingly mandatory legislative commands," a "true mandate" of police action requires "some stronger indication" from the legislature than mere use of "shall."[30] Similarly, in *Chicago v. Morales*, the Court dismissed the notion that an ordinance providing that a police officer "shall order all such persons to disperse and remove themselves from the area" could plausibly be understood to "afford[] the police *no* discretion," since "common sense" dictates "that all police officers must use some discretion in deciding when and where to enforce city ordinances."[31] Based on these interpretive principles, the Board of Immigration Appeals has similarly concluded that the word "shall" in another immigration law provision is directory, not mandatory. The Board emphasized that "in the context of a purported restraint on the DHS's exercise of its prosecutorial discretion . . . [i]t is common for the term 'shall' to mean 'may.'"[32]

Second, Tipton's interpretation of the "removal period" language is inconsistent with a slew of other statutory provisions. In several subsections within the very same section as the provision concerning the "removal period," the statute *expressly* contemplates circumstances in which officials do not remove noncitizens with final orders of removal during the "removal period." For example, § 1231(a)(3), an adjacent provision that Tipton nowhere cites or discusses, expressly provides for supervision of individuals who "are not removed within the removal period" before it expires—without defining any specific circumstances as prerequisites or triggers for the provision's applicability other than the passage of time.[33] A second nearby provision, § 1231(a)(6), also expressly contemplates circumstances in which officials have not removed individuals with final removal orders until after expiration of the "removal period," providing that certain categories of noncitizens may either be detained or subjected to other forms of supervision "beyond the removal period." Yet a third nearby provision,

possible, and in any event not later than three years after the expiration of the time for filing claims under this Act" is directory, not mandatory).

30. Town of Castle Rock v. Gonzales, 545 U.S. 748, 760–61 (2005) (holding that a "true mandate of police action would require some stronger indication" from the legislature than use of the word "shall").

31. Chicago v. Morales, 527 U.S. 41, 62 n.32 (1999).

32. *In re* E-R-M- & L-R-M-, 25 I. & N. Dec. 520, 522 (BIA 2011) (interpreting 8 U.S.C. § 1225(b)(1)(A)(i)); *see* David A. Martin, *A Defense of Immigration-Enforcement Discretion: The Legal and Policy Flaws in Kris Kobach's Latest Crusade*, 122 YALE L.J. ONLINE 167, 181–83 (2012), https://www.yalelawjournal.org/forum/a-defense-of-immigration-enforcement-discretion-the-legal-and-policy-flaws-in-kris-kobachs-latest-crusade [https://perma.cc/4HQ4-YHNN].

33. 8 U.S.C. § 1231(a)(3) ("If the alien does not leave or is not removed within the removal period, the alien, pending removal, shall be subject to supervision under regulations prescribed by the Attorney General.").

§ 1231(a)(7), also presupposes that officials are not required to remove all individuals with final removal orders during the removal period, providing instead that certain individuals with final orders of removal who remain in the United States may be granted employment authorization under certain circumstances.[34]

Tipton's breezy discussion of the word "shall" fails to make sense of any of these nearby provisions, and at no point does he bother to cite or discuss any of them.[35] In some places, his discussion reflects a flatly incorrect understanding of how the statute actually works. He incorrectly implies, for example, that the circumstances in which individuals are not removed within the removal period are and must be limited to situations in which some statutory, "enumerated exception" to § 1231(a)(1)(A) applies, citing 8 U.S.C. § 1231(a)(1)(C) as one such example of an "exception" to the removal period.[36] That provision, however, is not an "exception" that delays removal beyond the "removal period," but rather a tolling provision that *extends* the length of the "removal period" itself to be longer than 90 days. By contrast, provisions such as §§ 1231(a)(3), (a)(6), and (a)(7)—which Tipton does not discuss—expressly contemplate an entirely different category of circumstances: those in which individuals are not removed *during* the "removal period" before it expires.

Third, for all of his bluster in insisting that the Biden administration's partial moratorium "contravenes the unambiguous text" of § 1231(a)(1)(A), Tipton never pauses to consider whether that conclusion is plausible in light of the actual background realities—against which Congress has legislated—of what execution of final orders of removal involves. While he appears to acknowledge in passing that "practical circumstances" can "prevent removal within 90 days," that discussion betrays little understanding of what those "circumstances" actually look like. In a regime in which millions of noncitizens are potentially subject to the immigration law's broad removability provisions, but congressional appropriations permit enforcement action against only a small fraction of those individuals, the structure of the immigration system effectively delegates broad power to executive officials to shape immigration policy through their day-to-day, discretionary enforcement decisions.[37] While that dynamic may be most

34. 8 U.S.C. § 1231(a)(7); *see* 8 C.F.R. § 274a.12(c)(18).

35. *See* Patrick F. Philbin, *Limitations on the Detention Authority of the Immigration and Naturalization Service*, 18 Op. O.L.C. 58, 76 (2003) ("Both [§ 1231(a)(3) and § 1231(a)(6)] assume a situation in which an alien has not been removed by the end of the removal period. They would make no sense if the INA imposed an ironclad legal obligation to effect the removal of all aliens before the removal period ended."). By contrast, when pointedly asked during his Senate confirmation process if he would address statutory interpretation questions by "examin[ing] the entire statute rather than immediately reaching for a dictionary," Tipton responded that determining a statute's meaning requires consideration of "how statutory provisions work together to form a coherent whole" and that "it is proper to consider the words of a provision within the broader context of the statute as a whole." Drew B. Tipton, Responses to Questions for the Record, *Nomination of Drew B. Tipton to the U.S. District Court for the Southern District of Texas, Senate Comm. on the Judiciary*, 116th Cong., 2d Sess., at 13 (Feb. 12, 2020) (written question by Sen. Patrick Leahy).

36. *Texas I*, 21-cv-00003, 2021 WL 247877, at *3 (S.D. Tex. Jan. 26, 2021); *see also Texas II*, 2021 WL 723856, at *38 (S.D. Tex. Feb. 23, 2021).

37. ADAM B. COX & CRISTINA M. RODRÍGUEZ, THE PRESIDENT AND IMMIGRATION LAW 111–14, 127–29 (2020); Kalhan, *supra* note 8, at 85–87.

readily apparent with respect to initial charging decisions, officials inevitably face discretionary choices and tradeoffs at every stage of the enforcement process—including at the end of the process, *after* a final order of removal has been issued.

After a final order has been issued, officials must take a number of affirmative, resource-intensive steps not only at the final moment, when physically removing individuals from the United States, but also to make execution of those final removal orders possible.[38] Precisely when it becomes possible for immigration officials to execute a final removal order—and in particular, whether executive officials can or will remove noncitizens during the "removal period" specified in § 1231(a)(1)(A) or after it expires—depends not on what the statute itself recites in its text, but on a dynamic, complex set of factors, which unavoidably involve discretionary judgments about the individual circumstances of particular noncitizens as well as broader immigration policy concerns, enforcement priorities, foreign policy considerations, and tradeoffs in how scarce agency resources are allocated.[39] As the Supreme Court emphasized in *Zadvydas v. Davis*, executive efforts to implement the statute's removal provisions can involve "serious administrative needs and concerns" and "foreign policy judgments," which the Court relied upon to afford executive officials "appropriate leeway" over the precise timing of post-final order detention and removal. Moreover, given the enormous number of individuals with final orders of removal, and the limited resources that Congress has appropriated for immigration enforcement, any decision to actively pursue removal or other enforcement actions against one individual necessarily constitutes a choice not to pursue other enforcement actions against other individuals—making it difficult to characterize any of those actions as being the product of a "mandatory" obligation. ICE incurs large expenses to detain many individuals while it seeks to effect removal, but even for the many more individuals with final orders who are not in detention, the enforcement process can be costly. As a senior ICE official stated to Congress in 2020:

> Today, ICE's non-detained docket includes a record 3.3 million cases . . . with over a million of these aliens having already received final orders of removal. The Department of Justice's Executive Office for Immigration

38. *See, e.g.*, *Hidden in Plain Sight: ICE Air and the Machinery of Mass Deportation*, UNIV. OF WASH. CTR. FOR HUM. RTS. (Apr. 23, 2019), https://jsis.washington.edu/humanrights/2019/04/23/ice-air/ [https://perma.cc/7P36-LNZS] (noting that the "institutional infrastructure" of deportation has evolved to include a "sprawling, semi-secret network of flights on privately-owned aircraft chartered by [ICE]" costing thousands of dollars per hour); DEP'T OF HOMELAND SEC., OFFICE OF INSPECTOR GEN., ICE FACES BARRIERS IN TIMELY REPATRIATION OF DETAINED ALIENS (2019), https://www.oig.dhs.gov/sites/default/files/assets/2019-03/OIG-19-28-Mar19.pdf [https://perma.cc/7QTF-FVLH].

39. *See, e.g.*, Continued Detention of Aliens Subject to Final Orders of Removal, 66 Fed. Reg. 56,967, 56,968 (Nov. 14, 2001) (noting that "[e]fforts to secure travel documents and normalize immigration relations with other governments are not static in nature," and that "seeking removal in individual cases [after final orders have been issued] is a continuous process"); Detention of Aliens Ordered Removed, 65 Fed. Reg. 80,281, 80,289 (Dec. 21, 2000) (discussing, in the context of post-final order custody reviews under § 1231(a), the agency's need to "maintain flexibility for allocation of resources" and "redeployment of . . . staff for national immigration emergencies or other mandates requiring immediate attention"); 8 C.F.R. § 241.13(f) (discussing factors affecting the "prospects for the timeliness of removal"); *see also* Ma v. Reno, 208 F.3d 815, 820–21 (9th Cir. 2000) (discussing "various reasons" why "[m]any aliens . . . cannot be removed within the ninety day [removal] period").

> Review (EOIR) issued roughly 181,000 final orders of removal in FY 2019 and approximately 70,000 final orders of removal in just the first quarter of FY 2020. As numbers continue to climb, they will further outpace ICE's ability to conduct its work identifying, apprehending, and detaining this staggering number prior to effecting removal.[40]

Given these considerations, the Supreme Court in *Zadvydas* expressly concluded—directly at odds with Tipton's opinion—that it was "doubt[ful] that when Congress shortened the removal period to 90 days in 1996 it believed that all reasonably foreseeable removals could be accomplished in that time."[41] Without reference to *Zadvydas*, at least one other court reached the same conclusion a decade ago.[42] To reach the opposite conclusion, one also would need to ignore clear legislative evidence that in the 25 years since Congress enacted the provision, it never has enacted appropriations legislation providing sufficient funds to make it possible for executive officials to actually treat the provision as imposing a "mandatory" obligation in any meaningful sense.[43]

Fourth, Tipton's conclusion is at odds with a number of longstanding, widely accepted discretionary practices—which both the Supreme Court and Congress have repeatedly recognized—permitting executive officials to defer removal even after final orders have been issued.[44] As Justice Scalia discussed in *Reno v. American-Arab Anti-Discrimination Committee*, "[a]t each stage" of the enforcement process," including after removal orders have been issued, "the Executive has discretion to abandon the endeavor"—and given the discretionary nature of decisions to execute final removal orders, in particular, Congress has

40. Matthew T. Albence, Deputy Director, U.S. Immigration and Customs Enforcement, Statement Regarding the Fiscal Year 2021 President's Budget Request at 3, *Immigration and Customs Enforcement Budget Request for FY2021, Hearing Before H. Comm. on Appropriations, Subcomm. on Homeland Security*, 116th Cong., 2d Sess. (Mar. 11, 2020), https://www.congress.gov/116/meeting/house/110701/witnesses/HHRG-116-AP15-Wstate-AlbenceM-20200311.pdf [https://perma.cc/77LS-Y9V3].

41. Zadvydas v. Davis, 533 U.S. 678, 701 (2001); *see* Philbin, *supra* note 35, at 70–73, 77–79. If § 1231(a)(1)(A) were interpreted to embody a congressional determination that all reasonably foreseeable removals could be accomplished within 90 days, and therefore must be accomplished within that timeframe, it also would be in considerable tension with *Zadvydas*'s conclusion that a *longer* period of detention of six months is presumptively reasonable.

42. United States v. Marinez-Patino, No. 11 CR 064, 2011 WL 902466, at *8 (N.D. Ill. Mar. 14, 2011) (quoting Bartholomew v. United States, 740 F.2d 526, 531 (7th Cir. 1984)) (rejecting argument that 8 U.S.C. § 1231(a)(1)(A) imposes mandatory obligation). In its committee report on H.R. 2202, which first included the same language that was ultimately enacted and codified in § 1231, the House Judiciary Committee described the provision not as mandatory, but as a provision that "seeks to ensure" that noncitizens with final orders of removal would be "removed from the U.S. *within a target period* of 90 days." H.R. REP. 104-469, pt. 1, at 160 (emphasis added).

43. *See* NOURSE, *supra* note 21, at 94 ("No authorizing chairperson believes that his or her program will be funded if the appropriators disagree . . . . The sequence of [legislative] procedures from authorization to appropriations means that, as a general rule, appropriations supersede authorizations."); *see also* Adam B. Cox & Cristina M. Rodriguez, *The President and Immigration Law Redux*, 125 YALE L.J. 104, 148 (2015) ("If the Executive lacks the resources to pursue every violator of the law, she must make choices about which ones not to pursue."); SHOBA SIVAPRASAD WADHIA, BEYOND DEPORTATION: THE ROLE OF PROSECUTORIAL DISCRETION IN IMMIGRATION CASES 22–26 (2015).

44. *See generally* WADHIA, *supra* note 43.

even specifically shielded those "discrete actions" from judicial review.[45] Executive officials have repeatedly emphasized the importance of exercising enforcement discretion in a manner consistent with the agency's policies and priorities at every stage of the enforcement process.[46] These exercises of enforcement discretion take a variety of forms. Longstanding regulations permit noncitizens to request stays of removal, and officials are authorized to grant stays of removal "for such time and under such conditions as he or she may deem appropriate."[47] Officials also have broad discretionary authority to grant individuals with final orders of removal "deferred action," which provides its beneficiaries with nonbinding, revocable notification that the agency has been deprioritized their removal. On multiple occasions, Congress has enacted statutory provisions that acknowledge the agency's existing practice of exercising discretion to grant deferred action.[48] Tipton's interpretation would wipe away both of these discretionary practices—and potentially others, such as deferred enforced departure—during the period in which individuals are covered by § 1231(a)(1)(A).

Tipton's interpretation similarly fails to make sense of the agency's longstanding practice of not actively continuing to pursue removal of individuals who have been granted either withholding of removal under 8 U.S.C. § 1231(b)(3) or withholding or deferral of removal under the Convention Against Torture. Unlike asylum, both of these categories of humanitarian protection are country-specific: while the government is prohibited from removing recipients to the particular countries in which the individuals fear persecution or torture, a noncitizen granted either form of country-specific relief technically "remains an

45. Reno v. American-Arab Anti-Discrimination Committee, 525 U.S. 471, 482, 483–84 (1999) (discussing and interpreting 8 U.S.C. § 1252(g)); *see also* Arizona v. United States, 567 U.S. 387, 396–97 (2012); Heckler v. Chaney, 470 U.S. 821, 831–32 (1985).

46. *E.g.*, Memorandum from Doris Meissner, Commissioner, Immigration and Naturalization Service, *Exercising Prosecutorial Discretion* 1 (Nov. 17, 2000), https://www.aila.org/File/DownloadEmbeddedFile/48283 [https://perma.cc/G9NA-J5FK] ("[INS] officers are not only authorized by law but expected to exercise discretion in a judicious manner at all stages of the enforcement process—from planning investigations to enforcing final orders"); Memorandum from Jeh Charles Johnson, Secretary, Department of Homeland Security, *Policies for the Apprehension, Detention and Removal of Undocumented Immigrants* 2 (Nov. 20, 2014), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf [https://perma.cc/PH7A-M5XC] ("DHS personnel are expected to exercise discretion and pursue these priorities at all stages of the enforcement process—from the earliest investigative stage to enforcing final orders of removal"); Memorandum from John Morton, Director, Immigration and Customs Enforcement, *Exercising Prosecutorial Discretion Consistent with the Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens* 2–3 (June 17, 2011), https://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf [https://perma.cc/98W5-FMQZ]; *see also In re* Vizcarra-Delgadillo, 13 I. & N. Dec. 51, 53 (BIA 1968).

47. 8 C.F.R. § 241.6.

48. *See, e.g.*, William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 204, 122 Stat. 5044 (providing that denial of request for administrative stay of removal "shall not preclude the alien from applying for a stay of removal, deferred action, or a continuance or abeyance of removal proceedings") (codified at 8 U.S.C. § 1227(d)(2)); National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, § 1703(c), 117 Stat. 1392, 1693 (2003) (codified at 8 U.S.C. § 1151 note) (deeming certain immediate family members of noncitizen veterans "eligible for deferred action, advance parole, and work authorization"); USA PATRIOT Act of 2001, Pub. L. No. 107–56, § 423(b), 115 Stat. 272, 361 (noting that immediate family members of lawful permanent residents killed in the terrorist attacks of September 11, 2001, "may be eligible for deferred action and work authorization").

alien subject to a final order of removal," and "[g]enerally, [immigration officials] may execute that order to any country other than the country to which removal has been withheld or deferred."[49] However, instances in which the officials actively continue to seek third countries where recipients of withholding of removal and CAT relief potentially might be removed are exceedingly rare—which is hardly surprising, since third countries have no legal obligation to accept nationals of other countries and rarely have any incentive to do so.[50]

Accordingly, while recipients of withholding and CAT relief remain subject to the provisions of § 1231, both during and beyond the removal period, longstanding agency guidance recognizes ICE's authority to release these individuals from detention during the removal period if the government has decided not to actively pursue removal to a third country, since "[t]he purpose of the removal period . . . is to facilitate the execution of the removal order."[51] As such, the guidance presupposes the agency's authority not to pursue removal of these individuals during the removal period at all, as a valid exercise of enforcement discretion. On Tipton's interpretation of § 1231(a)(1)(A), however, the government would be understood to breach a mandatory statutory obligation by not affirmatively and actively continuing to make efforts to pursue the removal of each and every one of these individuals to third countries during the 90-day removal period—even though those efforts would be time-consuming, resource-intensive, and in many cases futile or ill-advised.

Perhaps recognizing that the cursory discussion in his TRO opinion left a fair bit to be desired, Tipton's preliminary injunction opinion pulls back to some extent from the bare conclusion that § 1231(a)(1)(A) imposes a mandatory obligation simply because "shall" automatically means "must."[52] Substantively, Tipton's overwritten preliminary injunction opinion is somewhat all over the place, spending many pages discussing basic immigration law principles that have zero bearing on the case, and in some cases doing so incorrectly.[53] However, when he eventually gets around to revisiting his previous conclusion that § 1231(a)(1)(A) imposes a mandatory obligation, roughly 65 pages into a 105-page opinion, Tipton's more extensive discussion does not fare much better than his previous four-word conclusion. For example, after dubiously characterizing *Richbourg Motor Company v. United States*, in which the Supreme Court overcame a presumption against interpreting "shall" as mandatory against the government, as resting on a freestanding conclusion that the statutory provision at issue was designed to

49. Memorandum from Bo Cooper, Gen. Counsel, Immigr. & Naturalization Serv., to Reg'l Counsel 1–2 (Apr. 21, 2000); *see* 8 C.F.R. § 208.16(f).

50. AM. IMMIGR. COUNCIL & NAT'L IMMIGRANT JUST. CTR., THE DIFFERENCE BETWEEN ASYLUM AND WITHHOLDING OF REMOVAL 7 (Oct. 2020), https://www.americanimmigrationcouncil.org/research/asylum-withholding-of-removal [https://perma.cc/EY9D-94WZ]. In 2017, for example, only 21 of the 1,274 individuals granted withholding of removal were removed to third countries.

51. Cooper, *supra* note 49, at 2.

52. *Texas II*, No. 21-cv-00003, 2021 WL 723856 (S.D. Tex. Feb. 23, 2021).

53. The opinion is also littered with sneering, dismissive asides that seem to drip with contempt for the Biden administration's initiatives, to some extent echoing the rhetoric that prevails in anti-immigration political discourse. *E.g.*, *id.* at *19, *28, *37–*38, *41–*42, *51.

"protect[] the interests of innocent third persons," Tipton concludes even more dubiously that § 1231(a)(1)(A) must be understood as mandatory because it rests on a similarly "unequivocal" congressional "purpose to protect 'public or private interests'"—namely, the interests of state governments.[54]

Quite apart from his doubtful premises about Congress's purposes in enacting § 1231(a)(1)(A), Tipton's preliminary injunction opinion is no more consistent than his TRO opinion with the most relevant evidence of Congress's legislative decisions—including the relationship between § 1231(a)(1)(A) and other provisions, evidence from appropriations legislation, and the statutory regime's express and de facto delegations of authority to executive officials to establish immigration policies and priorities—or the actual realities of the removal process, including the longstanding, background practices of enforcement discretion against which Congress has legislated. He places tremendous weight on several immigration law provisions enacted during the 1980s and 1990s, concluding after a lengthy discussion of legislative history that (1) those provisions were enacted primarily for the benefit of state governments, and (2) 8 U.S.C. § 1231(a)(1)(A) constitutes a "redesignat[ed] and amend[ed]" successor to these 1980s and 1990s provisions and bears that same legislative purpose.[55] Leaving aside Tipton's unreliable narration of that legislative history, the 90-day "removal period" language in § 1231(a)(1)(A) is not, in fact, the successor to *any* of those provisions. Rather, the provision's predecessor, which provided for a longer removal period of six months, was enacted in 1952 and not amended until 1996, when Congress enacted § 1231(a)(1)(A) and shortened the removal period to ninety days.[56]

Curiously, after this very lengthy discussion of the provision's text, structure, and legislative history, along with a host of judicial opinions that he claims to bear upon the provision's interpretation, Tipton *still* insists, rather implausibly,

54. *Texas II*, 2021 WL 723856, at *35. In *Richbourg Motor Company*, prohibition agents had arrested individuals for unlawfully transporting alcohol and seized their automobiles under the procedures set forth in Section 26 of the Volstead Act, Pub. L. No. 66-66, 41 Stat. 305 (1919) (codified at 27 U.S.C. § 40) (repealed 1935). Officials prosecuted the drivers for tax fraud, but instead of seeking forfeiture of the vehicles under Section 26 itself, which included protections for innocent lien holders such as Richbourg, prosecutors instead sought to use a more general, non-Volstead Act forfeiture provision which did not include those protections. The Court concluded that having seized the vehicle using the procedures in Section 26, the government lacked discretion to turn around and seek forfeiture under the non-Volstead Act provision instead, emphasizing that in addition to using the word "shall," Section 26 set forth "in detail" a sequence of "successive steps to be taken" by officials "which, if followed, lead unavoidably to forfeiture under [Section 26] and no other [provision]." Richbourg Motor Co. v. United States, 281 U.S. 528, 532–34 (1930). Contrary to Tipton's suggestion, however, the Court did not rest that conclusion on any sort of abstract, categorical rule that "shall" is mandatory when the provision's "purpose . . . is to protect the public or private interests of innocent third parties"—as many statutory provisions likely could be characterized. *Texas II*, 2021 WL 723856, at *35. Rather, the Court's discussion of Section 26's purpose came in the course of heeding a statutory instruction under a third statute, the Willis-Campbell Act, to interpret the two provisions to avoid a direct conflict between them. In this context, the Court emphasized that allowing discretionary use of the non-Volstead Act provision would have made Section 26's protections "an idle gesture," since as a practical matter officials could resort to the non-Volstead Act provision "in practically every case where the transporting vehicle is seized" using the procedures in Section 26. *Richbourg Motor Co.*, 281 U.S. at 532, 535; *see also* United States v. One Ford Coupe Auto., 272 U.S. 321, 335 (1926) (Stone, J., concurring).

55. *Texas II*, 2021 WL 723856, at *25–*29, *35 ("And there you have it.").

56. *See* 8 U.S.C. § 1252(c) (1995) (repealed 1996).

that the word "shall" in § 1231(a)(1)(A) "*unambiguously* means must remove."[57] To adapt Nourse's observation about textualism and the canons of construction, why was Tipton's elaborate discussion necessary at all if the meaning of the provision turns out to be "unambiguous"?[58]

II.

Tipton's conclusion that 8 U.S.C. § 1231(a)(1)(A) imposes a mandatory obligation on the government to deport individuals during the statutory "removal period" is at odds with a formal legal position taken by the Justice Department during the Bush administration.[59] In 2003, DOJ's Office of Legal Counsel issued a formal opinion recognizing broad executive discretion under § 1231 to determine the timing of removal after an administrative removal order becomes final—including discretion to delay removal beyond the statutory removal period even when the government could feasibly effect removal within 90 days.[60] OLC considered these issues in the context of a noncitizen with a final removal order who was suspected of having "significant connections" to al Qaeda. Although it was "logistically possible" to remove the individual "very early" during the § 1231(a)(1)(A) "removal period," the Bush administration nevertheless sought to delay his removal within and potentially even beyond the removal period, in order to further investigate and obtain the "fullest information possible" about that individual.

The OLC memo identified several different purposes related to immigration and foreign policy that officials sought to advance by exercising discretion to defer the individual's removal. First, to designate the most appropriate destination country, officials believed that additional time was necessary to investigate and obtain further information about the individual, including details about his suspected ties to terrorism, the nature and extent of the threat he might pose, and the ability and willingness of officials in possible destination countries "to

57. *Texas II*, 2021 WL 723856, at *38 (emphasis added).

58. *See* NOURSE, *supra* note 21, at 103–04 ("[W]hy do you need canons, after all, if the text is most often plain[?]").

59. Tipton's interpretation of § 1231(a)(1)(A) is also difficult, if not impossible, to reconcile with a position taken by the Trump Justice Department before the Supreme Court this year. Guzman Chavez v. Hott, 940 F.3d 867 (4th Cir. 2019), *cert. granted sub nom.* Albence v. Guzman Chavez, 141 S. Ct. 107 (2020). In that case, which was argued days before Biden was inaugurated, the government maintains that individuals whose prior orders of removal are reinstated pursuant to 8 U.S.C. § 1231(a)(5)—but who are applying for withholding of removal or CAT relief and ultimately might not be removed if their claims are successful—nevertheless are subject to "administratively final" removal orders under 8 U.S.C. § 1231(a)(1)(A) and therefore are not entitled to bond hearings to seek release from detention. However, because withholding and CAT relief hearings inevitably far exceed the 90-day removal period, the position necessarily is premised on the assumption that the government is not required to remove those individuals during the "removal period." At the same time, if the Court ultimately accepts the opposite conclusion, its conclusion may have no formal bearing on the proper interpretation of § 1231(a)(1)(A), since the Court will necessarily have concluded that the provision does not apply to those individuals at all.

60. Philbin, *supra* note 35, at 58–59. The author of the OLC opinion, Patrick F. Philbin, later served in the White House Counsel's office during the Trump administration and as one of President Trump's lawyers during his first impeachment.

deal appropriately" with the individual. Second, officials believed that even after a destination country had been designated, obtaining additional information would be "critical" to coordinate with law enforcement and security services in that country—not only to promote U.S. national security interests, but also to advance foreign policy interests in "maintaining good relations" with potential destination countries, since "other countries ordinarily would prefer not to have potential terrorists sent to their shores without adequate warning." Finally, officials also anticipated that further information about the individual might lead them to consider other potential actions against him, such as criminal prosecution or detention as an "enemy combatant."[61]

OLC concluded (1) that the statute neither "impose[s] a duty . . . to remove aliens as quickly as possible within the 90-day removal period" nor "prescribe[s] the reasons" why the Attorney General "might decide to act more quickly or more slowly" within the removal period, and (2) that "Congress did not intend a rigid time deadline to take precedence in situations where the proper administration of the immigration laws requires additional time."[62] With respect to the government's discretion to delay or expedite removal *within* the removal period, OLC concluded that the text, structure, and legislative history of § 1231(a)(1)(A) all counseled against interpreting the provision to implicitly require the government to remove individuals as quickly as possible within the removal period. OLC recognized that "in the abstract," the constitutional due process principles discussed in *Zadvydas* might limit the purposes "for which it is permissible to further delay the alien's removal while keeping the alien in detention." Nevertheless, it declined to "definitively resolve the hypothetical question" whether removal could be delayed in those circumstances for reasons "wholly unrelated to executing the immigration laws," since the case under consideration involved "multiple bases" for delaying removal "that were directly related to the broad considerations the Attorney General is charged with taking into account in enforcing the immigration laws."[63]

With respect to the government's discretion to delay removal *beyond* the statutory removal period, OLC concluded that given the "nature of the decisions that are entrusted to the Attorney General under the immigration laws," the statute permitted the Attorney General to choose to delay removal beyond the removal period "where the time deadline would conflict with the ability to enforce the immigration laws."[64] As a starting point, it concluded that the text of

61. *Id.* at 59–60.

62. *Id.* at 60, 79.

63. *Id.* at 60–62, 68–70. OLC's discussion of potential due process limits arising from *Zadvydas*, a case about immigration detention, was expressly premised on the individual being detained while their removal was being delayed. *Id.* at 69 ("[I]n the abstract, it might raise difficult constitutional questions if the Attorney General were expressly to delay the removal of an alien (*and thereby prolong his detention*) solely for a purpose that was—by hypothesis—entirely unrelated to any legitimate interest in the enforcement of the immigration laws." (emphasis added)). The memo did not examine circumstances in which removal might be delayed while individuals were not in detention.

64. *Id.* at 78. As an alternative basis for its conclusion about the permissibility of delaying removal specifically for purposes of detention, OLC interpreted § 1231(a)(6) to affirmatively authorize delaying removal before proceeding to independently conclude, "in light of the nature of the decisions entrusted to the Attorney General

§ 1231—and in particular, the provisions in §§ 1231(a)(3), (a)(6), and (a)(7) presupposing circumstances in which noncitizens have not been removed within the removal period—"makes it clear that Congress did not intend to obligate the Attorney General to remove aliens within the removal period in *all* instances." Those provisions "would make no sense," the memo reasoned, "if the INA imposed an ironclad legal obligation to effect the removal of all aliens before the removal period ended."[65] More fundamentally, OLC emphasized that a "rigid time deadline" would not be consistent with the "full range of considerations" that the Attorney General must weigh in executing removal orders and, more broadly, the many "discretionary immigration-related determinations" and "nondiscretionary functions" involved in administering the immigration laws.[66] As with its conclusion about delays within the removal period, OLC qualified its conclusion by suggesting that delays in removal beyond the removal period "must be based upon reasons related to the proper implementation of the immigration laws," particularly insofar as detention of individuals resulting from those delays would be subject to the limitations articulated in *Zadvydas*.[67]

For decisions to delay removal both within and beyond the statutory removal period, OLC did not attempt to identify all of the possible activities "related to the enforcement of the immigration laws" that might justify those decisions. It did, however, emphasize that the range of potential justifications for executive officials to delay removal is extensive:

> Given the numerous broad objectives that underlie the nation's regulation of immigration . . . there are potentially a vast array of interests legitimately related to policing immigration that may have a bearing on the Attorney General's decision (effected through the INS) concerning exactly when

under the immigration laws," that § 1231 also should be interested as implicitly authorizing the Attorney General to delay removal beyond the statutory removal period. *Id.* at 73–76, 78.

65. *Id.* at 76; *see also supra* notes 33–35 and accompanying text. OLC also observed that the detailed, often time-consuming process under 8 U.S.C. § 1231(b) to designate destination countries for removal—"a process that has various timing provisions built in and that . . . on its face, may take longer than 90 days"—necessarily presupposes that officials would not always remove noncitizens within the removal period. Philbin, *supra* note 35, at 76–77.

66. *Id.* at 78–79. OLC also emphasized that various longstanding INS practices, predating the enactment of § 1231(a)(1)(A), of exercising discretion not to remove noncitizens during the removal period reinforced its conclusion:

> The INS . . . has long treated the apparent statutory mandate that aliens be removed within the removal period as having implied exceptions and has long exercised its prosecutorial discretion in such a manner as to refrain from removing aliens within the removal period . . . . [I]f deferral and stay considerations such as the conservation of limited INS resources, humanitarian concerns, and law-enforcement needs constitute sufficient grounds to refrain from removing an alien within the removal period as directed by [§ 1231 (a)(1)(A)], then it would seem to follow *a fortiori* that the considerations described above (which are directly relevant to the proper execution of the immigration laws) certainly provide a sufficient basis for a similar implicit exception from the 90-day removal deadline.

Id. at 79–80; *see also supra* notes 44–51 and accompanying text.

67. Philbin, *supra* note 35, at 80–81. However, the memo also noted in passing, without purporting to express a view on the issue, that based on the INS's longstanding practices, if the agency exercised enforcement discretion not to execute a final removal order *at all*, that decision "need not be subject to the same limitations and might be subject to almost absolute discretion of the Attorney General." *Id.* at 81 n.12.

> during the removal period an alien should be removed . . . At a bare minimum, of course, administrative tasks [that are required to effect removal orders] are all legitimately related to removal . . . .
>
> [M]oreover, there is a substantially broader range of immigration-related considerations that the Attorney General is permitted to take into account in effecting the removal of an alien, and thus deciding whether and exactly when to remove an alien . . . . Every removal of an alien necessarily involves an act affecting foreign policy because it requires sending the alien to another country. In some cases, the foreign policy implications of that act may be significant . . . .
>
> [T]he INA [also] expressly gives the Attorney General authority in many instances to make discretionary decisions bearing upon the removal of an alien based on [other] broad considerations of policy . . . . [that] are directly related to—indeed, are an integral part of—the enforcement of the immigration laws.[68]

On Tipton's categorical interpretation of § 1231(a)(1)(A) as an absolute mandate, executive officials could not delay removal based on any of these considerations, even though such policy considerations have long been understood to be within their purview. Even if executive officials appropriately determined that delays in removal were warranted on foreign policy or national security grounds, Tipton evidently would insist that "shall means *must*" and require immediate removal.[69]

The Pekoske memorandum's policy-based rationales for the Biden administration's 100-day partial moratorium fit comfortably within the framework that OLC sets forth. At a minimum, it is at least difficult to see how a court could draw a defensible distinction between those rationales and those that OLC discusses (and, for that matter, those that the Supreme Court discusses in *Zadvydas*) without substituting its own immigration policy judgments for those of the Biden administration. Under the immigration laws, executive officials have been delegated broad authority to establish immigration enforcement policies and priorities and to channel the exercise of enforcement discretion toward them. Accordingly, policymaking officials have long issued guidance documents not only communicating the agency's policies and priorities, but providing direction to guide the allocation of resources and the exercise of discretion—at every stage of the removal process—to carry out those policies and priorities.[70]

Given the sweeping changes to enforcement policies and priorities that the Trump presidency instituted purely through executive action—and the extent to which the Biden administration, in turn, intends to take executive action to shift its own policies and priorities in different directions—the notion that a temporary, partial moratorium on executing final removal orders for certain categories of individuals may be justified to reallocate agency resources to effect that shift is hardly an extreme one, particularly given the actual realities of the removal

68. *Id*. at 70–72.

69. *Texas I*, No. 21-cv-00003, 2021 WL 247877, at *3 (S.D. Tex. Jan. 26, 2021).

70. Kalhan, *supra* note 8, at 86–87; *see supra* notes 44–46 and accompanying text.

process and the challenges discussed in the Pekoske memorandum. While purporting merely to require a "reasoned explanation" for the Biden administration's policies, Tipton effectively does more, potentially contributing to the entrenchment of the Trump presidency's immigration agenda and undermining the ability of the Biden administration to implement policies and priorities that depart from that agenda.[71]

CONCLUSION

While the Trump presidency found considerable success in implementing its sweeping anti-immigration initiatives—by one count instituting more than 1,000 separate measures—it never garnered strong public or congressional support for that agenda. To the contrary, even as restrictionism and xenophobia have been ascendant among conservative political, legal, and judicial elites, polls during the Trump presidency steadily found that majorities of Americans opposed its immigration agenda and continued to hold positive views about immigration. With this deep reservoir of public support for a different direction, the Biden administration has pledged to make rolling back the Trump presidency's initiatives and pursuing broader, popular reforms in Congress high priorities, and in its first 100 days it has made some initial progress toward achieving those goals.[72] In this context, however, immigration restrictionists have pursued a politics of "strategic entrenchment" in multiple settings, as they have for several years, in an attempt to create political, legal, and demographic "facts on the ground."[73]

71. *Texas II*, No. 21-cv-00003, 2021 WL 723856, at *37, *41–*42 (S.D. Tex. Feb. 23, 2021); *see* Anil Kalhan, *Building Immigration Policy Back Better*, *in* WHAT'S THE BIG IDEA? RECOMMENDATIONS FOR IMPROVING LAW & POLICY IN THE NEXT ADMINISTRATION AND IN THE STATES 7.1 (Kara Stein ed., 2020), https://www.acslaw.org/wp-content/uploads/2021/01/Whats-the-Big-Idea-Book-2020.pdf [https://perma.cc/H86V-MDVT].

72. Kalhan, *supra* note 71, at 7.6; Lucas Guttentag, IMMIGR. POL'Y TRACKING PROJECT, https://immpolicytracking.org/ (last visited Apr. 27, 2021) [https://perma.cc/ZA7A-UQUC]. In fact, public support for immigration grew stronger during Trump's presidency, including among Trump's own supporters.

73. *E.g.*, Nick Miroff & Josh Dawsey, *Stephen Miller Has Long-Term Vision for Trump's 'Temporary' Immigration Order, According to Private Call with Supporters*, WASH. POST (Apr. 24, 2020, 1:23 PM), https://www.washingtonpost.com/immigration/stephen-miller-audio-immigration-coronavirus/2020/04/24/8eaf59ba-8631-11ea-9728-c74380d9d410_story.html [https://perma.cc/QKC2-Q85X]. *See generally* PAUL STARR, ENTRENCHMENT: WEALTH, POWER, AND THE CONSTITUTION OF DEMOCRATIC SOCIETIES 5–11 (2019) (defining "strategic entrenchment" as "the conscious effort to make a change in a way that prevents it from being undone and sets the direction for the future"). As Starr discusses, the interest of a party or group in strategic entrenchment can intensify when it "is insecure about the future and believes it faces the risk of decline"—with the "key moment" for entrenchment coming

> when a group or party still holds power, or is capable of being mobilized to achieve it, before the dreaded long-term shifts become unstoppable. It may then pursue strategies of entrenchment as a form of political insurance, aiming to prevent its adversaries from subsequently changing policies or from ever gaining power at all.

STARR, *supra*, at 186–89, 193–96 (arguing that "high levels of polarization and fear of demographic and political decline among white majorities" in the United States and Europe have created conditions that encourage an antidemocratic politics of strategic entrenchment by populist nationalists and their oligarchic allies). For discussion of a historical antecedent, see Joshua Zeitz, *Another Time a President Used the "Emergency" Excuse to Restrict*

A federal judiciary significantly transformed during the Trump presidency has become a central arena for this emergent politics of restrictionist entrenchment, and Tipton's orders blocking the Biden administration's temporary, partial moratorium offer a glimpse at how those efforts might unfold in the years to come. During the Trump presidency, conservative legal elites and their Republican Party allies were wildly successful in their efforts to rapidly pack the federal courts with politically and ideologically reliable appointees.[74] In addition to Trump's three Supreme Court appointees, Senate Republicans also confirmed more than 230 Trump appointees to the lower federal courts during his presidency.[75] Prior to their nominations, these appointees tended to be "more openly engaged in causes important to Republicans" and "more typically . . . donated to political candidates and causes" than judges appointed by previous presidents. Prior to their nominations, for example, at least eight of Trump's appointees had, as lawyers in the offices of Republican state attorneys general, "argued for immigration positions . . . embraced by the Trump administration."[76] Another Trump appointee, Steven Menashi, worked closely with White House immigration advisor Stephen Miller, as a participant in Miller's "Immigration Strategic Working Group"—and then proceeded, during his confirmation process, to stonewall senators from both parties who sought to ask him questions about that role.[77]

Even before President Biden won the election, Trump-affiliated appointees had been delivering votes (and in some cases, lengthy and aggressive separate opinions) in support of restrictionist positions taken by the Trump presidency in a large number of significant immigration-related cases.[78] Now, as its first hundred days in office draw to a close, the Biden administration faces a growing

Immigration, POLITICO MAG. (Apr. 22, 2020, 10:10 AM), http://www.politico.com/news/magazine/2020/04/22/trump-emergency-suspend-immigration-history-200406 [https://perma.cc/RYN7-XHV4] (discussing use of ostensibly temporary, "emergency" immigration quotas legislation of 1921 to lay the foundation for permanent immigration restrictions enacted in Johnson-Reed Act of 1924).

74. Ruiz et al., *supra* note 18.

75. Oma Seddiq & Madison Hall, *Trump's Judicial Appointments Worsened Racial Diversity in the Federal Courts*, BUS. INSIDER (Apr. 8, 2021, 1:06 PM), https://www.businessinsider.com/trump-federal-judge-appointments-racial-diversity-2021-4 [https://perma.cc/M453-9L4X]; Larry Kramer, *Corrupting the Judiciary*, DEMOCRACY J. (Oct. 6, 2020), https://democracyjournal.org/magazine/specialissue/corrupting-the-judiciary/ [https://perma.cc/6FEY-TD65].

76. Ruiz et al., *supra* note 18.

77. After briefly wringing their hands, Senate Republicans confirmed Menashi to the Second Circuit, by a 51-41 margin, with only one Republican senator ultimately voting no. Jennifer Bendery, *Senate Confirms Wildly Problematic Trump Court Pick Steven Menashi*, HUFFPOST (Nov. 14, 2019, 2:23 PM), https://www.huffpost.com/entry/steven-menashi-republicans-senate-confirms-trump-judge_n_5dcd9beae4b00b9293bff09a [https://perma.cc/V5V8-V6HK].

78. *See, e.g.*, Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959 (2020); Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1932 (2020) (Kavanaugh, J., dissenting in part); Jennings v. Rodriguez, 138 S. Ct. 830 (2018); Trump v. Hawaii, 138 S. Ct. 2392 (2018); National Urban League v. Ross, 977 F.3d 698, 703 (9th Cir. 2020) (Bumatay, J., dissenting); Ramos v. Wolf, 975 F.3d 872, 900 (9th Cir. 2020) (Nelson, J., concurring); Meza Morales v. Barr, 973 F.3d 656 (7th Cir. 2020) (Barrett, J.); Cook County v. Wolf, 962 F.3d 208, 234 (7th Cir. 2020) (Barrett, J., dissenting); Doe #1 v. Trump, 957 F.3d 1050, 1070 (9th Cir. 2020) (Bress, J., dissenting from denial of stay pending appeal); Al Otro Lado v. Wolf, 952 F.3d 999, 1016 (9th Cir. 2020) (Bress, J., dissenting); Doe #1 v. Trump, 944 F.3d 1222, 1223 (9th Cir. 2019) (Bress, J., dissenting from

number of lawsuits by Republican political opponents that seek to entrench the Trump immigration agenda and effectively deny the Biden administration's ability to implement its own immigration policies. A number of these lawsuits have been brought by Republican state attorneys general, and with backing from the previous president himself, Miller has launched an organization that plans to work with those Republican elected officials and other groups to support their legal challenges against the Biden administration.[79] If the lawsuit before Tipton in the earliest days of the new administration is any indication, these entrenchment efforts may very well find receptive audiences if and when these lawsuits make their way to Trump's judicial appointees.

the denial of administrative stay); Vega-Anguiano v. Barr, 982 F.3d 542 (9th Cir. 2019) (Bennett, J., dissenting from denial of rehearing en banc); Yafai v. Pompeo, 912 F.3d 1018 (7th Cir. 2019) (Barrett, J.); Rodriguez-Penton v. United States, 905 F.3d 481 (6th Cir. 2018) (Thapar, J., dissenting); Alvarenga-Flores v. Sessions, 901 F.3d 922 (7th Cir. 2018) (Barrett, J.); United States v. Ataya, 884 F.3d 318, 326 (6th Cir. 2018) (Bush, J., dissenting); Garza v. Hargan, 874 F.3d 735, 752 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc); *see also* East Bay Sanctuary Covenant v. Biden, No. 18-17274, 2021 WL 1220082, at *31 (9th Cir. Mar. 24, 2021) (Bumatay, J., dissenting from denial of rehearing en banc); *id.* at *38 (VanDyke, J., dissenting from denial of rehearing en banc). In the Supreme Court, a number of these votes by Trump appointees have come in high profile immigration cases on the Court's notorious "shadow docket." *See* Stephen I. Vladeck, *The Solicitor General and the Shadow Docket*, 133 HARV. L. REV. 123 (2019).

79. Gabby Orr, *Stephen Miller to Launch a New Legal Group to Give Biden Fits*, POLITICO (Mar. 26, 2021, 1:03 PM), http://www.politico.com/news/2021/03/26/stephen-miller-legal-group-478167 [https://perma.cc/UM4B-AVKQ].