

In deportation cases, judiciary claims precedence over the executive. It shouldn't

By Lev Tsitrin

Life is full of paradoxes. Here is one, innocently embedded in *New York Times'* article focused on a judge's order to turn around a plane carrying deported Venezuelan gang members (the order which the Trump administration allegedly ignored), "[With Deportations, Trump Steps Closer to Showdown With Judicial Branch](#):"five Venezuelans in federal custody filed a class-action lawsuit claiming that their expulsion on ... [the Alien Enemies Act] basis would violate federal law and the Constitution's guarantee to due process." The paradox – apparently lost on Judge Boasberg of the U.S. District Court for the District of Columbia who “soon issued a restraining order blocking their removal” – is that people who disregarded the country's laws by entering it illegally, appeal to those same laws to prevent the country from restoring the *status quo ante* by deporting them.



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Trump's press secretary Karoline Leavitt posted this picture on X on 24 January announcing that deportation flights had begun

The hidden paradoxes run yet deeper. When one has more than a superficial understanding of how federal judiciary operates, and knows that judging in federal courts does not necessarily follow “due process” but can be utterly arbitrary, judges feeling free to replace parties’ argument by the utterly bogus argument of judges’ own concoction which they proceed to adjudicate, to find their own, “sua sponte” argument victorious, thus allowing them to adjudicate cases the way they want to (and to argue, when sued for fraud, that such “procedure” is legitimate because in *Pierson v Ray* federal judges gave themselves “absolute immunity” for acting from the bench “maliciously and corruptly”), one discovers even more paradoxes in the tug-of-war between the executive and the judiciary in recent deportation proceedings that are conveniently enumerated in CNN’s analysis titled [“White House denies ignoring court order halting Venezuelan deportations.”](#)

Consider the brouhaha over the arrest of an anti-Israeli agitator, Columbia graduate and green card holder Mahmoud Khalil on the basis of a law that allows the Secretary of

State to revoke permanent residency of anyone he determines to act "counter to the foreign policy interest of the United States of America." Once again, a federal judge halted the deportation pending examination of the action's legality.

What's the paradox here, you'll ask? The answer is simple: the premise of the judge's order is that Secretary Rubio may have acted arbitrarily – and therefore a federal judge has to step in to prevent such potentially arbitrary action. Left unsaid by the judge, however, is that there is absolutely no guarantee that he, the federal judge, will not himself act arbitrarily (or, as *Pierson v Ray* elegantly put it, "maliciously and corruptly") in deciding on this matter – since *Pierson* very clearly empowers him to do precisely that. Hence, an interesting and paradoxical question arises: does the presumably (and so presumed by the judge) arbitrary action ordered by a Secretary of State have lesser validity than a similarly arbitrary – because potentially "malicious and corrupt" – opposite action by a federal judge? Why is federal judge's "arbitrariness," so to speak, more legitimate than that of a Secretary of State, given that the federal judiciary is merely coequal to the executive in authority, and not superior to it? At least, if federal judges were legally obligated to follow the law by following due process, and there were enforceable consequences for judicial *sua sponte*, perhaps an argument could have been made that a federal judge's order is more firmly rooted in law – but in the light of *Pierson v Ray* one cannot possibly make such a claim, since *Pierson* automatically makes any judicial decision subject to suspicions of being made "maliciously and corruptly" – i.e. made on a whim.

Hence, a paradox in the conflict of two potentially – and coequally – arbitrary decisions, one by the Secretary Rubio, another by Judge Jesse Furman. Why should a judge necessarily prevail in the conflict of the absolute equals is truly beyond me.

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