

CONVENIENT FACTS: *NKEN V. HOLDER*, THE SOLICITOR GENERAL, AND THE PRESENTATION OF INTERNAL GOVERNMENT FACTS

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*In April 2012, facing a court order to disclose internal Justice Department e-mails, the Office of the Solicitor General (OSG) wrote to the United States Supreme Court to admit that it had made a factual statement to the Court three years earlier in *Nken v. Holder* about agency policy and practice that was not accurate. The statement had been based on e-mail communications between Justice Department and agency lawyers. In fact, the statement neither reflected the content of the e-mails nor the actual policy and practice of the relevant government agencies. The letter promised remedial measures and concluded by assuring the Court that the OSG took its responsibility of candor seriously. The underlying factual representation by the OSG in the *Nken* case was unusual because it attracted attention and lengthy Freedom of Information Act (FOIA) litigation that led to the disclosure of the communications that served as the basis of the statement. But it is not at all unusual as an example of unsupported factual statements by government lawyers that are used to support legal arguments. Indeed, unsupported statements appear in OSG briefs on a wide range of issues. These statements benefit from the unusual position of the government: It has access to information not available to other litigants, and it benefits from a presumption of candor that endows its statements with a claim of self-evident authority that no private litigant could match.*

*The *Nken* case provides a unique opportunity to explore the consequences of judicial acceptance of fact statements provided by the OSG. Because of FOIA litigation, we have an opportunity to examine how the OSG gathered information as well as the role played by government counsel at the Justice Department and the interested agencies. This examination shows multiple dangers with unsupported statements about internal government facts. It also demonstrates the difficulty of relying on lawyers representing the government to seek out and offer information that will undermine the government's litigation position. Finally, it shows that it is dangerous to rely on the party that has misled the Court to develop an appropriate remedy.*

* Copyright © 2013 by Nancy Morawetz, Professor of Clinical Law, New York University School of Law. The author gratefully acknowledges the comments of Jason Cade, Lucas Guttentag, Rochelle Dreyfus, Troy McKenzie, Adam Samaha, Catherine Sharkey, Manuel Vargas, Jordan Wells, and the participants in the New York University School of Law Summer Workshop; the research assistance of Natasha Silber; the administrative assistance of Noelia Rodriguez; and the financial assistance of the Filomen D'Agostino and Max E. Greenberg Research Fund of New York University School of Law. The author served as a supervisor in some of the litigation discussed in this Article, and thanks her colleagues Alina Das, Jessica Chicco, Judy Rabinovitz, Adam Raviv, Trina Realmuto, Rachel Rosenbloom, Paul Wolfson, and Isaac Wheeler, and former students Wonjun Lee, Marie Mark, Julie Mao, Saerom Park, Martha Saunders, Nancy Steffan, Pierce Suen, Nikki Reisch, and Jordan Wells for all of their work on these issues. The views expressed are her own.

Prevention of misleading statements could be pursued through greater self-regulation, prohibition of extra-record factual statements, or through a model of disclosure and rebuttal. This Article argues that the experience in Nken reflects the grave danger in presuming that self-regulation is an adequate safeguard against erroneous statements. It further argues that despite the appeal of a rigid rule that prohibits such statements, such an approach ignores the Court’s interest in information about real world facts that are relevant to its decisions. The Article concludes by arguing that the best proactive approach is to adopt a formal system of advance notice combined with access to the basis of government representations of fact. It further argues that courts should refuse to honor statements in court decisions that are based on untested and erroneous statements of fact by the government.

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INTRODUCTION

In *Nken v. Holder*, the Supreme Court dealt a blow to immigrants seeking stays of removal.¹ The Court stated that deportation during the pendency of a court challenge can never, on its own, provide the

¹ 556 U.S. 418 (2009).

showing of “irreparable injury” necessary for a stay.² In reaching this conclusion, the Court presumed that a person who was deported and later won his or her case would have no trouble returning to the United States. As support, the Court cited the Office of the Solicitor General’s (OSG) brief claiming that the government had a “policy and practice” of returning deportees who won their cases to their pre-removal status.³ Three years later, faced with a court order to turn over key internal Justice Department e-mails,⁴ the OSG wrote to the Supreme Court to “clarify and correct” its prior statement.⁵ In essence, it admitted that no comprehensive policy or practice existed to return immigrants who won their cases. But the damage was done. The language in *Nken* was on the books, and lower courts had already revised caselaw about stays in light of the Supreme Court’s pronouncement. To this day, the Supreme Court has done nothing to

² *Id.* at 435.

³ Brief for Respondent at 44, *Nken v. Mukasey*, 555 U.S. 1042 (2008) (No. 08-681), 2009 WL 45980, at *44.

⁴ The Immigrant Rights Clinic at New York University School of Law serves as counsel to the requestors in the Freedom of Information Act (FOIA) litigation that obtained these documents. The FOIA requestors are several organizations that work on behalf of immigrants, as well as a law professor, a law school organization that specializes in issues related to immigrants who have been wrongfully deported, and two individuals who prevailed in their federal court cases after being removed from the country. The FOIA request, filed in the wake of *Nken*, sought to uncover any agency practices that would allow a prevailing litigant to return to the United States, as well to expose the lack of any basis for the statements about agency practice that the OSG made to the Supreme Court in *Nken*. The requests were filed with the Department of Justice, the Department of State and the Department of Homeland Security. In the fall of 2009, when the requestors filed the administrative FOIA requests, David Gerbier, one of the individual requestors, was in Haiti despite having prevailed in his removal case before the Third Circuit in 2002. See *infra* notes 172–74 and accompanying text. In addition to representing the FOIA requestors in their search for documents, the Immigrant Rights Clinic handled Gerbier’s individual case seeking return and the FOIA served the very practical objective of identifying mechanisms for his return. The district court has decided three summary judgment motions in the case. Nat’l Immigration Project of the Nat’l Lawyers Guild v. U.S. Dep’t of Homeland Sec., 842 F. Supp. 2d 720, 730 (S.D.N.Y. 2012) (granting summary judgment for plaintiffs on release of the e-mail communications that were the basis of the OSG statement); Nat’l Immigration Project of the Nat’l Lawyers Guild v. U.S. Dep’t of Homeland Sec., 868 F. Supp. 2d 284 (S.D.N.Y. 2012) (granting summary judgment in part for plaintiffs on scope of exemptions from FOIA release); Nat’l Immigration Project of the Nat’l Lawyers Guild v. U.S. Dep’t of Homeland Sec., No. 11-CV-3235, 2012 WL 6809301 (S.D.N.Y. Dec. 27, 2012) (granting summary judgment for plaintiffs in part on the adequacy of the search for documents). The author is one of the supervisors of this litigation.

⁵ Letter from Michael R. Dreeben, Deputy Solicitor Gen., U.S. Dep’t of Justice, to William K. Suter, Clerk, Supreme Court of the U.S. (Apr. 24, 2012) [hereinafter Dreeben Letter], available at http://www.nationalimmigrationproject.org/legalresources/NIPNLG_v_DHS/OSG%20Letter%20to%20Supreme%20Court,%20Including%20Attachments%20-%20April%2024%202012.pdf.

undo the damage caused by the Court's reliance on the statement of the OSG.

The revelation about the *Nken* statements came on the heels of an admission that the OSG had supplied the Supreme Court with erroneous factual information in a far more famous set of cases. In 2011, outgoing Acting Solicitor General Neal Kumar Katyal publicly acknowledged that the OSG had been deceptive during its defense of the infamous convictions of Gordon Hirabayashi and Fred Korematsu for violating laws targeting persons of Japanese descent during World War II.⁶ Katyal admitted what had become clear through subsequent historical research and court findings: The OSG knowingly misled the Supreme Court by making statements based on a War Department report that had been doctored to provide a bogus military justification for both the curfew on and the internment of American citizens of Japanese descent.⁷

Scholars and courts have devoted substantial attention to how the OSG lied to the Court in the internment cases and the contemporaneous efforts of some OSG lawyers to prevent or mitigate those misrepresentations.⁸ In *Hirabayashi* and *Korematsu*, the OSG argued

⁶ Neal Kumar Katyal, *Confession of Error: The Solicitor General's Mistakes During the Japanese-American Internment Cases*, THE JUSTICE BLOG (May 20, 2011), <http://blogs.usdoj.gov/blog/archives/1346> [hereinafter *Katyal Statement*] (statement of Acting Solicitor General Neil Kumar Katyal); see also Neal Kumar Katyal, *The Solicitor General and Confession of Error*, 81 FORD. L. REV. 3027, 3031–37 (2013) (describing basis for the confession of error).

⁷ See Eric K. Yamamoto, *Korematsu Revisited—Correcting the Injustice of Extraordinary Government Excess and Lax Judicial Review: Time for a Better Accommodation of National Security Concerns and Civil Liberties*, 26 SANTA CLARA L. REV. 1, 10–15 (1986) (summarizing the DeWitt Report as well as contradictory government findings). Historical documents showed that the original version of a War Department report in 1943 stated that the curfew and internment orders were based on the broad assumption that it was impossible to separate loyal and disloyal persons of Japanese descent and did not make any claim of exigency. When Army officials realized that the report would undermine the government's legal arguments in challenges to internment, they ordered that all copies of the original report be burned. The report was rewritten to insert the false claim of immediacy. See *Hirabayashi v. United States*, 828 F.2d 591, 598 (9th Cir. 1987) (discussing this history and quoting a War Department memo on the burning of the report, proofs, galley, drafts, and memoranda). One copy of the original report survived in the National Archives. See *id.* The historical record also shows that the briefs to the Court were misleading about military judgment of the threat of invasion. See Eric L. Muller, *Hirabayashi and the Invasion Evasion*, 88 N.C. L. REV. 1333, 1338 (2010) (noting that Justice Department lawyers on the *Hirabayashi* brief knew that the military saw little risk of a Japanese invasion of the West Coast in 1942, but nonetheless told the Court that “[t]he principal danger preoccupying military officials in early 1942 was a Japanese invasion”) (alteration in original) (internal quotation marks omitted); Yamamoto, *supra*, at 15 (describing investigations that refuted charges of shore-to-ship signaling).

⁸ See *Korematsu v. United States*, 584 F. Supp. 1406, 1417 (N.D. Cal. 1987) (quoting Memorandum from John L. Burling, Assistant Dir., Alien Enemy Control Unit, U.S. Dep't

that the wartime orders targeting persons of Japanese descent were issued because “[p]rompt and decisive action was necessary,” and because loyal persons of Japanese descent could not be separated from those who might be disloyal.⁹ The government has since conceded that this argument was false and that the military order was based on racist assumptions, not military judgment.¹⁰ Furthermore, historical research has shown that lawyers within the OSG knew at the time they submitted their briefs that they were misrepresenting the actual military decision.¹¹ Yet those government lawyers who sought to draft the briefs in light of what they knew to be true were overruled.¹² It took more than four decades to vacate the *Hirabayashi* and *Korematsu* convictions, and that only happened after researchers discovered that the War Department had destroyed evidence of the basis for its original orders.¹³

Although the historical context of the Japanese internment cases makes them particularly outrageous, they are not the only instances in which the OSG has offered statements of fact to the Court based on internal government information inaccessible to opposing parties. *Nken* provides a rare opportunity to examine the underpinnings of the OSG’s statements of internal government facts. Because of the extensive e-mail correspondence uncovered through *Nken*-related Freedom of Information Act (FOIA) litigation, the public has access to a detailed record of the conversations that served as the basis for the factual presentation to the Court. These documents show systemic

of Justice to Herbert Wechsler, Assistant Attorney Gen. (Sept. 11, 1944) (seeking to insert a footnote into the OSG brief that directly discredited the War Department account)); Peter Irons, *Introduction: Righting a Great Wrong, in JUSTICE DELAYED: THE RECORD OF THE JAPANESE INTERNMENT CASES* 3, 5–6 (Peter Irons ed., 1989) (describing efforts on the part of Justice Department lawyers Edward J. Ennis and John L. Burling to persuade the Solicitor General to reveal the true facts of the case); see also Katyal, *supra* note 6, at 3032–33 (noting the OSG’s misrepresentations as well as attempts by Ennis to push the OSG to be forthcoming with the Court); Muller, *supra* note 7, at 1355–68 (describing archival research demonstrating that there was no real threat of a Japanese invasion at the time internment policies were instituted); Yamamoto, *supra* note 7, at 9–19 (describing misrepresentations and suppression of evidence by the OSG).

⁹ Brief for Respondent at 34, *Hirabayashi v. United States*, 320 U.S. 81 (1943) (No. 870), 1943 WL 71885, at *34.

¹⁰ See *Hirabayashi*, 828 F.2d at 601 (noting that the government conceded in the *coram nobis* proceeding that “General DeWitt [who issued the internment and curfew orders] acted on the basis of his own racist views and not on the basis of any military judgment that time was of the essence”).

¹¹ Irons, *supra* note 8, at 7.

¹² *Hirabayashi*, 828 F.2d at 602 n.11 (quoting Memorandum from Edward Ennis, Dir., Enemy Alien Control Unit, U.S. Dep’t of Justice, to Charles H. Fahy, Solicitor Gen. (Apr. 30, 1945)).

¹³ The convictions were overturned through *coram nobis* proceedings. See *Hirabayashi*, 828 F.2d at 608; *Korematsu*, 584 F. Supp. at 1420.

problems with the Supreme Court's reliance on the untested factual representations of the OSG.

This Article unpacks the factual record of the *Nken* misrepresentation to highlight the problem of unsupported factual claims made by the OSG in a relatively ordinary case before the Supreme Court. The record in *Nken* shows that at the time it made its factual representation about the fate of deported persons who won their cases, the OSG knew that, at best, agency policy for those deported was riddled with exceptions and practical hurdles. By the time of oral argument, the OSG knew that if Jean Marc Nken were deported during his case, he would probably not be allowed to return to the United States following a court victory. Furthermore, government documents show that Department of Homeland Security (DHS) and Justice Department lawyers outside the OSG knew that the power to decide what would happen to a deported immigrant who won his or her case was largely decentralized, allowing agency law enforcement officers to decide the fates of the people whom they had successfully deported prior to a court ruling. Despite all of this information, the OSG chose to characterize agency practice in a distorted way that was convenient for the legal position it was espousing.

Nken makes clear that it is time to rethink whether the Court should treat statements of fact from the OSG as presumptively trustworthy. Professionalism alone appears to be insufficient to ensure that the OSG will always offer unbiased evidence, particularly when doing so would harm the government's case. There is also good reason to doubt that the OSG can be an effective monitor of the facts provided to it by other government lawyers. These doubts suggest that the Court should reexamine the special credence it grants the OSG for internal government facts.

This Article proceeds as follows: Part I traces the history of the OSG's use of factual claims that are rooted in its privileged access to government information. Part II sets out the story of the *Nken* case as revealed through e-mails and documents obtained through FOIA litigation. This Part demonstrates how breakdowns in internal government fact-finding can limit what the OSG actually knows about agency practice. It also shows how litigation interests in adversarial proceedings can distort the information that the OSG chooses to supply to the Court, and that these choices may thereby mislead the Court. Part III examines the nature of the problem created by misleading information, both for the litigants and for parties affected by the rules pronounced by the Court. Part IV considers remedies that would mitigate the effects of improper representations of fact. Prevention of misleading statements could be pursued through greater

self-regulation, prohibition of extra-record factual statements, or through a model of disclosure and rebuttal. This Article argues that the experiences of the Court and the litigants in *Nken* show that self-regulation is not an adequate safeguard against erroneous statements. It further argues that, despite the appeal of a rigid rule that prohibits such statements, such an approach ignores the Court's interest in information about real world facts that are relevant to its decisions. The Article contends that the best approach is to give opposing parties and amici access to the evidentiary bases of government representations of fact, together with advance notice and an opportunity to rebut factual claims. The Article concludes by suggesting that the Court should expressly flag decisions that it later learns were based on misrepresented facts in order to inform lower courts and protect litigants from the unreliable sections of a decision.

I

THE OSG'S USE OF OUT-OF-RECORD STATEMENTS DERIVED FROM INTERNAL GOVERNMENT INFORMATION

The OSG enjoys a special relationship to the Supreme Court unlike that of any other litigant. The Court is more likely to grant petitions for certiorari filed by the OSG,¹⁴ it is more likely to grant petitions for certiorari where the OSG supports a private party,¹⁵ and it is more likely to rule for the OSG.¹⁶

The OSG's privileged status with the Court is enhanced by two factors. First, the OSG is the gatekeeper in the government's federal appellate litigation. No federal government appeal can be filed in the courts of appeals without agreement by the OSG.¹⁷ And no petition for writ of certiorari can be filed without OSG's assent.¹⁸ This winnowing role contributes to the credibility of the OSG: While many

¹⁴ See Richard J. Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 GEO. L.J. 1487, 1493 (2008) ("The Court grants the Solicitor General's petitions for writ of certiorari . . . about 70% of the time compared to less than 3–4% for others.").

¹⁵ See *id.* at 1494 (noting that the Supreme Court invites the Solicitor General to file an amicus brief advising the Court of whether review should be granted in a number of cases each year and "almost every time the Court follows the Solicitor General's advice"); see also Margaret Meriwether Cordray & Richard Cordray, *The Solicitor General's Changing Role in Supreme Court Litigation*, 51 B.C. L. REV. 1323, 1334 (2010) (explaining that the Court follows the recommendation of the OSG as amicus at the petition stage over seventy-five percent of the time).

¹⁶ Lazarus, *supra* note 14, at 1494.

¹⁷ 28 C.F.R. § 0.20(b) (2012).

¹⁸ See REBECCA MAE SALOKAR, *THE SOLICITOR GENERAL: THE POLITICS OF LAW* 63–64 (1992) (describing OSG system for vetting cases for petitions for writ of certiorari).

lawyers will push for certiorari in a dubious case if their client asks, the OSG need not do so.¹⁹ Second, the OSG has developed a reputation for stating the law fairly and making accurate representations about the record.²⁰ This reputation was damaged when the OSG was politicized during the Reagan Administration.²¹ However, over time, the OSG has actively protected its reputation of being committed to a fair representation of the record and the law. Indeed, former Acting Solicitor General Neal Kumar Katyal's confession of error in *Korematsu* and *Hirabayashi* explicitly invoked the standard of absolute candor toward the Court as a valued tradition of the OSG.²²

Candor with respect to characterizations of statutes, case law, and the record, of course, is something that the Supreme Court can test in every case. After all, the Justices and clerks can read the statutes, cases, and record, and judge for themselves whether a brief fails to account for important distinctions.²³ And given the frequency with which the OSG appears before the Court, there is ample opportunity to determine if this aspect of the Office's reputation is justified.²⁴

The Supreme Court's trust in the OSG, however, extends beyond verifiable indicators of candor and into factual assertions about the practical effect of legal rules. David Strauss has applauded this aspect of the OSG's relationship with the Court, writing that "the Office is also one of the Court's few sources of information about the effects of

¹⁹ See Cordray & Cordray, *supra* note 15, at 1336. *But see* Adam D. Chandler, Comment, *The Solicitor General of the United States: Tenth Justice or Zealous Advocate*, 121 *YALE L.J.* 725, 735–36 (2011) (arguing for more aggressive certiorari practice by the OSG).

²⁰ See SALOKAR, *supra* note 18, at 34 (discussing the Office's reputation for "accuracy and reliability"); Cordray & Cordray, *supra* note 15, at 1336 (describing the OSG's reputation for excellence); Ruth Bader Ginsburg & Elena Kagan, *Remarks Commemorating Celebration 55: The Women's Leadership Summit*, 32 *HARV. J.L. & GENDER* 233, 250 (2009) (conversation between Justice Ruth Bader Ginsburg and then-Dean Elena Kagan regarding Justice Ginsburg's experience on the Court and noting Justice Ginsburg's view on the integrity and truthfulness of the OSG).

²¹ See, e.g., LINCOLN CAPLAN, *THE TENTH JUSTICE: THE SOLICITOR GENERAL AND THE RULE OF LAW* 51–64 (1987) (discussing the politicization of the Solicitor General's Office during the Reagan Administration).

²² See Katyal, *supra* note 6, at 3031 (noting the "responsibility of candor" the Solicitor General has in court); *Katyal Statement*, *supra* note 6 (noting that the special relationship between the OSG and the Court requires "great responsibility and a duty of absolute candor").

²³ See Ginsburg & Kagan, *supra* note 20, at 250 (quoting Justice Ginsburg as saying, "If the SG [Solicitor General] cites a case and I go to the shelf, it will say what the SG said it does. It's an office we can all be proud of").

²⁴ See Lazarus, *supra* note 14, at 1495 (discussing the OSG's work in the Supreme Court).

legal rules and decisions in the world.”²⁵ He argues that it is difficult to see where the Court can turn—other than the OSG—for information about, for example, how a particular reading of the Freedom of Information Act might affect the government’s ability to gather intelligence.²⁶ Speaking in a way that is perhaps wishful, he states: “If the Court can trust the Solicitor General to provide accurate information and reliable judgments, the Court’s ability to do its job is improved.”²⁷

In fact, the OSG has a history of using its position to inject specific factual claims that appear to be supplied by government agencies into the proceedings before the Court. Using oblique grammatical phrasing, the OSG has repeatedly told the Court that it has been “advised” of facts that are relevant to a case. These facts often serve to support a broader narrative that the agency is presenting about the issues in a case. They may not be strictly necessary to the argument, but they provide context that the attorneys plainly see as advantageous to their presentation.²⁸

²⁵ David A. Strauss, *The Solicitor General and the Interest of the United States*, LAW & CONTEMP. PROBS. Winter & Spring 1998, at 165, 172.

²⁶ *Id.*

²⁷ *Id.*

²⁸ See, e.g., Brief for Petitioner at 27, *United States v. Galletti*, 541 U.S. 114 (2004) (No. 02-1389), 2003 WL 22087631, at *27 (“We are advised by the Internal Revenue Service that there are currently outstanding partnership employment tax liabilities in excess of \$10 billion that have been timely assessed but for which separate assessments have not been made against partners individually.”); Brief for the Respondent at 39, *Hernandez v. C.I.R.*, 490 U.S. 680 (1989) (Nos. 87-963 & 87-1616), 1988 WL 1025636, at *39 (“Similarly, we are advised by the IRS that it would not allow a deduction for payments made in exchange for a strictly religious educational benefit . . . (although to our knowledge this precise issue has never been the subject of litigation or a revenue ruling.)”); Brief for the United States at 29–30, *Nat’l Treasury Emps. Union v. Von Raab*, 489 U.S. 656 (1989) (No. 86-1879), 1987 WL 880093, at *29–30 (stating “[w]e are advised, for example, that criminal investigators, specialists, and auditors for the Bureau of Alcohol, Tobacco, and Firearms must undergo complete physical exams, including a urine test for sugar levels” and describing similar tests for specified employees of the Secret Service, the Government Printing Office, and the Immigration and Naturalization Service); Brief for Petitioners at 26 n.17, *U.S. Dep’t of Transp. v. Paralyzed Veterans of Am.*, 477 U.S. 597 (1986) (No. 85-289), 1985 WL 669457, at *26 n.17 (“We are advised by the Department of Transportation that the vast majority of contributions to the airport trust fund—87% in fiscal year 1985—is derived from an 8% tax on airline tickets that, by statute, must be paid by passengers.” (internal citations omitted)); Brief for Respondents at 10, *Wayte v. United States*, 470 U.S. 598 (1985) (No. 83-1292), 1984 WL 565693, at *10 (“Selective Service has employed an ‘active enforcement’ system to identify and locate nonregistrants. . . . We are advised that . . . all such people who were subject to the registration requirement have elected to comply pursuant to the ‘beg’ policy, and thus no prosecutions have been instituted.” (footnotes omitted)); Reply Brief for Petitioners at 29–30, *United States v. Dann*, 470 U.S. 39 (1985) (No. 83-1476), 1984 WL 565738, at *29–30 (“[W]e are advised by the Secretary that the [judgment fund of the Western Shoshones] now exceeds \$43.5 million. Thus any delay in distribution does not operate to erode the Western Shoshones’ property rights.” (footnotes omitted)).

A good example of the OSG's practice of inserting government-provided facts into proceedings occurred in *Atkins v. Parker*,²⁹ one of the few instances in which this behavior drew a rebuke from the Court. In *Atkins*, the question was whether food stamp recipients were entitled to individualized notice of their food stamp calculations in the context of "mass changes" in food stamp rules.³⁰ The OSG argued that due process did not require individualized notice of legislative reductions in benefits, and that in any event the notices provided by Massachusetts met constitutional requirements. In its brief, the OSG stated in its usual vague phrasing: "We are advised that the reductions involved did not exceed \$6 per month for a four-member household if the household remained eligible for benefits."³¹ Later in the brief, the OSG employed this unsupported statistic to distinguish the importance of the private interest in *Atkins* from that in *Goldberg v. Kelly*, stating that "this case involves, for most recipients, only a modest (at most, \$6 per month per four-person household) reduction in benefits. (Only comparatively well-off households at the margin of eligibility were terminated as a result of the change)."³² The OSG's reliance on these statements served to minimize the value of more robust notice procedures based upon facts that had not been gathered in the proceeding below, but instead were proffered by the government at the highest appellate stage.

As Lincoln Caplan noted in his study of the OSG,³³ the factual statements in *Atkins* drew criticism from Justice Stevens. In a footnote, Justice Stevens remarked, "The Government states that it is 'advised that the reductions involved did not exceed \$6 per month for a four-member household if the household remained eligible for benefits.' It does not indicate where in the record this information is located; nor does it indicate the source of the 'advice.'"³⁴ Despite this chiding, the OSG has proceeded to make similar statements since *Atkins*.³⁵

The OSG also makes factual statements directly, without the tell-tale passive construction "we are advised."³⁶ For example, in *Demore*

²⁹ 472 U.S. 115, 118 (1985).

³⁰ *Id.* at 118, 120.

³¹ Brief for the Federal Respondent Supporting Reversal at 7, *Atkins v. Parker*, 472 U.S. 115 (1985) (Nos. 83-1660 & 83-6381), 1984 WL 565462, at *7.

³² *Id.* at 36 n.32.

³³ CAPLAN, *supra* note 21, at 24.

³⁴ *Parker*, 472 U.S. at 118 n.8 (internal citation omitted).

³⁵ See *supra* note 28 (collecting examples).

³⁶ Such claims can be made either in briefs or at oral argument. See, e.g., Catherine M. Sharkey, *Against Categorical Preemption: Vaccines and the Compensation Piece of the Preemption Puzzle*, 61 DEPAUL L. REV. 643, 666-67 (2012) (discussing a factual claim

v. Kim,³⁷ the Supreme Court rejected a constitutional challenge to laws that require the detention of some immigrants during their removal proceedings. The government argued that the case was a facial challenge. But it also proceeded to defend the legality of a no-bond regime through reference to the difference between post-removal-order detention (which the Court had limited to a six-month period) and pre-removal-order detention.³⁸ To do so, it argued not just about the purposes of the two detention regimes, but also about the factual question of whether detention prior to removal was prolonged. The OSG's brief stated:

The actual implementation of [mandatory detention for pre-removal cases] reinforces this fundamental statutory difference [between detention post-removal order and pre-removal order]. The Executive Office for Immigration Review has calculated that, in cases where the alien is charged with being removable on grounds that trigger mandatory detention under Section 1226(c), its immigration judges complete removal proceedings in an average time of 47 days and a median time of 30 days—both far below the six-month period that this Court determined was presumptively reasonable for detention after a final order of removal. *See Zadvydas*, 533 U.S. at 701. . . . In the relatively small percentage of cases that are appealed to the BIA, the average time required for disposition of the appeal—from the filing of the appeal through the BIA's issuance of its decision—is approximately four months. The median time is slightly shorter (114 days).³⁹

The government's brief did not cite any publicly available statistics. The internal statistics it did provide left many questions. Did they include the time in detention from the time of arrest? Apparently no. Did they include people who agreed to a removal order on their first appearance before the judge? Apparently yes. These two considerations alone suggest that the statistics were highly misleading. For example, if eighty percent of persons arrested and detained immediately agreed to removal, and the remaining twenty percent challenged

made by the Solicitor General at argument about a conscious "choice" made during agency proceedings, when the record of those proceedings was not fully presented to the Court and it was unclear whether the agency had the necessary information to make such a choice).

³⁷ 538 U.S. 510 (2003).

³⁸ In *Zadvydas v. Davis*, 533 U.S. 678, 701 (2001), the Court concluded that, because indefinite detention would raise serious constitutional questions, it was appropriate to read the statute to limit the length of authorized detention. It therefore ruled that detention following a removal order was generally permissible for only six months, which the Court concluded was a reasonable time for the government to enforce a removal order. *Id.*

³⁹ Brief for Petitioners at 39–40, *Demore*, 538 U.S. 510 (No. 01-1491), 2002 WL 31016560, at *39–40.

their deportation and did not receive a final hearing decision for six months, the “average” detention time would be approximately 36 days (and the median would be zero). But the statistic of 36 days of detention would not represent the experience of any person and would provide very little insight into how detention operated.

Kim’s lawyers offered some critique of the government’s statistics. But because the government never revealed the methodology or data set for its statistics, Kim’s lawyers and amici faced a difficult task. One amicus brief questioned the OSG statement regarding the time for resolution of BIA appeals, stating: “In the experience of amici, appeals which are not quickly dismissed for procedural default typically take far longer than this average.”⁴⁰ Meanwhile, Kim’s lawyers, recognizing that they did not have access to the data necessary to challenge the presentation of the statistics, emphasized those aspects of the statistics presented by the government that supported their points.⁴¹ They also identified some of the shortcomings in the statistics, such as the fact that they did not appear to measure beginning from the time of arrest.⁴² Finally, they noted that Kim himself had been held for five weeks without any opportunity for bond before appearing in front of an immigration judge.⁴³

In its reply brief, the OSG took advantage of the difficulty that Kim’s lawyers faced in challenging the internal government statistics. The OSG reply brief repeatedly spoke of its statistics as “undisputed,” relying on the government’s original representations and the inability of Kim’s lawyers to disprove those numbers.⁴⁴ It is of course easy for statistics to be undisputed when there is no genuine opportunity to dispute them.

Demore v. Kim was decided five to four, and the majority cited the statistics offered by the OSG at length as support for the proposition that detention was likely to be brief and therefore constitutional.⁴⁵ No one can know how important those facts were to the

⁴⁰ Brief of Citizens and Immigrants for Equal Justice et al. as Amici Curiae Supporting Respondent at 26 n.28, *Demore*, 538 U.S. 510 (No. 01-1491), 2002 WL 31455513, at *26 n.28.

⁴¹ See Brief for Respondent at 26–27, *Demore*, 538 U.S. 510 (No. 01-1491), 2002 WL 31455525, at *26–27 (showing that the average time for an immigration judge hearing and the average time for an appeal added up to approximately six months).

⁴² *Id.* at 27 n.20.

⁴³ *Id.*

⁴⁴ See Reply Brief for Petitioners at 14–16, *Demore*, 538 U.S. 510 (No. 01-1491), 2002 WL 31969024, at *14–16 (“Respondent does not dispute that the duration of Section 1226(c) detention is, on average, very short. See Gov’t Br. 26–27. . . . It is undisputed, however, that only about 15% of removal orders entered by IJs against criminal aliens are appealed. See Gov’t Br. 40.”).

⁴⁵ 538 U.S. at 529–31.

disposition of the case. However, the OSG's arguments show that it thought these facts would influence the Court's assessment of the nature of the liberty interests at stake. The Court's ultimate decision suggests that the OSG's assumption was most likely correct.

The ability to introduce facts outside the record obtained through special access to government agencies offers the OSG a clear benefit. As litigators, OSG lawyers seek to offer the Court contextual information that supports their positions. Unlike other litigants, they have enormous access to government information by virtue of the fact that their "client" is the United States government. Absent some countervailing pressure, the temptation to include such information is very powerful, even when the information is filtered through self-interested agency personnel or has not been thoroughly vetted. But because the facts are, by definition, internal government facts, the OSG is unlikely to be held accountable for the way in which it gathers and presents them. Absent extensive historical research (as happened in the internment cases)⁴⁶ or FOIA litigation (as happened after *Nken*), the OSG is not held accountable for misleading presentations of internal government facts.

II

NKEN: A CASE STUDY OF THE PITFALLS OF OSG PRESENTATIONS OF INTERNAL GOVERNMENT FACTS

Nken v. Holder provides an unusual opportunity to study the pitfalls of the OSG's presentation of facts. Because of the FOIA case following *Nken*, the public now has access to the inter-agency discussions that led to the OSG statement of fact in that case, documents on the practices of the relevant office in the Justice Department, as well as documents about the practices of the client agency—DHS—and its sub-agencies. *Nken* also provides a window into what the OSG views as an appropriate solution to problems that arise after erroneous statements have been made to the Court.

The FOIA records in the *Nken* case include the crucial communications that developed internal government facts for presentation to the Supreme Court. E-mail conversations made public through FOIA litigation show what agencies told the OSG and how the OSG did and did not press back for greater clarity about the relevant facts. They also show the gap between what the OSG was told and what it conveyed to the Court. Other FOIA documents show the gap between the agency's actual practices and the way in which the agency described its practices to the OSG. Finally, the subsequent history of

⁴⁶ See *supra* note 7 (describing some of that research).

the *Nken* case shows just how much pressure is required to uncover OSG misstatements to the Court and how even then, the OSG can dissuade the Court from taking corrective action while Justice Department lawyers continue to benefit from the Court's ill-gotten language.

A. *The Nken Litigation*

In 2008, when it granted certiorari in *Nken v. Holder*, the Court took on a question that had been litigated for twelve years and had split the circuits since 2002.⁴⁷ The issue presented by *Nken* was the appropriate standard for issuance of a stay on behalf of a noncitizen with a petition for review of a removal order pending before a circuit court. Some lower courts held that, under the 1996 changes to the immigration law, a noncitizen must show clear and convincing evidence that execution of the removal order is *prohibited* as a matter of law.⁴⁸ Meanwhile, other courts ruled that the clear and convincing evidence test only applied to final injunctions against removal and that temporary stays were subject to the traditional test for a preliminary injunction.⁴⁹ Under that test, an immigrant had to show irreparable harm and either a likelihood of success on the merits or both serious questions going to the merits and a balance of hardships that warranted the injunctive relief.⁵⁰

In proceedings before the Fourth Circuit, Jean Marc Nken sought review of an order of the Board of Immigration Appeals (BIA) that denied reopening of his removal order and ordered that he be removed to Cameroon.⁵¹ In the underlying case, Nken argued that changed conditions in Cameroon made it likely that he would suffer

⁴⁷ See *Kenyeres v. Ashcroft*, 538 U.S. 1301, 1303–04 (Kennedy, Circuit Justice 2003) (noting the circuit split on application for a stay).

⁴⁸ See, e.g., *Teshome-Gebreegziabher v. Mukasey*, 528 F.3d 330, 334 (4th Cir. 2008); *Weng v. U.S. Att'y Gen.*, 287 F.3d 1335, 1337 (11th Cir. 2002).

⁴⁹ See, e.g., *Tesfamichael v. Gonzales*, 411 F.3d 169, 176 (5th Cir. 2005); *Hor v. Gonzales*, 400 F.3d 482, 485 (7th Cir. 2005), *petition granted and remanded*, 421 F.3d 497 (5th Cir. 2005); *Lim v. Ashcroft*, 375 F.3d 1011, 1011 (10th Cir. 2004); *Douglas v. Ashcroft*, 374 F.3d 230, 234 (3d Cir. 2004); *Arevalo v. Ashcroft*, 344 F.3d 1, 9 (1st Cir. 2003), *vacated*, 386 F.3d 19 (1st Cir. 2004); *Mohammed v. Reno*, 309 F.3d 95, 99–100 (2d Cir. 2002); *Bejjani v. INS*, 271 F.3d 670, 688 (6th Cir. 2001); *Andreiu v. Ashcroft*, 253 F.3d 477, 482 (9th Cir. 2001) (en banc).

⁵⁰ See *Andreiu*, 253 F.3d at 483–84 (applying preliminary injunction standard and concluding that no stay was warranted).

⁵¹ *Nken's* petition to the Fourth Circuit sought review of the denial of his motion to reopen his case based on changed country conditions, including a letter from his brother about the dangers he would face in Cameroon, photographs of Nken at a political demonstration, and news articles about increased authoritarianism in Cameroon. *Nken v. Holder*, 585 F.3d 818, 820 (4th Cir. 2009).

persecution if he were deported.⁵² To prevent his immediate removal during the pendency of the case, Nken's lawyers asked the Fourth Circuit to stay his removal.⁵³ They argued that the court should grant a stay under either test: the clear and convincing evidence test or the traditional preliminary injunction standard.⁵⁴ The government, in turn, argued that the higher standard was appropriate and that Nken should not be granted a stay.⁵⁵ The Fourth Circuit denied Nken's stay shortly after issuing an en banc decision adopting the stricter test.⁵⁶

Nken's lawyers proceeded to seek an emergency stay before the Supreme Court.⁵⁷ In the alternative, they asked the Court to grant certiorari and stay removal pending the outcome of their decision.⁵⁸ In their papers, Nken's lawyers set out the conflict among the circuits on the proper standard for a stay.⁵⁹ They also argued that their client would prevail under the traditional stay standard.⁶⁰ The OSG responded that although there was a split among the circuits, Nken's case was not a suitable vehicle for resolving the issue. They argued that his case lacked merit and that he had not shown that the "equities" warranted a stay.⁶¹

In the course of this discussion, the OSG argued that removal does not constitute irreparable harm in light of Congress's judgment that it is generally appropriate to require noncitizens to pursue challenges to removal orders from outside the United States.⁶² The OSG did not make any factual arguments to support this position, relying instead on the fact that Congress had deleted the previous automatic

⁵² *Id.*

⁵³ *Id.* at 821.

⁵⁴ Nken's arguments to the Fourth Circuit are described in his subsequent emergency motion to the Supreme Court after his motion to the Fourth Circuit was denied. See Emergency Motion for a Stay of Removal Pending Adjudication of the Petition for Review in the Fourth Circuit, or in the Alternative, Petition for Certiorari and a Stay of Removal Pending Resolution of the Petition at 4, *Nken v. Mukasey*, 555 U.S. 1042 (2008) (No. 08A413) (on file with author), *opinion after grant of cert. sub nom.* *Nken v. Holder*, 556 U.S. 418 (2009).

⁵⁵ *Id.* at 5. The government did not make an argument about the proper application of the traditional test for a stay.

⁵⁶ *Id.* at 5–6.

⁵⁷ *Id.*

⁵⁸ *Id.* at 14–16.

⁵⁹ *Id.* at 6–8.

⁶⁰ *Id.* at 9–16.

⁶¹ Memorandum for the Respondent in Opposition at 21–29, *Nken v. Mukasey*, 555 U.S. 1042 (2008) (No. 08A413) (on file with author), *opinion after grant of cert. sub nom.* *Nken v. Holder*, 556 U.S. 418 (2009).

⁶² *Id.* at 26.

stay provisions from the statutory scheme for judicial review.⁶³ The reply brief focused on facts concerning irreparable harm that were particular to Mr. Nken's situation and the persecution he would face if deported to Cameroon.⁶⁴

The Court granted certiorari and temporarily stayed removal during the pendency of the case.⁶⁵ Its order stated that review was limited to the legal question of the proper standard for a stay of removal.⁶⁶

The briefing before the Court focused on the proper standard for a stay, but both the briefs of the parties and of amici addressed the implications of the choice of standard.⁶⁷ It was in connection with these discussions about the implications of the different standards that the OSG sought to use internal government information to shore up its argument for applying a tough stay standard.

Mr. Nken's lawyers submitted a brief focusing on the question of the choice of stay standard. The brief explored the text of the provision, the structure of the immigration statute, and the statute's legislative history. The brief further argued that application of the higher stay standard would lead to absurd results. The brief noted that while a noncitizen "technically" is entitled to return to the United States,

⁶³ Compare 8 U.S.C. § 1252(b)(3)(B)(2012) (no automatic stay), with 8 U.S.C. § 1105a(a)(3) (1994) (repealed 2006) (automatic stay absent an aggravated felony conviction).

⁶⁴ Reply in Support of Emergency Motion for a Stay of Removal Pending Adjudication of the Petition for Review in the Fourth Circuit, or in the Alternative, Petition for Certiorari and a Stay of Removal Pending Resolution of the Petition at 8–10, *Nken*, 555 U.S. 1042 (No. 08A413) (on file with author).

⁶⁵ *Nken v. Mukasey*, 555 U.S. 1042, 1042 (2008), *opinion after grant of cert. sub nom.* *Nken v. Holder*, 556 U.S. 418 (2009).

⁶⁶ *Id.*

⁶⁷ See Brief for Petitioner at 7, *Nken v. Holder*, 556 U.S. 418 (2009) (No. 08-681) ("The choice of the proper standard is critical to a petitioner's ability to obtain a stay of his final order of removal."); Brief for Respondent at 31, *Nken*, 556 U.S. 418 (No. 08-681) ("IIRIRA's elimination of automatic stays and its addition of a statutory standard for injunctive relief make plain Congress's intention to render it more difficult for aliens to remain in the United States after the agency has rejected their claims."); Reply Brief for Petitioner at 17–18, *Nken*, 556 U.S. 418 (No. 08-681) ("Imposing a high standard for injunctions in the direct review context ensures that in all but the most extraordinary cases, the relief available . . . is limited to stays, vacatur, and the granting of their petition for review."); Brief for Amici Curiae American Immigration Lawyers Ass'n, et al. Supporting Petitioner at 3–4, *Nken*, 556 U.S. 418 (No. 08-681) (arguing that the heightened standard would lead to removal of petitioners with meritorious challenges to their removal orders while their cases are still pending); Brief Amicus Curiae of Law Professors in Support of Petitioner at 4, *Nken*, 556 U.S. 418 (No. 08-681) (arguing that the Fourth Circuit's interpretation imposed impermissible obstacles to relief); Brief of Wash. Legal Found. & Allied Educational Found. as Amici Curiae in Support of Respondent at 2, *Nken*, 556 U.S. 418 (No. 08-681) (arguing that sufficient checks in the system would prevent improper removals even under the heightened standard).

many in Mr. Nken's position would be maimed or murdered in their home countries before they could return.⁶⁸ It also noted a separate danger: that the heightened standard could lead to the removal of United States citizens.⁶⁹

Two amicus briefs were filed in support of Mr. Nken. In one, law professors argued that the high stay standard would constitute an unconstitutional suspension of the writ of habeas corpus.⁷⁰ This brief argued that to meet the minimum requirements of the Suspension Clause, a statutory limitation on judicial review could not interfere with the courts' ability to grant effective relief.⁷¹ The brief provided several examples of situations in which the high stay standard would deny effective relief.⁷²

In a second brief, immigrant rights organizations argued that the government's high standard "would place petitioners who present meritorious challenges to their removal orders at risk of irreparable harm and would be unduly burdensome on both petitioners and courts."⁷³ The brief showed that under the government's preferred standard, persons with meritorious claims would be denied stays prior to winning their cases. It cited five examples of such cases from the Eleventh Circuit, which had adopted the higher stay test.⁷⁴ In each of those examples, the individual was denied a stay but later prevailed in the challenge to removal. The brief also offered evidence of the kinds of harms that noncitizens would face during the pendency of their cases, and the practical difficulty they would have in meeting the high stay standard in a short time period.⁷⁵ Finally, the brief argued that removal constituted irreparable harm even for those who did not face direct physical injury during the pendency of their case. In a passage that would prompt a response from the government, the amici stated:

⁶⁸ Brief for Petitioner at 42, *Nken*, 556 U.S. 418 (No. 08-681).

⁶⁹ *Id.* at 45 (arguing that under the government's reading of the statute, the higher stay standard would apply not just to asylum seekers, but also to petitioners claiming that removal is improper because they are United States citizens).

⁷⁰ See Brief Amicus Curiae of Law Professors in Support of Petitioner at 21, *Nken*, 556 U.S. 418 (No. 08-681) ("Section 1252(f) as construed by the courts of appeals imposes a heightened and inflexible standard for temporary relief that is inconsistent with the core meaning and historical understandings of the Suspension Clause.").

⁷¹ *Id.* I was one of the signatories to this brief.

⁷² See, e.g., *id.* at 18 (describing persons who may be incarcerated on their return to their country of origin for political offenses); *id.* at 19 (describing cases in which a petitioner may face torture or other persecution).

⁷³ Brief for Amici Curiae American Immigration Lawyers Ass'n, et al. Supporting Petitioner at 1, *Nken*, 556 U.S. 418 (No. 08-681).

⁷⁴ See *id.* at 9 n.7.

⁷⁵ See *id.* at 21-27 ("Although petitioners would face these obstacles under any standard, the application of § 1252(f)(2)'s standard would make them considerably more arduous.").

[I]n practice it is extremely difficult for an alien to return once he has been deported, even if his petition for review has been successful. There is no class of visa or other formal reentry mechanism available to aliens who have been previously removed but have successfully challenged their removal orders. As a result, trying to obtain travel documentation that will permit a returning alien to reenter the United States can be onerous, extraordinarily time-consuming, and often entirely improvisatory. Furthermore, the cost associated with return travel and documentation (including the nearly indispensable assistance of counsel in such a difficult endeavor) may be so burdensome that it effectively precludes the petitioner from returning at all. Thus, even an alien who wins his or her case may still be kept out of the country.⁷⁶

In its answering brief, the OSG contended that the government's preferred standard would not defeat effective relief. The OSG stated:

By policy and practice, the government accords aliens who were removed pending judicial review but then prevailed before the courts effective relief by, *inter alia*, facilitating the aliens' return to the United States by parole under 8 U.S.C. 1182(d)(5) if necessary, and according them the status they had at the time of removal.⁷⁷

The OSG offered no citation in its brief for this claimed "policy and practice." It did not explain the process used for providing "effective relief" other than "inter alia" awarding parole. Nor did the OSG explain the technical meaning of "parole," which is to allow the person to enter the United States while maintaining the legal fiction that the person remains at the border.⁷⁸ As would later become clear, the "parole" mechanism used by DHS was a highly imperfect way to return immigrants and had the potential to cause them substantial prejudice.⁷⁹

The OSG also sought to minimize any losses by asking the Court to reach out and speak to the requirements for a stay under the traditional test.⁸⁰ It argued that even under the traditional test, Mr. Nken's stay should be denied.⁸¹ Mr. Nken's reply protested the OSG's effort

⁷⁶ *Id.* (citing AM. IMMIGRATION L. FOUND., PRACTICE ADVISORY: RETURN TO THE UNITED STATES AFTER PREVAILING ON A PETITION FOR REVIEW 1 (2007)).

⁷⁷ *Id.* at 44.

⁷⁸ 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, 175 (2012), <http://yalelawjournal.org/2012/12/20/martin.html> ("Under a legal fiction, a parolee remained constructively at the border and would be treated as an applicant for admission once again (thus subject to the exclusion grounds and procedures) whenever the parole ended.").

⁷⁹ See *infra* notes 163–64 and accompanying text.

⁸⁰ See Brief for Respondent at 46, *Nken*, 556 U.S. 418 (No. 08-681) (asking the Court to address the showing demanded by the four-part test).

⁸¹ *Id.*

to expand the issues, noting that the scope of the traditional test for a stay was not part of the question presented.⁸²

In its opinion, the Court rejected the government's proposed standard and then proceeded to discuss the requirements under a traditional stay test.⁸³ The Court made a blanket declaration that "the burden of removal alone cannot constitute the requisite irreparable injury,"⁸⁴ and justified this assertion on the grounds that "[a]liens who are removed may continue to pursue their petitions for review, and those who prevail can be afforded effective relief by facilitation of their return, along with restoration of the immigration status they had upon removal."⁸⁵ For this proposition, the Court cited only the factual statements about agency practice in the OSG's brief.⁸⁶ Thus, the bare representation of government lawyers in a brief became the basis for the Court's pronouncement that deportation pending resolution of an appeal could not serve as irreparable harm.

Nken should have been a victory for the immigrant rights community. It rejected the government's proposed high standard and preserved the ability to make an individualized showing that a stay is appropriate under the factual circumstances of particular cases. But the Court's language about the irreparable harm prong of the "traditional" test immediately led to litigation about the scope of the traditional test. Before long, some lower courts concluded that *Nken* had changed the traditional standard for a stay and that removal during the pendency of a case could not constitute irreparable harm.⁸⁷ These changes to stay case law can be attributed to the Court's decision to

⁸² Reply Brief for Petitioner at 26, *Nken*, 556 U.S. 418 (No. 08-681) (stating that the government's argument that Mr. Nken was not entitled to a stay under the traditional standard was "not fairly within this Court's limited grant of certiorari, which asks only which standard should apply").

⁸³ The Court ignored the petitioner's objection that this was not part of the question presented. See *Nken*, 556 U.S. at 433 (discussing the traditional standard despite petitioner's objection). It reasoned that because the parties had characterized the traditional test differently, the scope of this test was properly before the Court. *Id.* (noting that the "parties dispute what the [traditional test] is").

⁸⁴ *Id.* at 435.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ See, e.g., *Maldonado-Padilla v. Holder*, 651 F.3d 325, 328 (2d Cir. 2011) (denying stay and citing *Nken* for the proposition that removal is not "categorically irreparable"); *Leiva-Perez v. Holder*, 640 F.3d 962, 965 (9th Cir. 2011) (granting stay, but noting that "[*Nken*] rais[ed] the irreparable harm threshold"); see also *Lezama-Garcia v. Holder*, 666 F.3d 518, 537-38 (9th Cir. 2011) (citing *Nken* for the proposition that aliens may continue to effectively pursue their claims after removal); *Luna v. Holder*, 637 F.3d 85, 88 (2d Cir. 2011) (same); *Rodriguez-Barajas v. Holder*, 624 F.3d 678, 681 & n.3 (5th Cir. 2010) (same); *Villajin v. Mukasey*, No. CV 08-0839, 2009 WL 1459210, at *4 (D. Ariz. May 26, 2009) (same).

treat the OSG's unsubstantiated statement about agency practice as fact.

B. Uncovering the Factual Basis for the Statement in Nken

At the time the OSG made its statement in *Nken* about the process for returning immigrants who prevail before the courts, there was good reason to question whether it represented the facts on the ground. Indeed, amici had cited an advisory which spelled out the difficulties that counsel may have in returning a client who had been deported and proposed methods for bringing litigation to return a client who had succeeded in the court of appeals.⁸⁸ The immigration bar and the public were left to wonder whether there was any basis for the OSG's factual statements.

Ordinarily, such a question would never be answered. But in *Nken*, the gap between the factual statement and the reality faced by deported immigrants sparked litigation under FOIA.⁸⁹ As a result, there is a body of detailed documentation about what the OSG knew and did not know about agency practice. That record illustrates the twin dangers of the Court's reliance on statements by government counsel based on internal information: (1) the OSG may repackage unreliable and equivocal information that it receives from agencies in ways designed to support its litigation position; and (2) the information that interested agencies and divisions of the Justice Department provide to the OSG may be selective and inaccurate. In addition, the *Nken* experience shows how hard it is to expose such unreliable information. Although the FOIA litigation ultimately led the OSG to partially recant its statement to the Court, the road to that result was long and the ultimate recantation did not alter the Court's published statements. Rather than showing that existing systems work to correct past misstatements, the *Nken* story illustrates the need for reform.

1. The Office of the Solicitor General

As a result of FOIA litigation,⁹⁰ the OSG released a set of e-mail correspondence that plainly shows the gap between what it knew about agency policy and practice and what it represented to the Court when it briefed and argued *Nken*. The e-mails show that the OSG was concerned about how to defend against the charge that an immigrant who is deported will have difficulty returning. They also show that the

⁸⁸ See AM. IMMIGRATION L. FOUND., *supra* note 76, at 6 (suggesting that litigation may be necessary to obtain return).

⁸⁹ 5 U.S.C. § 552 (2012); *see also supra* note 4 and accompanying text (discussing the *Nken* FOIA litigation).

⁹⁰ *See supra* note 4 and accompanying text (describing FOIA litigation).

OSG was sufficiently concerned about this question that it sought repeatedly to clarify the agency's practice and to obtain more information. Nonetheless, the e-mails show that the OSG presented the Court with a rosy picture of a "policy and practice" of return despite being informed that the agency had no set procedure and was not committed to returning all immigrants who prevailed in their cases, including the party in *Nken*.

The disclosed e-mails indicate that, from the start, the OSG was concerned about answering the charge by amici that those deported did not have an effective method for returning after prevailing in their cases. The released e-mails start on December 31, 2008, when a lawyer at DHS wrote to a lawyer at the Justice Department's Office of Immigration Litigation (OIL) to answer a question about how DHS deals with prevailing noncitizens who have been deported.⁹¹ The OIL lawyer who received the answer forwarded the e-mail to the OSG on January 2, 2009 with the subject heading, "Nken request for information – reentry of aliens with successful PFR [petition for review]."⁹² In answering the question about "how an alien returns if he is removed during the adjudication of his [petition for review] and is ultimately successful," DHS stated:

[T]he consensus is that the alien is paroled back in. Here's the comment I got back from [Enforcement Law Division], but I also checked with [Customs and Border Protection (CBP)] and they concur with this process.

As we all know there is no statute that directly addresses the issue and given that CBP will not simply let the person pass through inspection based on the [petition for review] grant, we have relied on parole under 212(d)(5). I don't believe that [Immigration and Customs Enforcement (ICE)] has a "procedure" per se, but has handled them on a case by case basis. The process is generally that ICE grants the parole and sends a cable to the consulate or embassy nearest to the alien with instructions to issue a travel document/boarding letter to the alien. The alien must supply his/her own transportation to the U.S., and if the alien was in detention prior to deportation, the alien is returned to detention upon arrival at the [port of entry].⁹³

⁹¹ E-mail from undisclosed attorney, Dep't of Homeland Sec., to Melissa Neiman-Kelting, Attorney, U.S. Dep't of Justice (Dec. 31, 2008, 5:13 PM). This e-mail and all other e-mails without Bates numbers cited below are available online at http://www.nationalimmigrationproject.org/legalresources/NIPNLG_v_DHS/OSG%20and%20DHS%20Email%20Communications%20in%20Nken%20-%20May%2010,%202012.pdf.

⁹² E-mail from Melissa Neiman-Kelting, Attorney, U.S. Dep't of Justice, to Nicole A. Saharsky, Assistant to the Solicitor Gen. (Jan. 2, 2009, 7:24 AM).

⁹³ E-mail from undisclosed attorney, *supra* note 91.

The language of this e-mail offered many clues suggesting that its author lacked definite knowledge of agency practice. The e-mail did not refer to any regulation, directive, or other procedure. It stated that there was no “‘procedure’ per se.” The person answering the question was providing a “consensus.” By any evidentiary standard, the e-mail statement offered little reason for confidence that the e-mail’s author was a reliable source.⁹⁴ The e-mail also made clear that the agency policy, to the extent it existed, was one that varied “case by case.” This “case by case” approach was not a policy and practice that promised return. Instead, it involved discretion on the part of ICE and required clearance with CBP.

Although the OSG ultimately failed to verify the credibility of the factual statements supplied by DHS, it did attempt to seek clarification of the statements. The OSG lawyer who received this initial agency e-mail wrote back the same day with a follow-up question, directed not to whether the evidence of a policy was sufficient, but instead to the scope of the policy’s application.⁹⁵ She inquired about whether the policy applied only when there was an outright win at the circuit stage, or whether it applied as well when cases were remanded to the agency.⁹⁶ The answer was forwarded to the OSG by the OIL point of contact who, while attaching the DHS response, also commented: “It appears that the process is followed in any case where a successful petitioner wants to return to the US”⁹⁷ The attached DHS answer was more equivocal, however:

There is not a large volume of these cases and we generally handle them on a by request basis. But, anytime the BIA decision is vacated I would believe the alien could ask to come back to the US to have the former status restored. It should be noted that most of these cases involve criminal aliens. We return the alien to the custody situation from which the alien was removed. There have been several cases I’ve been involved in where the alien opts to reside outside the US to continue proceedings.⁹⁸

⁹⁴ For example, the Federal Rules of Evidence require that a witness have personal knowledge or be qualified as an expert in order to testify. *See* FED. R. EVID. 602 (requiring personal knowledge of lay witnesses); FED. R. EVID. 702 (allowing witnesses to testify without personal knowledge only if qualified as an expert witness).

⁹⁵ E-mail from Nicole A. Saharsky, Assistant to the Solicitor Gen., to Melissa Neiman-Kelting, Attorney, U.S. Dep’t of Justice (Jan. 2, 2009, 1:40 PM).

⁹⁶ *Id.*

⁹⁷ E-mail from Melissa Neiman-Kelting, Attorney, U.S. Dep’t of Justice, to Nicole A. Saharsky, Assistant to the Solicitor Gen. & Edwin S. Kneedler, Deputy Solicitor Gen. (Jan. 2, 2009, 2:29 PM).

⁹⁸ E-mail from undisclosed attorney, Dep’t of Homeland Sec., to Melissa Neiman-Kelting, Attorney, U.S. Dep’t of Justice (Jan. 2, 2009, 2:13 PM).

Such generalizations are poor evidence of agency practice by any standard. The DHS lawyer offered merely a “belief” about how things would work. The basis of the belief, and how it would be achieved, was not stated. In addition, the responder made clear that the process was “by request,” a clear sign that pro se litigants would have great difficulty returning after winning their cases. Rather than offer support for the claims, the writer sought to diminish the importance of the question by suggesting that the successful litigant would choose not to return due to detention policies.

Given the weak response from DHS, the OIL lawyer acting as a go-between followed up on January 5, 2009, with an e-mail to DHS saying that absent further support, OSG would prefer to remove a passage from the draft brief claiming that an immigrant who was deported and later won his or her case would be returned to the same status he or she had prior to deportation.⁹⁹ The OSG lawyer involved in the discussion added that if DHS could be more concrete or provide a citation, they would leave in the statement about successful immigrant litigants being returned to their pre-removal status.¹⁰⁰ Without such a citation, however, the OSG “[did not] want to open [them]selves up to trouble.”¹⁰¹ The DHS lawyer then responded that it was fine to remove the language.¹⁰² On receiving these e-mails, the OSG attorney wrote to her supervisor that in her opinion there was a need to rework the language.¹⁰³

⁹⁹ E-mail from Melissa Neiman-Kelting, Attorney, U.S. Dep’t of Justice, to undisclosed attorney, Dep’t of Homeland Sec. (Jan. 5, 2009, 5:47 PM).

¹⁰⁰ E-mail from Nicole A. Saharsky, Assistant to the Solicitor Gen., to Melissa Neiman-Kelting, Attorney, U.S. Dep’t of Justice (Jan. 5, 2009, 5:54 PM).

¹⁰¹ *Id.*

¹⁰² E-mail from undisclosed attorney, Dep’t of Homeland Sec., to Nicole A. Saharsky, Assistant to the Solicitor Gen., et al. (Jan. 5, 2009, 6:32 PM).

¹⁰³ E-mail from Nicole A. Saharsky, Assistant to the Solicitor Gen., to Edwin S. Kneedler, Deputy U.S. Solicitor Gen. (Jan. 5, 2009, 6:44 PM). Meanwhile, the OIL lawyer circulated the draft brief to colleagues within OIL. One colleague wrote back stating that in his experience DHS would facilitate return “if the petitioner’s counsel presses the matter.” But he added that since “the alien is brought back on parole . . . it is not correct in my experience to say that the alien is accorded the former status he had at the time of removal.” E-mail from David V. Bernal, Assistant Dir., Office of Immigration Litig., to Melissa Neiman-Kelting, Attorney, U.S. Dep’t of Justice, et al. (Jan. 5, 2009, 3:26 PM) (Bates stamped DOJ Civil 000007) (on file with author). All documents referenced by Bates number were produced as a result of the National Immigration Project FOIA litigation, *supra* note 4. The Bates numbers on these documents were assigned by the agency producing the documents. Those labeled “DOJ Civil” were produced by the Office of Immigration Litigation (OIL) within the Department of Justice. Those labeled “2010FOIA” were produced by Immigration and Customs Enforcement (ICE), a division of the Department of Homeland Security (DHS). E-mails without Bates numbers were produced by OSG. The documents sometimes include the position of the author and

The OSG continued to press DHS for more information about what actually happens in practice to those who are deported and later win their cases. On January 6, 2009, one day before it filed its brief, the OSG asked DHS to provide a chart that would address what actually happened to five individuals listed in one of the amicus briefs¹⁰⁴ who had prevailed after losing their request for a stay under the tough standard that the OSG endorsed.¹⁰⁵ The OSG asked DHS to answer whether the person was deported, whether the case involved an asylum issue, the ultimate disposition of the case, and whether the person was returned to the United States.¹⁰⁶

DHS's answers about the actual cases on the chart looked very different from the vague and general comments they had previously provided. Specifically, the answers in the chart provided no evidence of a working, comprehensive system for the safe return of immigrants who had won their appeals. The chart showed that of the five individuals for whom the court had denied the stay, three had actually been removed.¹⁰⁷ Of those three, not one had returned to the United States at the time the chart was prepared in early 2009, even though all of their cases were remanded from the courts of appeals at least a year earlier.¹⁰⁸ In one case, the court of appeals had granted a remand on June 21, 2007, a year and a half before the *Nken* briefs were filed.¹⁰⁹ On remand in that case, the immigration judge stated that addressing relief was "meaningless as respondent's stay of removal was denied by the 11th [C]ircuit and respondent has been removed."¹¹⁰ In a second case, the court of appeals remanded the case on October 15, 2007,

recipients. That information is included in citations where it is available. In the case of OIL, any person whose title is not in the e-mails is listed as "attorney."

¹⁰⁴ The e-mail referred to six cases. The count of cases that fit the description in the e-mail was mistaken since one of the six persons on the chart was listed in the amicus brief as having been granted a stay (due to the government's non-opposition) and then prevailing before the court of appeals. See Brief for American Immigration Lawyers Ass'n et al. as Amici Curiae Supporting Petitioner at 8 n.7, *Nken v. Holder*, 556 U.S. 418 (2009) (describing one case in which a stay was granted and the individual prevailed and five cases in which the stay was denied and the petitioner prevailed).

¹⁰⁵ E-mail from Nicole A. Saharsky, Assistant to the Solicitor Gen., to undisclosed attorney, Dep't of Homeland Sec. (Jan. 6, 2009, 11:19 AM).

¹⁰⁶ *Id.*

¹⁰⁷ E-mail from undisclosed attorney, Dep't of Homeland Sec., to Nicole A. Saharsky, Assistant to the Solicitor Gen. (Jan. 6, 2009, 5:19 AM).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* The precise form of relief is redacted in the e-mails. The immigration judge also stated that the court had not received any communication from counsel for the respondent. Under agency practice, counsel does not remain on the case absent a new filing of a notice of appearance.

over a year before the chart was prepared.¹¹¹ The chart states the agency would pick up the individual for a hearing, but gave no indication of the reasons for the delay, or whether the agency would have returned the individual absent the inquiry from the OSG about the case.¹¹² In the third case, remanded sometime before June 2007, DHS stated that the immigration judge had decided that no testimony was necessary.¹¹³ DHS claimed that the individual would have been brought to the hearing had the immigration judge found it necessary.¹¹⁴

The chart seems to have given the OSG pause about the fate of Mr. Nken in the event of his victory. On January 7, 2009, the day that the government brief was due to the Supreme Court, the OSG sought clarification from OIL about the most salient aspect of the DHS policy: What would happen to Mr. Nken himself if he won his case?¹¹⁵ The OIL lawyer proceeded to ask her DHS contact for more details:

OSG would like me to confirm that if Nken succeeds in his petition for review before the Fourth Circuit and the case is remanded to the Board [of Immigration Appeals], DHS will parole him back in whether or not the remand provides for a new hearing before the IJ (at which he would be entitled to appear). Put another way, are there circumstances under which Nken would succeed on his [petition for review], have his case remanded to the Board, but DHS would be unwilling to parole him back into the US?¹¹⁶

The OSG did not wait to receive a response to this direct inquiry before filing its brief.¹¹⁷ But by the time of filing, the OSG already had confirmation of several caveats to any claim that there existed a “policy” of return. The OSG knew that there was, at best, a “case by case,” “on request” practice that was not reduced to writing, and that may not even apply to Mr. Nken himself (although there had not yet been a response to the inquiry about Mr. Nken’s specific case). The OSG also knew that DHS policy was to require deported immigrants to pay for any return transportation.

Despite the evidence suggesting that no policy existed, the OSG proceeded to file a brief containing a confident statement about the

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ See E-mail from Melissa Neiman-Kelting, Attorney, U.S. Dep’t of Justice, to undisclosed attorney, Dep’t of Homeland Sec. (Jan. 7, 2009 12:11 PM) (conveying request from the OSG).

¹¹⁶ *Id.*

¹¹⁷ See Brief for Respondent at 44, *Nken v. Holder*, 556 U.S. 418 (2009) (No. 08-681) (referencing the policy and practice).

ability of immigrants to return after succeeding in their cases. Setting aside prior concerns that such language might create “trouble,” the final brief stated:

By policy and practice, the government accords aliens who were removed pending judicial review but then prevailed before the courts effective relief by, *inter alia*, facilitating the aliens’ return to the United States by parole under 8 U.S.C. 1182(d)(5) if necessary, and according them the status they had at the time of removal.¹¹⁸

Disregarding the many concerns in the e-mail chain, the OSG statement clearly implied the existence of a set of procedures that would “accord aliens who were removed . . . effective relief,” the key to answering the Suspension Clause argument raised by the law professor amici. The statement also implied that the agency actively facilitated returns, as opposed to acting only on a “by request” basis and placing the monetary costs of return on the person who won the case. The OSG had made only two changes from the initial draft of the paragraph: It added “if necessary” after the reference to parole, and it moved the citation to parole to the middle of the paragraph.¹¹⁹

As the day of oral argument approached, DHS revised its description of its return policy. DHS sent another e-mail providing the “latest answer on the issue of returning aliens who are removed while a PFR is pending.”¹²⁰ This time, DHS was more explicit about how it limits return based on the prevailing party’s prior status and the necessity of return. Specifically, DHS stated that it would facilitate return “if the alien was lawfully residing in the US, or the alien’s presence is required for continued proceedings But, where cases can be resolved without the alien’s return, then we don’t facilitate the alien’s return”¹²¹ None of these important caveats were conveyed to the

¹¹⁸ *Id.*

¹¹⁹ The day after the brief was filed, OIL forwarded the DHS response to the question of whether Mr. Nken himself would benefit from the return policy if he won his case in the circuit court. The DHS lawyer said, “the short answer is yes.” DHS proceeded to provide examples that presumed that the question applied to the time on remand before the Board of Immigration Appeals reopened the case and sent it back to an immigration judge. During this time, they noted, Mr. Nken would be subject to removal in the absence of a stay so it might not be appropriate to return him. The clear implication was that once Mr. Nken’s case was remanded to an immigration judge, he would fall within the broader group of persons who would be returned. But an examination of the prior chart showed cases in which a person’s case had been sent back to an immigration judge and the individual was not returned. *See* E-mail from undisclosed attorney, Dep’t of Homeland Sec., to Nicole A. Saharsky, Assistant to the Solicitor Gen., Melissa Neiman-Kelting, Attorney, U.S. Dep’t of Justice, et al. (Jan. 7, 2009, 12:29 PM).

¹²⁰ E-mail from undisclosed attorney, Dep’t of Homeland Sec., to Nicole A. Saharsky, Assistant to the Solicitor Gen., Melissa Neiman-Kelting, Attorney, U.S. Dep’t of Justice, et al. (Jan. 16, 2009, 11:54 AM).

¹²¹ *Id.*

Court.¹²² This failure to inform the Court was especially troubling because the caveats pertained directly to Mr. Nken, who lacked lawful status at the time the government was seeking his removal.

The issue of return policies did not arise during oral argument, and the OSG did not choose to clarify the representation in its brief. As discussed in Part II.A, *supra*, the Court proceeded to rely on the government's statements in its brief as fact, and it used them as the basis for claiming that removal alone could not be irreparable harm. The OSG did nothing, either before or after argument, to correct the Court's misimpression prior to the district court order in the FOIA litigation that required disclosure of its e-mail conversations, three years after the Court's judgment in *Nken*.

2. *The Office of Immigration Litigation*

Along with the OSG, OIL appeared on the brief before the Court. It also served as the conduit for information to the OSG. Much of OIL's role is described in the e-mails to the OSG. But the FOIA documents also show that OIL failed to convey some of what it knew and that OIL did not act to develop a better understanding of what happened to immigrants who won their cases. As the office that represents the government in most of the thousands of immigration cases before the courts of appeals each year,¹²³ OIL had an opportunity to bring its experience to bear. Instead, it downplayed the consequences for immigrants of deportation prior to a court victory.

Early on, OSG's OIL point-of-contact on the brief sought to imply that no one who lost a stay motion ever won his or her case in the court of appeals. She circulated proposed language to OIL supervisors stating that

[a]mici have failed to point to any particular instance in which an alien applied for and was denied a stay of removal under any standard, was removed from the United States, and subsequently obtained a ruling [in] his or her favor—even in those courts of appeals that have applied Section 1.252(f)(2)'s standard—and respondent's attorneys are unaware of any such instances."¹²⁴

¹²² See Brief for Respondent at 44, *supra* note 117 (presenting no such limitations to the government's policy and practice).

¹²³ See *Office of Immigration Litigation: Appellate Section*, UNITED STATES DEPARTMENT OF JUSTICE, <http://www.justice.gov/civil/oil/as/oil-app.html> (last visited July 2, 2013) (reporting that in fiscal year 2009 the section handled over 7500 petitions for review).

¹²⁴ E-mail from Melissa Neiman-Kelting, Attorney, U.S. Dep't of Justice, to Thorn Hussey, Civil Div., U.S. Dep't of Justice, David J. Kline, Civil Division, U.S. Dep't of Justice (Jan. 2, 2009, 1:26 PM) (Bates stamped DOJ Civil 000015) (on file with author).

The FOIA productions do not include a response, but as the OSG later recognized, the American Immigration Lawyers Association amici had in fact offered such examples in their brief.¹²⁵ Despite the information before it, OIL did not take responsibility for identifying what happened to those who were denied stays.

After government lawyers circulated a draft brief, one OIL staff attorney raised concerns about the claim that immigrants returned on parole would be returned to their pre-removal status. The attorney explained: “The alien is brought back on parole, while further proceedings may be pending before the agency. Thus it is not correct in my experience to say that the alien is accorded the former status he had at the time of removal.”¹²⁶ The attorney also stated that return depended on “the petitioner’s counsel press[ing] the matter with the OIL attorney or DHS.”¹²⁷ The OIL point-of-contact for Nken replied that she had forwarded a DHS e-mail to the OSG that stated “I would believe the alien could ask to come back to the US to have the former status restored.”¹²⁸ There is no sign in the e-mails released through the FOIA litigation that OIL passed on the OIL attorney’s concern about the implications of parole to the OSG. The status of parole means legally treating a person as though he or she is at the border.¹²⁹ Thus, as the OIL staff attorney implied, parole is only a return to a person’s original status if their status prior to removal was that of a person at the border. According to the documents released as part of the FOIA litigation, however, none of this salient information was conveyed to the OSG.

In fact, at the same time that OIL was offering reassurance to the OSG, it was involved in cases where it knew that DHS did not allow litigants with remanded cases to return. In one case, DHS wrote that if a case can be resolved on remand at the Board of Immigration Appeals, “we typically don’t allow the return.”¹³⁰ DHS further

¹²⁵ See E-mail from Nicole A. Saharsky, Assistant to the Solicitor Gen., to undisclosed attorney, Dep’t of Homeland Sec. (Jan. 6, 2009, 11:19 AM) (asking for information on the amici example cases).

¹²⁶ E-mail from David V. Bernal, Assistant Dir., Office of Immigration Litig., to Melissa Neiman-Kelting, Attorney, U.S. Dep’t of Justice, Donald E. Keener, Attorney, Office of Immigration Litig., et al. (Jan. 5, 2009, 3:26 PM) (Bates stamped DOJ Civil 000007) (on file with author).

¹²⁷ *Id.*

¹²⁸ E-mail from Melissa Neiman-Kelting, Attorney, U.S. Dep’t of Justice, to David V. Bernal, Assistant Dir., Office of Immigration Litig. et al. (Jan. 5, 2009, 4:18 PM) (Bates stamped DOJ Civil 000007) (on file with author).

¹²⁹ See Martin, *supra* note 78, at 175 (explaining the concept of immigration parole).

¹³⁰ E-mail from undisclosed attorney, Dep’t Homeland Sec., to Stuart Nickum, Civil Division, U.S. Dep’t of Justice (Nov. 20, 2008, 11:47 AM) (Bates stamped DOJ Civil 000147) (on file with author).

explained that if the case has to go back to an immigration judge they would explore a telephonic hearing, although “that’s often quite a hassle and we end up letting the alien back in.”¹³¹ DHS ended by saying the decision to return an alien “would be Phoenix’s call,” demonstrating that there was no uniform national practice that local offices would be required to follow.¹³²

Moreover, had the OIL lawyers on *Nken* drawn on the experience of their own office, they would have informed the OSG that the Justice Department itself had impeded the return of successful litigants. Prior to *Nken*, there were several cases in which lawyers sought to return their clients through contempt motions or other actions in the courts that had reversed their clients’ removal orders.¹³³ In these cases, the government lawyers did not respond initially by correcting the error. Instead they worked to defend the failure to return deported noncitizens.

For example, Joe Hohenstein, a lawyer in Philadelphia, handled two cases before the United States Court of Appeals for the Third Circuit prior to the *Nken* briefs in which he sought court intervention to obtain the return of his clients. In the first case, he represented Anderson Okeke, a Nigerian national who was ordered removed, and was deported prior to winning his case before the court of appeals.¹³⁴ After that victory, Hohenstein contacted government counsel to arrange his client’s return. He was told that because his client had been lawfully removed, the government had no obligation to return him and that Hohenstein should work with the embassy in Nigeria instead.¹³⁵ Hohenstein proceeded to schedule an interview with the embassy, which denied a visa based on the very legal issue on which the agency had lost at the Third Circuit.¹³⁶ Hohenstein next filed a contempt motion in the Third Circuit.¹³⁷ The government opposed the motion saying that only the State Department could issue the necessary visa.¹³⁸ Once the contempt motion was filed, however, the government lawyers began working with the consulate to facilitate a

¹³¹ *Id.*

¹³² *Id.*

¹³³ See, e.g., *Okeke v. Gonzales*, 407 F.3d 585 (3d Cir. 2005); *Ytem v. Immigration & Naturalization Serv.*, No. 03-3333, slip op. at 6 (3d Cir. May 20, 2004) (per curiam); *Gerbier v. Holmes*, 280 F.3d 297 (3d Cir. 2002).

¹³⁴ See *Okeke*, 407 F.3d at 591 (granting Okeke’s petition for review).

¹³⁵ Declaration of Joseph Hohenstein ¶ 6, *Nat’l Immigration Project of the Nat’l Lawyers Guild v. U.S. Dep’t of Homeland Sec.*, 842 F. Supp. 2d 720 (S.D.N.Y. 2012) (No. 11 CV 3235), available at http://www.nationalimmigrationproject.org/legalresources/cd_NIP_v_DHS_FOIA_Complaint_with_exhibits.pdf.

¹³⁶ *Id.* ¶ 7.

¹³⁷ *Id.* ¶ 10.

¹³⁸ *Id.* ¶ 11.

boarding letter so that Mr. Okeke could board a plane back to the United States.¹³⁹ The government refused to pay for the transportation, however.¹⁴⁰ Once Mr. Okeke arrived back in the United States the government detained him and refused to set bond, apparently because he was treated as an “arriving alien” ineligible for bond.¹⁴¹ He was not returned to the status that he had prior to his removal, where he would have been subject only to deportability charges and not to inadmissibility rules applied to those seeking a new admission at the border.

Following Hohenstein’s success in bringing back Mr. Okeke, the Third Circuit appointed him to represent Ronald Ytem, another immigrant who had prevailed in the Third Circuit.¹⁴² Mr. Ytem, like Mr. Okeke, had been deported while his case was pending. The government’s sole ground of deportability was a conviction charged as an “aggravated felony.”¹⁴³ In 2004, the Third Circuit ruled that the conviction was misclassified.¹⁴⁴ The case was remanded, first to the district court and then to the Board of Immigration Appeals, which terminated the removal proceedings.¹⁴⁵ But for Mr. Ytem, that result meant little. He was in the Philippines and needed a way to return. Acting pro se, he sought the assistance of various government agencies to no avail. He was told by Citizenship and Immigration Services that he was inadmissible to the United States for five years simply because he had been deported, without any consideration of the fact that his removal order had been reversed.¹⁴⁶ Mr. Ytem turned to the courts, returning to the district court that had first heard his case.

Rather than recognize that something had gone wrong because a successful petitioner was out of the country and had not been able to return for his immigration court hearing on remand, the government tried to throw Mr. Ytem out of court. The government successfully moved to dismiss on jurisdictional grounds.¹⁴⁷ Mr. Ytem then appealed and the Third Circuit requested briefing.¹⁴⁸ While Mr. Ytem

¹³⁹ *Id.* ¶ 12.

¹⁴⁰ *Id.* ¶ 11.

¹⁴¹ *Id.* ¶ 14.

¹⁴² Order Appointing Joseph C. Hohenstein, Esq. CJA Counsel to Represent Appellant, No. 06-5023 (3d Cir. June 4, 2007).

¹⁴³ *Ytem v. Immigration & Naturalization Serv.*, No. 03-3333, slip op. at 6 (3d Cir. May 20, 2004) (per curiam).

¹⁴⁴ *Id.* at 6.

¹⁴⁵ Declaration of Joseph Hohenstein ¶ 24.

¹⁴⁶ *Id.* ¶ 25.

¹⁴⁷ *Ytem v. Immigration & Naturalization Serv.*, No. 3:06-cv-00535 (M.D. Pa. May 4, 2006).

¹⁴⁸ Order, *Ytem v. Immigration & Naturalization Serv.*, No. 06-5023 (3d Cir. Jan 12, 2007).

was still appearing pro se, the government moved to dismiss on the grounds that there was no final order of removal and that the Court therefore lacked jurisdiction.¹⁴⁹ After several adjournments, the Third Circuit appointed Hohenstein to represent Mr. Ytem in June 2007.¹⁵⁰ In November the parties reached an agreement for Ytem's return, three years after he had prevailed in the court of appeals.¹⁵¹ As with Mr. Okeke, Mr. Ytem would never have been able to return without the vigorous assistance of counsel. *Ytem* and *Okeke* demonstrate that there was not, in fact, a clear pathway for removed immigrants to return to the United States once the government defeated their request for a stay, even if they later prevailed on the merits.

In both of these cases the government's position and its conduct were a far cry from the "effective relief" by "facilitating the aliens' return" that it described to the Court in *Nken*.¹⁵² The government did not act affirmatively to facilitate the return of prevailing parties. It did nothing to assist a pro se party who had won his case and turned to the courts for help. When the pro se parties sought assistance from the courts, the government responded by filing motions to dismiss. Even when the immigrant was represented, government lawyers disclaimed responsibility. Relief, when it came, arrived years after the initial court victory and only as a result of pressure from court action by represented parties.

Hohenstein's experience returning his clients to the United States matched that of other lawyers around the country. Indeed, lawyers have even had difficulty effectuating the return of clients whose cases reached the Supreme Court. In its 2006 ruling in *Lopez v. Gonzalez*,¹⁵³ the Supreme Court rejected the government's argument that a state drug possession conviction is an "aggravated felony" drug trafficking crime if it is a felony under state law.¹⁵⁴ By the time the Court ruled, Mr. Lopez had been deported.¹⁵⁵ His lawyer tried to make arrangements for his return. At first, the government refused to make any arrangements, arguing that a hearing from Mexico would be

¹⁴⁹ Declaration of Joseph Hohenstein ¶ 28.

¹⁵⁰ Order, No. 06-5023 (3d Cir. June 4, 2007).

¹⁵¹ Declaration of Joseph Hohenstein ¶ 30. Even after his return, there were complications in Ytem's case. The government insisted that he could be charged with inadmissibility. *Id.* ¶ 28. That meant that he would need a waiver. Ultimately the government backed down on this claim. *Id.* ¶ 34. The government also at first insisted on detention, but later agreed not to detain Ytem upon his return. *Id.* ¶ 33.

¹⁵² Brief for Respondent at 44, *Nken v. Mukasey*, 555 U.S. 1042 (2008) (No. 08-681), 2009 WL 45980, at *44.

¹⁵³ 549 U.S. 47 (2006).

¹⁵⁴ *Id.* at 59-60.

¹⁵⁵ *Id.* at 52 n.2.

sufficient.¹⁵⁶ Later they agreed to Mr. Lopez's return,¹⁵⁷ but there was no effective or uniform mechanism in place to effectuate this return. Mr. Lopez's lawyer arranged for him to come to the border, but border officers told him he could not enter the country due to his past removal order.¹⁵⁸ He was eventually able to return several months after his Supreme Court victory as a result of his lawyer's sustained efforts.¹⁵⁹

Strikingly, the government action in these cases was not simply that of an Assistant United States Attorney. Mr. Lopez had been before the Supreme Court. And in *Okeke* and *Ytem*, the government was represented by OIL, the same specialized immigration litigation office that later appeared on the brief in *Nken* and which assured the Court in that case that the agency provided "effective relief" for those in Mr. Nken's position. The OSG, however, did not have access to information about cases like *Ytem* and *Okeke* when it submitted its briefs in *Nken*.

3. *The Department of Homeland Security*

Both the OSG and OIL turned repeatedly to lawyers at DHS, which they treated as the client agency, to answer their questions about agency practice.¹⁶⁰ The DHS lawyers were engaged simultaneously in answering questions for the *Nken* litigation and for another case in which an immigrant who had prevailed before the circuit court sought return. The correspondence among these attorneys shows a keen recognition of the fact that deportees who returned via parole did not regain their prior immigration status. However, these internal DHS concerns were not passed on to OIL or the OSG.

Between January 2 and January 14, 2009, during the time of the *Nken* briefing and preparation for oral argument, DHS fielded questions from its Houston office about how to handle cases that the Fifth Circuit had remanded to the Board of Immigration Appeals. This e-mail conversation included the DHS lawyer who was "working on the

¹⁵⁶ Declaration of Patricia Mattos, ¶ 6, Nat'l Immigration Project of the Nat'l Lawyers Guild v. U.S. Dep't of Homeland Sec., 842 F. Supp. 2d 720 (S.D.N.Y. 2012) (No. 11 CV 3235), available at http://www.nationalimmigrationproject.org/legalresources/cd_NIP_v._DHS_FOIA_Complaint_with_exhibits.pdf.

¹⁵⁷ *Id.* ¶¶ 7–8.

¹⁵⁸ *Id.* ¶¶ 9–10.

¹⁵⁹ See Declaration of Patricia Mattos, *supra* note 156 (detailing the actions taken by Mr. Lopez's attorney).

¹⁶⁰ Although the released OSG e-mails redact the names of the DHS lawyers, the FOIA productions indicate that these documents are from the Office of the Principal Legal Advisor at ICE (a division of DHS). Declaration of Ryan Law, ¶ 14, Nat'l Immigration Project of the Nat'l Lawyers Guild v. U.S. Dep't of Homeland Sec., 842 F. Supp. 2d 720 (S.D.N.Y. 2012) (No. 11 CV 3235).

big picture question” for the OIL lawyer who was the OSG’s point of contact in *Nken*.¹⁶¹ In the e-mails about the Fifth Circuit cases, the Houston Office argued that it was a mistake to use parole to return a deported immigrant to the United States after winning in the court of appeals.¹⁶² The Houston Deputy Chief Counsel argued that if a person were paroled he would not be eligible to adjust his or her status. That would create a major problem in the specific case since the circuit court had remanded to allow an adjustment application. Another lawyer noted that parole opened up “huge issues” relating to bond.¹⁶³ Both adjustment and bond are examples of issues in which persons who are inside the United States and charged with deportability are treated differently from those who are at the border seeking admission.¹⁶⁴ Since parole is a legal fiction that treats the person as being at the border, parole is, by its nature, a change in immigration status from that which a person would have had prior to being deported, unless the individual was already being treated as an “arriving alien.”¹⁶⁵

¹⁶¹ In discussions with OIL lawyers about individual cases in which prevailing immigrants sought to return, Rachel Silber of DHS stated that she was “working on the big picture question for Melissa,” a reference to the OIL point-of-contact in *Nken*. E-mail from Rachel N. Silber, Assistant Dist. Counsel, U.S. Dep’t of Justice, to Stuart Nickum, Trial Attorney, Office of Immigration Litig., (Dec. 30, 2008, 11:01 AM) (Bates stamped 2010FOIA1959.000047) (on file with author); *see also* E-mail from Rachel N. Silber, Assistant Dist. Counsel, U.S. Dep’t of Justice, to Donald W. Cassidy, Deputy Chief Counsel, Office of the Chief Counsel, Immigration & Customs Enforcement, Hous. Office, & Erica McGuirk, Senior Attorney, Office of the Chief Counsel, Immigration & Customs Enforcement, Hous. Office (Jan. 14, 2009, 11:44 AM) (Bates stamped 2010FOIA1959.000106) (on file with author) (discussing use of parole to return prevailing immigrants).

¹⁶² E-mail from Donald W. Cassidy, Deputy Chief Counsel, Office of the Chief Counsel, Immigration & Customs Enforcement, Hous. Office, to Erica McGuirk, Senior Attorney, Office of the Chief Counsel, Immigration & Customs Enforcement, Hous. Office (Jan. 14, 2009, 11:44 AM) (Bates stamped 2010FOIA1959.000106) (on file with author).

¹⁶³ E-mail from Erica McGuirk, Senior Attorney, Office of the Chief Counsel, Immigration & Customs Enforcement, Hous. Office, to Donald W. Cassidy, Deputy Chief Counsel, Office of the Chief Counsel, Immigration & Customs Enforcement, Hous. Office (Jan. 14, 2009 10:22 AM) (Bates stamped 2010FOIA1959.000107) (on file with author).

¹⁶⁴ Under agency regulations, an arriving alien can only seek adjustment of status if he or she is returning on advanced parole if the adjustment application was filed prior to departure, and he or she is seeking review of the prior adjustment application. 8 C.F.R. § 1245.2(a)(1)(ii). An arriving alien can seek release from custody administratively, but cannot obtain release from an immigration judge. 8 C.F.R. § 1003.19(h)(2)(i)(B).

¹⁶⁵ Arriving aliens are also subject to grounds of inadmissibility, listed in 8 U.S.C. § 1182 (2012), which are often broader than the grounds of removability that apply to persons in the country. *See* 8 U.S.C. § 1227(a) (2012); *Vartelas v. Holder*, 132 S. Ct. 1479, 1485 n.3 (2012) (remarking on the different treatment of those seeking admission); *Judulang v. Holder*, 132 S. Ct. 476, 479 (2011) (describing gap between rules of inadmissibility and rules of deportability).

The Houston Deputy Chief Counsel argued that it would be better to simply let the person who succeeded in the court of appeals pass through inspection and be treated as though he had never left.¹⁶⁶ Other DHS lawyers wrote back that CBP, which handles inspections at the border, would not allow a person to pass through inspection without being admitted or paroled.¹⁶⁷ One DHS lawyer commented that there had been a running battle on this question for the six years that CBP had been part of DHS and that the situation was “far from optimal.”¹⁶⁸ The practical solution, they argued, was to provide parole documentation for the purposes of CBP, but then have ICE treat the person as though he or she had never left the country. The lawyer described ICE’s view that the paperwork was a “parole of convenience.”¹⁶⁹ As one DHS lawyer commented in a separate e-mail chain, “parole is the only method for returning an alien. I wouldn’t call it a ‘preferred’ method.”¹⁷⁰

When DHS lawyers told OIL and the OSG that the method used for return was “parole,” they did not explain that this method depended on a series of actors (from ICE to the immigration courts) treating the person as though the parole had never happened. This method of return, even when a person was successfully returned, was messy and created confusion—not surprisingly, given the conventional understanding that a person who is paroled is to be treated as an arriving alien.¹⁷¹ This fact, however, was not explained to the OSG or the Court.

C. *Post-Nken Failure to Live Up to the OSG’s Representations*

After *Nken*, the Court had adopted the OSG’s representations as fact, but there were no procedures in place to make the Court-sanctioned “fact” a reality. As courts, lawyers, and the press sought answers, the government deflected questions. Meanwhile, none of the

¹⁶⁶ E-mail from Donald W. Cassidy to Erica McGuirk, *supra* note 162.

¹⁶⁷ E-mail from Rachel N. Silber to Donald W. Cassidy & Erica McGuirk, *supra* note 161 (discussing that the parole option began because “CBP insisted on it”).

¹⁶⁸ E-mail from William B. Odencrantz, Dir. of Field Legal Operations, Immigration & Customs Enforcement, to Erica McGuirk, Senior Attorney, Office of the Chief Counsel, Immigration & Customs Enforcement, Hous. Office, et al. (Jan. 14, 2009, 5:11 PM) (Bates stamped 2010FOIA1959.000105) (on file with author).

¹⁶⁹ *Id.*

¹⁷⁰ E-mail from Kyle Hansen, Deputy Chief, Enforcement Law Div., Office of the Principal Legal Advisor, Immigration & Customs Enforcement, to Rachel N. Silber, Assistant Dist. Counsel, U.S. Dep’t of Justice, et al. (Jan. 5, 2009, 9:30 AM).

¹⁷¹ Richard Frankel, *Illegal Emigration: The Continuing Life of Invalid Deportation Orders*, 65 SMU L. REV. 503, 520 n.98 (2012) (describing charge of inadmissibility made by ICE attorney after an immigrant returned to the United States following a successful petition for review).

relevant agencies took steps to formalize the policy described by the OSG (or to admit to the Court the existence of significant gaps in their stated policy) until forced to do so by the imminent release of the OSG e-mails pursuant to the FOIA litigation.

Shortly after the *Nken* decision, DHS faced questions from the press over its return policy. Sandra Hernandez, a reporter, noted a conflict between the Court's statements in *Nken* and a case she learned of while visiting Haiti on a research project. While in Haiti in 2009, Hernandez met David Gerbier, a lawful permanent resident who had been deported in 2000 and had won his circuit case in 2002.¹⁷² Left in Haiti without counsel, Gerbier tried on his own to vindicate his rights. He went to the United States Embassy in Haiti on at least four occasions, only to be turned away.¹⁷³ By the time Sandra Hernandez reported his story in the *Miami New Times*, Gerbier had been in Haiti for seven years after his victory at the Third Circuit.¹⁷⁴

¹⁷² Sandra Hernandez, *He Can't Come Home Again: Despite a Mention by the Supreme Court, David Gerbier is Locked Out of the United States*, MIAMI NEW TIMES (Sept. 10, 2009), <http://www.miaminewtimes.com/2009-09-10/news/he-can-t-come-home-again-david-gerbier-deported-to-haiti/>. Following the *Miami New Times* story about David Gerbier, the Immigrant Rights Clinic at New York University School of Law took on his representation and ultimately succeeded in bringing him back to the United States. The author of this Article supervised his case.

¹⁷³ Declaration of David Gerbier ¶ 12, Nat'l Immigration Project of the Nat'l Lawyers Guild v. U.S. Dep't of Homeland Sec., 842 F. Supp. 2d 720 (S.D.N.Y. 2012) (No. 11 CV 3235), available at http://www.nationalimmigrationproject.org/legalresources/cd_NIP_v._DHS_FOIA_Complaint_with_exhibits.pdf; Hernandez, *supra* note 172.

¹⁷⁴ Gerbier's case illustrates how lack of counsel makes it impossible for a person to return to the United States after being deported, even after winning in a court of appeals. Soon after the court's order, Gerbier's original lawyer (who represented him in the court of appeals) petitioned the court to order the government to arrange for Gerbier's return. The government resisted this effort, telling the court that the process for returning Gerbier was "already underway" and that it would be "inane" for the court to order his return. Declaration of Marie Mark ¶ 2, Nat'l Immigration Project of the Nat'l Lawyers Guild v. U.S. Dep't of Homeland Sec., 842 F. Supp. 2d 720 (S.D.N.Y. 2012) (No. 11 CV 3235), available at http://www.nationalimmigrationproject.org/legalresources/cd_NIP_v._DHS_FOIA_Complaint_with_exhibits.pdf. The court declined to order Gerbier's return and he remained in Haiti. Lacking the resources, Gerbier no longer had access to counsel to pursue his return. Once Hernandez's story about Gerbier ran in the *Miami New Times*, he obtained counsel, and was eventually able to return. *Id.* ¶¶ 4–22. The process, however, was extremely difficult and illustrated the lack of a set procedure for the return of successful petitioners. The consular section (the part of the embassy responsible for visas) wrote that Gerbier would have to file for a new immigrant visa, wholly ignoring the fact that his deportation order had been reversed. *Id.* ¶ 13. Meanwhile, efforts to reopen his case in immigration court were not successful because the court concluded that it lacked jurisdiction over a case where the person had been deported. *Id.* ¶ 14. The agency eventually began the process for parole back into the United States. *Id.* ¶ 16. Gerbier was required to pay for his own transportation and was detained for three months upon his return. *Id.* ¶¶ 18, 20. After appearing before an immigration judge in June 2010, he was ultimately freed as a lawful permanent resident—ten years after his deportation and eight years after he had won his case in the circuit court. Declaration of David Gerbier ¶ 30,

While researching her story, Hernandez wrote to the ICE press office seeking information about the government's claim in *Nken* that they had a mechanism for returning successful petitioners to the United States.¹⁷⁵ She asked what "exact rules or guidelines are in place to bring back an immigrant who wins [in the court of appeals] after they have been deported."¹⁷⁶ Her inquiry led to a flurry of internal e-mails at the ICE office. The Enforcement Law Division of ICE proposed stating that "ICE's role in returning an individual in these situations varies on a case-by-case basis. Where necessary, ICE will assist in the individual's return to the United States."¹⁷⁷ Before answering the reporter, the question was sent up through the ranks because the reporter had mentioned the *Nken* case. The Deputy Chief of the Enforcement Law Division recalled that "the attorney who argued *Nken* before the [S]upreme [C]ourt [may] have specifically talked about this issue."¹⁷⁸ He proceeded to respond to the e-mail by pasting the statement from the government's brief in *Nken* and cautioning against saying something that would conflict with what was said to the Supreme Court in that case.¹⁷⁹ In response, an ICE Office of the Principal Legal Advisor attorney proposed rewording the answer for the reporter to state that the deported immigrant would be accorded "the status he had at the time of removal."¹⁸⁰ But then the Enforcement Law Division recommended against "saying anything

Nat'l Immigration Project of the Nat'l Lawyers Guild v. U.S. Dep't of Homeland Sec., 842 F. Supp. 2d 720 (S.D.N.Y. 2012) (No. 11 CV 3235), *available at* http://www.nationalimmigrationproject.org/legalresources/cd_NIP_v._DHS_FOIA_Complaint_with_exhibits.pdf. Gerbier was represented by the Immigrant Rights Clinic at New York University School of Law and was one of the original requestors in the *Nken* FOIA case. At the time of the request, he was stranded in Haiti and the process, if any, for his return was unclear.

¹⁷⁵ E-mail from Redacted to Ivan L. Ortiz-Delgado, Pub. Affairs Officer, Immigration & Customs Enforcement (June 4, 2009, 12:53 PM) (Bates stamped 2010FOIA1959.00069) (on file with author). In the FOIA materials Hernandez's name is redacted. The name is clear, however, from the subsequent *Miami New Times* story.

¹⁷⁶ *Id.*

¹⁷⁷ E-mail from Jo Ellen Ardinger, Office of the Principal Legal Advisor, Immigration & Customs Enforcement, to Michelle M. Ressler et al. (June 9, 2009, 12:30) (Bates stamped PM2010FOIA1959.000050) (on file with author).

¹⁷⁸ E-mail from Kyle Hansen, Deputy Chief, Enforcement Law Div., Office of the Principal Legal Advisor, Immigration & Customs Enforcement, to Jo Ellen Ardinger, Office of the Principal Legal Advisor, Immigration & Customs Enforcement (June 9, 2009, 12:43 PM) (Bates stamped 2010FOIA1959.000050) (on file with author).

¹⁷⁹ E-mail from Kyle Hansen, Deputy Chief, Enforcement Law Div., Office of the Principal Legal Advisor, Immigration & Customs Enforcement, to Jo Ellen Ardinger, Office of the Principal Legal Advisor, Immigration & Customs Enforcement, et al. (June 9, 2009, 1:08 PM) (Bates stamped 2010FOIA1959.000081) (on file with author).

¹⁸⁰ E-mail from Michelle M. Ressler to Kyle Hansen, Deputy Chief, Enforcement Law Div., Office of the Principal Legal Advisor, Immigration & Customs Enforcement, et al. (June 9, 2009, 1:27 PM) (Bates stamped 2010FOIA1959.000134-5) (on file with author).

about the status an alien may have when he's returned to the U.S."¹⁸¹ One e-mail from the ICE Office of the Principal Legal Advisor notes: "CBP may have one view of the status they obtain when paroled in, while EOIR [the Executive Office of Immigration Review] and ICE [have] another."¹⁸² Another e-mail notes that "the return status has been tricky."¹⁸³

In the *Miami New Times* article, the ICE spokesperson is quoted as saying: "When appropriate, [we] will assist in the individual's return to the United States. However, our role in these cases varies on a case-by-case basis."¹⁸⁴ This carefully worded response to the press was a far cry from the robust assertions that had been made to the Supreme Court in *Nken*.¹⁸⁵ Unlike the statement in *Nken*, the statements in the news article left room for the government to deny return on a case-by-case basis, and thereby made clear that removal pending resolution of a petition for review to a circuit court could leave a successful litigant stranded abroad.

The government's failure to live up to the OSG's representations in *Nken* was further illustrated in a series of e-mails circulated throughout OIL in November 2009 with the subject "Response to Mandamus Action to Facilitate Alien's return; Any Circuit." Throughout these e-mails, OIL attorneys debated the extent of their obligations to ensure the return of successful litigants under *Nken*. One e-mail noted that the government's brief in *Nken* did not explain the "extent of 'facilitating'" return.¹⁸⁶ The e-mail scoffed at the idea of the government paying to return the person they deported, stating that to do so "would be akin to winning damages in an immigration case."¹⁸⁷ At around the same time, another series of e-mails displayed

¹⁸¹ E-mail from Jo Ellen Ardinger, Office of the Principal Legal Advisor, Immigration & Customs Enforcement, to Riah Ramlogan, Dir. of Field Operations, Immigration & Customs Enforcement, et al. (June 9, 2009, 2:28 PM) (Bates stamped 2010FOIA1959.000133) (on file with author).

¹⁸² E-mail from David A. Landau to Jo Ellen Ardinger, Office of the Principal Legal Advisor, Immigration & Customs Enforcement, et al. (June 9, 2009, 2:37 PM) (Bates stamped 2010FOIA1959.000133) (on file with author).

¹⁸³ E-mail from Jo Ellen Ardinger, Office of the Principal Legal Advisor, Immigration & Customs Enforcement, to Melody A. Brukiewa, Chief Counsel, Immigration & Customs Enforcement, Balt. Office, et al. (June 9, 2009, 2:00 PM) (Bates stamped 2010FOIA1959.000566) (on file with author).

¹⁸⁴ Hernandez, *supra* note 172 (alteration in original) (quoting Ivan Ortiz).

¹⁸⁵ See *supra* note 77 and accompanying text (quoting and discussing the OSG's position that the government "facilitat[es] the aliens' return to the United States").

¹⁸⁶ E-mail from Michael Heyse, Civil Div., U.S. Dep't of Justice, to David Kline, Deputy Dir., Office of Immigration Litig., Civil Div., U.S. Dep't of Justice, & Thom Hussey, Dir., Office of Immigration Litig., Civil Div., U.S. Dep't of Justice (Nov. 19, 2009, 4:16 PM) (Bates stamped DOJ Civil 000071) (on file with author).

¹⁸⁷ *Id.*

an OIL attorney's surprise that DHS did not agree with a position that he believed was uncontroversial: that return was available after a successful circuit court case whether or not the petitioner had sought a stay.¹⁸⁸ Instead, it turned out that some members of ICE took the position that they would only consider returning a person who had previously sought a stay and had it denied.¹⁸⁹

The pressing need for a policy on return became even more evident after the Supreme Court's decision in *Carachuri-Rosendo v. Holder*.¹⁹⁰ While *Carachuri* was pending, several other cases were held in abeyance at the Supreme Court,¹⁹¹ with countless more under consideration at the circuit courts.¹⁹² As soon as the Court issued its unanimous ruling in *Carachuri* that a second simple drug possession conviction is not an aggravated felony that mandates deportation,¹⁹³ OIL faced the question of what return policy, if any, would apply to the many cases implicated. It quickly became apparent that no guidance was forthcoming, much to the chagrin of an OIL attorney heavily involved with *Carachuri* remands.¹⁹⁴ He later explained: "There's no policy to speak of, except for the statement in the gov[ernment] brief in *Nken* that the government will cooperate with opposing counsel to facilitate an alien's return if the alien's removed and then prevails in a case."¹⁹⁵ In another e-mail, he explained that there had been no general guidance mainly because "it's really more a

¹⁸⁸ E-mail from Bryan Beier, Civil Div., U.S. Dep't of Justice, to Donald Keener, Civil Div., U.S. Dep't of Justice (Nov. 19, 2009, 9:59 AM) (Bates stamped DOJ Civil 000069) (on file with author).

¹⁸⁹ *Id.*

¹⁹⁰ 130 S. Ct. 2577 (2010).

¹⁹¹ See *Lopez-Mendoza v. Holder*, 130 S. Ct. 3463 (2010) (mem.) (vacating and remanding for reconsideration in light of *Carachuri-Rosendo*); *Alexis v. Holder*, 130 S. Ct. 3462 (2010) (mem.) (same); *Alvarez v. Holder*, 130 S. Ct. 3461 (2010) (mem.) (same); *Garbutt v. Holder*, 130 S. Ct. 3460 (2010) (mem.) (same); *Young v. Holder*, 130 S. Ct. 3455 (2010) (mem.) (same); *Cardona-Lopez v. Holder*, 130 S. Ct. 3452 (2010) (mem.) (same); *Escobar v. Holder*, 130 S. Ct. 3451 (2010) (mem.) (same); *Fernandez v. Holder*, 130 S. Ct. 3451 (2010) (mem.) (same).

¹⁹² See, e.g., *Heredia-Arroyo v. Holder*, 403 F. App'x 881 (5th Cir. 2010) (granting petition for review and remanding in light of *Carachuri-Rosendo*); *Castro-Rodriguez v. Holder*, 399 F. App'x 906 (5th Cir. 2010) (same); *Salazar-Rodriguez v. Holder*, 399 F. App'x 878 (5th Cir. 2010) (same); *Cortinovis v. Holder*, 396 F. App'x 62 (5th Cir. 2010) (same); *Thompson v. Holder*, 394 F. App'x 131 (5th Cir. 2010) (same); *Cardona-Lopez v. Holder*, 392 F. App'x 286 (5th Cir. 2010) (same).

¹⁹³ *Carachuri*, 130 S. Ct. 2577.

¹⁹⁴ E-mail from Manning Evans, Civil Div., U.S. Dep't of Justice, to Jeff Leist, Civil Div., U.S. Dep't of Justice (June 25, 2010, 4:32 PM) (Bates stamped DOJ Civil 000055) (on file with author) ("[A]las, I don't expect the guidance will address the issue of returns.").

¹⁹⁵ E-mail from Manning Evans, Civil Div., U.S. Dep't of Justice, to Robert Markle, Senior Litig. Counsel, Appellate Attorney, U.S. Dep't of Justice (Oct. 19, 2010, 1:31 PM) (Bates stamped DOJ Civil 000021) (on file with author).

matter for DHS than [OIL] (at least in the first instance) and also it tends to be case-specific.”¹⁹⁶ He proceeded to comment on DHS’s approach: “I’m not sure, but I’m under the impression that DHS prefers to put off facilitating the return of aliens at least until it is clear that there is a need for their return.”¹⁹⁷ He advised OIL to “bow out but monitor the situation with DHS. I think that would meet our obligations under representations made in our *Nken* [Supreme Court] brief that the government would work with opposing counsel to facilitate aliens’ return when appropriate.”¹⁹⁸ He concluded by saying that “obviously it would be preferable to keep any issue about returning an alien out of the courts, so if it looks like it’s coming to that, we and others should consult further. Also, of course we don’t want to say anything about general policies.”¹⁹⁹ In other words, the OIL lawyer who appears from the FOIA documents to have been the main contact on *Carachuri* remands understood the obligation under *Nken* to be nothing more than to work with opposing counsel to facilitate return “when appropriate” and to do so primarily to keep the issue out of the courts.²⁰⁰

DHS documents confirm the reluctance of the prosecuting agency to allow those it had deported to return, even in the wake of *Nken*. In one e-mail from January 2010, for example, a DHS lawyer commented that the ICE Office of Chief Counsel in Baltimore (which plays the role of prosecutor in immigration court) “does not want to let the guy back in the US.”²⁰¹ The response explains that in the specific case, DHS expected the immigration court to order that the immigrant must be present at the hearing, so DHS discussed granting parole.²⁰² In other words, unless the immigration court on remand deemed the immigrant’s presence to be necessary, DHS would not permit return. Meanwhile, in immigration courts around the country, DHS lawyers lacked guidance about how to handle these cases. In some cases,

¹⁹⁶ E-mail from Manning Evans, Civil Div., U.S. Dep’t of Justice, to Jamie Dowd, Civil Div., U.S. Dep’t of Justice (Oct. 18, 2010, 4:53 PM) (Bates stamped DOJ Civil 000019) (on file with author).

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ E-mail from Paul E. Gleason, Office of the Principal Legal Advisor, Immigration & Customs Enforcement, to Kyle Hansen, Deputy Chief, Enforcement Law Div., Office of the Principal Legal Advisor, Immigration & Customs Enforcement (Jan. 7, 2010, 3:34 PM) (Bates stamped 2010FOIA1959.000464) (on file with author).

²⁰² E-mail from Kyle Hansen, Deputy Chief, Enforcement Law Div., Office of the Principal Legal Advisor, Immigration & Customs Enforcement, to Paul E. Gleason, Office of the Principal Legal Advisor, Immigration & Customs Enforcement (Jan. 8, 2010, 10:33 AM) (Bates stamped 2010FOIA1959.000464) (on file with author).

attorneys for DHS argued that persons who had been returned following *vacatur* of a removal order should be treated as “arriving aliens” thereby subjecting persons who won their cases to new grounds of removability.²⁰³ Thus, even when returned, immigrants faced the very real prospect of not being returned to the same status that they had possessed at the start of their cases.

D. Prelude to the OSG’s Confession of Error

In *Nken*, as with *Hirabayashi* and *Korematsu*, the OSG did not act on its own to uncover its past misstatements or to confess error. Instead, the confession of error came only after external advocates discovered information that embarrassed the OSG. The story of *Nken* thus leaves no reason for confidence that internal regulation at the OSG will uncover and fix misstatements in the future.

The OSG was not a willing or active participant in the efforts to uncover the misstatements in *Nken*. In June 2010, the Justice Department’s FOIA officer routed the FOIA request seeking the basis of the OSG’s *Nken* fact statement to the OSG office.²⁰⁴ That office responded to the request a month later by supplying a copy of the government’s brief in *Nken*.²⁰⁵ The requestors appealed, questioning the adequacy of the search and asking for notes, documents, or whatever other support there might be for the government’s factual assertions in *Nken*.²⁰⁶ Six months later, the OSG wrote back identifying four pages of potentially responsive records, but withholding the records on grounds of privilege.²⁰⁷

In May 2011, the FOIA requestors filed their action in federal district court.²⁰⁸ The action sought the withheld documents from the OSG as well as other agency documents that would show the purported policy and practice on providing relief to those who are deported prior to winning their case. Attached to the complaint was documentation of the difficulty of immigrants—including Gerbier,

²⁰³ See Frankel, *supra* note 171, at 533 (discussing how DHS has argued this when aliens were abroad for 180 days).

²⁰⁴ Plaintiff’s 56.1 Statement of Uncontested Material Facts ¶ 14, Nat’l Immigration Project of the Nat’l Lawyers Guild v. U.S. Dep’t of Homeland Sec., 842 F. Supp. 2d 720 (S.D.N.Y. 2012) (No. 11 CV 3235), available at http://www.nationalimmigrationproject.org/legalresources/cd_NIP_v._DHS_FOIA_Complaint_with_exhibits.pdf.

²⁰⁵ *Id.* ¶ 15.

²⁰⁶ *Id.* ¶ 16.

²⁰⁷ *Id.* ¶ 17.

²⁰⁸ See Complaint, Nat’l Immigration Project of the Nat’l Lawyers Guild v. U.S. Dep’t of Homeland Sec., 842 F. Supp. 2d 720 (S.D.N.Y. 2012) (No. 11 CV 3235), available at http://www.nationalimmigrationproject.org/legalresources/cd_NIP_v._DHS_FOIA_Complaint_with_exhibits.pdf.

Ytem, Okeke, and others—in returning to the United States after winning their cases.²⁰⁹

According to the OSG's subsequent letter to the Supreme Court, it was only after the OSG lost its bid in federal district court to keep the agency communications secret that the OSG began any investigation into the accuracy of its statements in *Nken*.²¹⁰ None of the preliminary steps leading to the district court order—including the administrative requests to the OSG office, the federal complaint that detailed examples that disproved the government's confident statements, or the agency documents disclosed in the summary judgment papers before the district court—served to prompt any agency examination of whether its representations had been accurate. Those materials alone, as the OSG later admitted, “raised questions about the promptness and consistency” of any policy to allow return, and showed that some immigrants who won their cases “encountered substantial impediments in returning.”²¹¹ But that evidence was not sufficient to prompt an internal review by the OSG. The review happened instead after the Department of Justice lost its effort to block public access to the e-mails and the district court ordered that the communications be made public.²¹²

In finally deciding to release the documents and confess its error, the OSG faced considerable pressure. In addition to the district court decision, the government faced adverse publicity and an inquiry from the Chair of the Senate Judiciary Committee.²¹³ An appeal to the court of appeals to prevent disclosure also would have placed increased focus on the veracity of the OSG's statements, and would have required a balancing of the equities on the need for a stay. On the day on which it would have had to file an appeal (and a further request for a stay), the government released its confession of error.²¹⁴

²⁰⁹ See generally *id.*

²¹⁰ See Dreeben Letter, *supra* note 5, at 1 n.1 (“The government undertook a review of the accuracy of [its] statement to the Supreme Court in *Nken* following a district court decision in Freedom of Information Act (FOIA) litigation seeking the basis for the government's statement.”).

²¹¹ *Id.* at 3.

²¹² Nat'l Immigration Project of the Nat'l Lawyers Guild v. U.S. Dep't of Homeland Sec., 842 F. Supp. 2d 720 (S.D.N.Y. 2012).

²¹³ See Jess Bravin, *Government's Error Leads to Shift in Deportation Practices*, WALL ST. J., Apr. 25, 2012, at A6 (quoting Senator Leahy, Chair of the Senate Judiciary Committee, as stating “[i]f the Solicitor General spoke in error, it must correct the record”); Lyle Denniston, *Regrets, But No Apology*, SCOTUSBLOG (Apr. 25, 2012, 7:51 PM), <http://www.scotusblog.com/2012/04/regrets-but-no-apology>.

²¹⁴ Dreeben Letter, *supra* note 5.

E. *Spinning the Confession of Error*

The OSG's ultimate confession of error sought to leave in place the ill-gotten language in the Supreme Court's opinion. Although the OSG stated that the letter was intended to "clarify and correct" its past statement,²¹⁵ it structured its letter to assure the Court that its past statements were inadvertent and that the government had put policies in place that would implement an effective system for the return of successful litigants going forward. It ended its confession by reasserting its "special obligation to provide this Court with reliable and accurate information at all times" but stated its view that no action was required on the part of the Court.²¹⁶

The first part of the letter addressed the information that the OSG had at the time of its representation and the intentions of the attorneys in their presentation to the Court. The OSG summarized the amalgam of agency practices presented in the e-mails.²¹⁷ It then stated that its "policy and practice" statement to the Court had been intended to "encapsulate the core aspects" of the information in the e-mails.²¹⁸ But the OSG's statement to the Court buried the fact that under any reading of the e-mails, there was no policy that provided for the return of persons in the same position as Mr. Nken, the petitioner whose case was before the Court.²¹⁹

Although a careful reading of the letter showed that immigrants such as Mr. Nken would only be allowed to return if the agency deemed return necessary to future proceedings, the OSG did not

²¹⁵ *Id.* at 1.

²¹⁶ *Id.* at 6.

²¹⁷ *Id.* at 2.

²¹⁸ *Id.* at 3.

²¹⁹ The OSG described the underlying e-mails as saying that whether a successful immigrant would be returned could depend on the nature of the judicial relief and "whether the alien's presence was necessary for further administrative proceedings on remand." *Id.* at 2. This description of the e-mails appears to have been designed to conform the past e-mails to the policy that the agency claimed to be putting in place in conjunction with its confession. But in fact, the e-mail discussion about Mr. Nken never indicated that return depended on a judgment about whether return was "necessary." Instead, the e-mails raised two potential obstacles to the return of Mr. Nken: (1) whether his underlying removal order would be vacated by the BIA, which suggested that return might be delayed pending BIA action; and (2) the reasons why the BIA might ultimately vacate the removal order, including whether it acted on procedural grounds (which presumably would be less likely to lead to allowing the individual to return). E-mail from undisclosed sender, DHS to Melissa Neiman-Kelting, Attorney, Department of Justice (Jan. 7, 2009, 12:29 PM). Thus the letter mischaracterized the e-mails so as to better conform to the policy that the agency was willing to implement going forward—a policy where a successful immigrant (other than a lawful permanent resident) would only be returned if ICE deemed it "necessary." In any event, both the e-mail description and the later statement to the Supreme Court in the OSG's confession were a far cry from the assurance of return that the OSG included in its *Nken* brief.

connect the dots or provide the Court with the e-mails that made that fact clear. The OSG's description also ignored the plain relevance of the details of the agency policy for the legal issue the Court had addressed in *Nken*. The Court, after all, had said that the policies for return meant that deportation per se is not irreparable harm. If those policies were contingent and full of loopholes, the legal issue would be quite different.²²⁰

The letter proceeded to characterize the Court's statements in a way that was compatible with the information the OSG had at its disposal, thereby burying the implications of its statement to the Court. The OSG quoted the Court as "correct" when it said that a successful deported immigrant "can be afforded effective relief,"²²¹ implying that the Court's only concern was whether it was theoretically possible for such relief to be accorded. Such a theoretical possibility could never have been sufficient to support the Court's statements that removal does not constitute irreparable harm. For example, it is difficult to imagine a situation in which a court would deny a preliminary injunction because it was theoretically possible for the plaintiff to be made whole after winning, with no clear mechanism for achieving that result and with the keys to the remedy in the hands of the losing party.²²²

The second part of the letter addressed the actual agency practices that came to light in the FOIA litigation. The OSG stated that, after reviewing these documents, it could not be "confident that the process for returning removed aliens, either at the time its brief was filed or during the intervening three years, was as consistently effective as the statement in its brief in *Nken* implied."²²³ It therefore stated that in addition to correcting its past statement, the government would take steps to ensure that in the future, noncitizens who prevail in their petitions for review would be able to return to the United

²²⁰ For example, as the law professor amici argued in *Nken*, review of removal orders must provide effective relief in order to substitute for a writ of habeas corpus. If the possible relief at the end of the case did not allow the person to fully vindicate the challenge to removal, a standard that easily denied stays would raise serious concerns under the Constitution's general prohibition of suspension of the writ of habeas corpus, outside of circumstances of rebellion or invasion. Brief of Law Professors as Amici Curiae in Support of Petitioner at 9–10, *Nken v. Holder*, 556 U.S. 418 (2009) (No. 08-681), 2008 WL 5433362, at *9–10 (discussing applicability of U.S. Const. Art. 1, § 9, cl. 2 to standard for the issuance of stays).

²²¹ Dreeben Letter, *supra* note 5, at 3.

²²² See 11A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2948.1 (2d ed. 1995) (stating that the irreparable harm inquiry considers whether the lack of an injunction "would impair the court's ability to grant an effective remedy").

²²³ Dreeben Letter, *supra* note 5, at 4.

States.²²⁴ These steps included a new (nonbinding) agency directive, a promise to inform lower courts of the issues if the government argued that removal alone was not irreparable harm, a cable alerting embassies and consulates to the issue, and letters to deportees.²²⁵

Although presented by the OSG as implementing what the OSG had previously told the Court was already being done, the new directives in fact codified many of the gaps that had previously existed in the protection of deported immigrants who win their appeals. For instance, the new directive and accompanying policy explanations make it clear that immigrants deported by the government due to the absence of a stay will be required to pay for their return.²²⁶ In addition, an asylum applicant such as Mr. Nken would have been required to produce a passport from his country of nationality in order to return, even though that could put him at risk by requiring him to present himself to the very government he feared.²²⁷ It also makes clear that an immigrant such as Mr. Nken (who was an applicant for asylum status and was challenging the denial of that status) would not be allowed to return as a matter of course if he won his court case. Instead, return would be contingent on the government's unilateral assessment of whether such return was "necessary" for continued removal proceedings.²²⁸ Indeed, the directive contained an escape clause allowing the government to refuse to facilitate reentry if "extraordinary circumstances" are present.²²⁹

The OSG concluded the letter by stating that no action was needed on the part of the Court.²³⁰ Having misled the Court, the OSG sought to preserve the Court's language in *Nken* by trying to change the facts moving forward in order to match what the OSG described

²²⁴ *Id.* at 4–6.

²²⁵ *Id.*

²²⁶ U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, POLICY DIRECTIVE 11061.1: FACILITATING THE RETURN TO THE UNITED STATES OF CERTAIN LAWFULLY REMOVED ALIENS 1–2 (2012) [hereinafter DIRECTIVE], available at http://www.ice.gov/doclib/foia/dro_policy_memos/11061.1_current_policy_facilitating_return.pdf. ICE provided further explanation about the contours of the directive in a set of Frequently Asked Questions. *Frequently Asked Questions About ICE Policy Directive Number 11061.1, Facilitating the Return to the United States of Certain Lawfully Removed Aliens*, IMMIGRATION & CUSTOMS ENFORCEMENT, <http://www.ice.gov/about/offices/enforcement-removal-operations/ero-out-reach/faq.htm> (last visited Jan. 13, 2013) [hereinafter *Frequently Asked Questions*], reprinted in Dreeben Letter, *supra* note 5, app. D. The directive states that it does not create enforceable rights. See DIRECTIVE, *supra*, ¶ 8 ("This Directive is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by any party in any administrative, civil, criminal matter.").

²²⁷ See *Frequently Asked Questions*, *supra* note 226, at 4.

²²⁸ DIRECTIVE, *supra* note 226, ¶ 2.

²²⁹ *Id.*

²³⁰ Dreeben Letter, *supra* note 5, at 6.

as its past understanding of agency practice. The OSG promised that in future cases in the lower courts it would apprise the courts of its actual procedures if the government argued that removal did not constitute irreparable harm.²³¹ The letter implied that there was no harm to petitioners from years of caselaw that was built on the Court's reliance on its past misstatement.

However dramatic the OSG's letter to the Court might have been, it surely did not remedy the ultimate effect of the statements in *Nken*. *Nken* remained on the books, with no subsequent history to suggest that it is limited in its reach. Similarly, the lower court decisions implementing *Nken* likewise remain on the books. The new measures to help successful petitioners return to the United States are helpful to some, but explicitly exclude many successful litigants (including Mr. Nken himself) who did not have lawful permanent resident status prior to being deported or who ICE decides fall into the undefined category of "extraordinary circumstances." Thus, rather than ensuring effective relief, the government's statements and new directives solidified its doctrinal gains in *Nken*.

In response, the *Nken* amici wrote to the Supreme Court, objecting to the OSG's argument that no action was needed to remedy the effects of the misleading fact statement. The amici requested that the Court remove the unfounded language from its original decision.²³² They argued that lower courts and litigants would continue to look to the Court's language as stated in the official reporters, without being aware of the OSG's confession of error.²³³ This effort garnered substantial attention in the Supreme Court press.²³⁴ However, presumably because there is no rule allowing amici to lodge any filing other than an initial amicus brief on the merits, the Court did not even docket the request.

The *Nken* amici returned to the Court at the end of 2012 through a more standard procedural vehicle. In *Meza v. Holder*, an immigrant with an appeal pending in the Fifth Circuit had been denied a stay in a one-line order.²³⁵ Meza sought a stay from the Supreme Court citing the problem with litigating stay issues in the shadow of the language

²³¹ *Id.* at 5.

²³² Letter from Paul R. Q. Wolfson to William K. Suter, Clerk, Supreme Court of the United States, at 1 (May 4, 2012), available at http://www.nationalimmigrationproject.org/legalresources/NIPNLG_v_DHS/Amici%20Letter%20to%20the%20Supreme%20Court%20in%20Nken%20-%20May%204%202012.pdf.

²³³ *Id.* at 2.

²³⁴ See, e.g., Lyle Denniston, *Will Court Confess Error on Immigrants' Rights?*, SCOTUSBLOG (May 8, 2012, 3:54 PM), <http://www.scotusblog.com/2012/05/will-court-confess-error-on-immigrants-rights>.

²³⁵ *Meza v. Holder*, No. 12-60529 (5th Cir. Sept. 29, 2009) (per curiam).

of *Nken*.²³⁶ The *Nken* amici once again filed as amici curiae urging the Court to disavow the *Nken* language and to remand the case so that the Fifth Circuit could consider the stay issue free from the sweeping statements about irreparable harm in *Nken*.²³⁷ The Court denied the stay motion without any reference to the request of the amici.²³⁸

Meanwhile, OIL has not followed through on the promise to bring the problems with the *Nken* language before the lower courts. In case after case, OIL has argued that removal does not constitute irreparable harm, relying on the language of *Nken* and without alerting courts to the agencies' actual practices.²³⁹ OIL has taken the position that the OSG's promise to the Court in the wake of *Nken* only requires OIL to provide actual procedures for return if OIL makes the specific argument that it would return the petitioner in a particular case. Otherwise, under OIL's view, it is free to quote the problematic language in *Nken* and pretend that it was not based on a misrepresentation.²⁴⁰ A year after the OSG's promise that the issue would be placed before the lower courts, there is no case law considering the implications of the OSG's misrepresentation.

As a result, even in the wake of the OSG's letter, the language of *Nken* remains on the books. For those lawyers and courts that are unaware of the OSG's misrepresentation and subsequent confession of error, it is as though the confession never happened. These lawyers and courts will continue to find and rely on the *Nken* Court's misguided statements about irreparable harm.

²³⁶ Application of David Meza for a Stay of Removal Pending Adjudication of His Petition for Review in the United States Court of Appeals for the Fifth Circuit or, in the Alternative, Petition for a Writ of Certiorari at 2–3, *Meza v. Holder*, 133 S. Ct. 904 (2013) (No. 12A509).

²³⁷ *Id.*

²³⁸ *Meza*, 133 S. Ct. at 904 (denying stay of removal).

²³⁹ See Brief for Nat'l Immigration Project of the Nat'l Lawyers Guild et al. as Amici Curiae Supporting Petitioner's Motion for a Stay of Removal at 4–5, *Contreras-Soto v. Holder*, No. 13-70001 (9th Cir. Apr. 5, 2013) (on file with author) (collecting OIL briefs).

²⁴⁰ In *Lupera-Espinoza v. Holder*, No. 12-2007, 2013 U.S. App. LEXIS 10645, at *5–6 (3d Cir. May 28, 2013), the petitioner and the government briefed the stay issue, including the question of irreparable harm, without reference to the OSG's confession letter or the agency's new procedures that would allow some, but not all, prevailing immigrants to return. Afterwards, the petitioner's pro bono attorneys learned about the OSG confession letter and wrote to the court to apprise them of it. Letter from Gregory F. Laufer, Associate, Paul, Weiss, Rifkind, Wharton & Garrison LLP, to Marcia M. Waldron, Clerk, U.S. Court of Appeals for the Third Circuit, 2 (Mar. 4, 2013) (on file with author). In response, the OIL lawyer wrote that the OSG letter did not require it to explain the new procedures unless they specifically argued that there was no irreparable harm because of the possibility of return. Letter from Lauren E. Fascett, Trial Attorney, Office of Immigration Litig., to Marcia M. Waldron, Clerk, U.S. Court of Appeals for the Third Circuit, 2 (Mar. 7, 2013) (on file with author).

III

REFLECTIONS ON *NKEN*, OSG FACT STATEMENTS, AND THE NEED FOR REFORM

Nken provides a window into what can go wrong with OSG fact statements in a relatively ordinary case. The OSG relies on agency information filtered through agency lawyers. Agency information may have an inadequate factual basis, or it could be wrong or misleading. Meanwhile, the OSG (1) may or may not be aware that the factual information from the agency is wrong or has an inadequate basis and (2) may choose to convey to the Court the information it does have in a way that is wrong, misleading, or designed to advance the government's position. The opposing party might not have a serious interest in or the capacity to respond to problematic fact statements. Meanwhile, amici who have a stake in the factual issue may have no opportunity to question the presentation of the facts and may lack the information necessary to do so effectively.

In *Nken*, all of these issues were at play. The DHS lawyers who provided information about systems for return made guesses about policy and practice based on a handful of cases they recalled, performing only minimal research.²⁴¹ Their conclusions did not have a factual basis in statistics, a comprehensive survey of case examples, or official documentation of agency procedures.²⁴² The DHS lawyers *did* provide some hints about the limitations of their knowledge base, for example, by calling the conclusion a “consensus” or a “belief” about how things worked rather than an official policy.²⁴³ They also provided some information in a misleading way. For example, DHS lawyers knew that the “parole” process was not suited for returning a person to their prior status because parole, by definition, leaves the person with the status he or she had *at the border*.²⁴⁴ They knew that the agency relied on ICE lawyers and judges pretending that the parole had not happened so that individuals who were not “arriving aliens” could return to their prior status. This was recognized in internal DHS e-mails, but DHS did not convey that information to the OSG.²⁴⁵ The OSG may have presumed that parole was simply a technical agency term that would return a party to the pre-removal status.

Meanwhile, on the receiving end, the OSG knew or should have known that the statements of agency practice were not reliable. The

²⁴¹ See *supra* notes 92–93, 97–98 and accompanying text (discussing DHS's response to OIL's inquiry about the procedure for returning prevailing petitioners post removal).

²⁴² See *id.*

²⁴³ See *supra* note 93 and accompanying text.

²⁴⁴ See *supra* notes 162–70 (discussing DHS correspondence about immigration parole).

²⁴⁵ See *supra* Part II.B.3.

statements the OSG received were written in contingent ways that merely expressed the beliefs of the various writers. In addition, the OSG knew that the policy described by DHS was a limited form of relief that only reached some deported immigrants who prevailed in the courts of appeals. It knew that those deported would have to pay for their return, that the decision whether to return a person such as Mr. Nken would depend on whether the agency deemed it “necessary,” and that the process used for return was parole. By the time the OSG filed its brief, it also knew from the case chart that, of the three cases where the agency had removed an immigrant following denial of a stay, none had been returned since the case was remanded, even though over a year had passed in all three cases.²⁴⁶ It further knew that in one case the immigration judge had concluded that denial of a stay meant that there was no point to considering relief and that in another the immigration judge had concluded that return was not “necessary.”²⁴⁷ Yet, despite all of this information, the OSG provided the Court with a sunny statement regarding agency “policy and practice.” It omitted highly important caveats to the agency’s stated policy and confidently presumed that the agency’s practice reflected the policy statements.

The *Nken* example also shows the complex role played by Justice Department lawyers who are not part of the OSG in determining whether facts are developed reliably and whether erroneous factual presentations favor one party over another. The conduit for agency information in immigration cases is OIL—the same unit of the Justice Department that defends removal decisions in the courts of appeals and that had its own experience with issues involved in the return of successful immigrants. In the *Nken* case, OIL mostly forwarded inquiries and responses from the OSG to DHS. Because OIL is part of the Justice Department and has extensive experience with immigration cases, the OSG may have seen OIL’s involvement as a check on DHS’s representations. But OIL not only failed to act as a check, it compounded the problem of a skewed factual presentation by not informing the OSG about its track record in previous cases. As an organization, OIL had opposed efforts to get courts to return removed individuals who won their cases. Its lawyers had direct experience with

²⁴⁶ See *supra* note 108 and accompanying text.

²⁴⁷ It also knew from the chart that the prospects for those who had not been removed were much better. In one case, the case was remanded and the individuals were granted asylum. In another, the immigration court denied relief, but the individual was able to pursue an appeal. E-mail from undisclosed attorney, Dep’t of Homeland Sec., to Nicole A. Saharsky, Assistant to the Solicitor Gen. (Jan. 6, 2009, 5:19 PM).

how difficult it was for individuals to return, and knew that the agency had faced mandamus and contempt on these questions.²⁴⁸

The adversary process proved ill-suited to interrogate the OSG statements. Because the statements had no citations, the briefs did not provide the opposing party with an opportunity to examine the basis of the statements and argue that the OSG's conclusions were unsupported by the cited source. The opposing party also had no access to the underlying documents that formed the basis of the OSG's statement. The now-infamous e-mails were not available. The agency's documentation of its practices was also unavailable and, as is now clear, there was no formal set of instructions for agency employees. As a result, opposing counsel had no opportunity to argue that the underlying documents or agency statements lacked the clarity and force of the language that ultimately made it into the OSG's brief.

Furthermore, *Nken* illustrates how the party before the Court (in this case, Mr. Nken himself) may not have a sufficient interest in uncovering erroneous facts. The question whether deportation alone is irreparable harm mattered less to Mr. Nken because he had a more specific claim that his removal created a risk of persecution.²⁴⁹ Mr. Nken's lawyers also lacked the kind of record that has since developed through the FOIA litigation, so they had limited means to challenge the OSG's assertions. Meanwhile, the amici, who cared a great deal about this issue, were hobbled because amici supporting a party can only file a brief within seven days of the filing of that party's merits brief.²⁵⁰ In *Nken*, that opportunity had come and gone before the OSG made the statements to the Court. Even if the amici had been able to file, they would not have had access to the detailed record that later became available through FOIA litigation and thus would have had difficulty challenging the OSG's assertions.

The *Nken* case also illustrates how the Court's respect for the OSG's reputation for legal candor spilled over into unwarranted credit for the OSG's out-of-record statements of internal government facts. The Court faced an argument from one set of amici that, absent

²⁴⁸ See *supra* note 137 and accompanying text (discussing contempt motion in the *Okeke* case); *supra* note 174 (discussing motion to direct return in the *Gerbier* case).

²⁴⁹ See Reply Brief for Petitioner at 26–27, *Nken v. Mukasey*, 555 U.S. 1042 (2009) (No. 08-681), 2009 WL 106651, at *26–27 (referring to stay arguments in the emergency request for a stay); Emergency Motion for a Stay of Removal Pending Adjudication of the Petition for Review in the United States Court of Appeals for the Fourth Circuit, or in the Alternative, Petition for Writ of Certiorari and Stay of Removal Pending Resolution of the Petition at 2, *Nken*, 555 U.S. 1042, (No. 08-681) (on file with author) (arguing that Mr. Nken faces “arrest, torture, and death” if returned to Cameroon).

²⁵⁰ SUP. CT. R. 37 (stating that an amicus curiae brief before the Supreme Court “shall be submitted within 7 days after the brief for the party supported is filed”).

systems for effective relief, a high stay standard would violate the Suspension Clause.²⁵¹ Other amici made a factual claim that there was no effective system for return.²⁵² That claim was supported by a citation to a practice advisory that reflected the experience of the immigration bar and highlighted the absence of any relevant formal procedures in the event of a victory on appeal.²⁵³ In this battle between the OSG and amici, only the government had the benefit of party status. In choosing to credit the OSG's statements, the Court allowed that party to set the facts for an issue addressed, but not properly litigated, in the case. The Court's approach presumed that it could get the facts right by relying on the OSG, and that such reliance would not bias the result, even though the OSG was a party to the litigation.

Nken also illustrates how the OSG can use proprietary government information to advance the government's agenda in ways that matter for cases other than the one before the Court. One of the great ironies of *Nken* is that the government did not really care whether Mr. Nken received a stay. On remand, it agreed not to deport him pending the Fourth Circuit's resolution of the case on the merits.²⁵⁴ The government's concerns were likely instead with the general rule and the government's ability to win stay battles in other cases. Meanwhile, the debate over the adequacy of systems for return was of little concern to Mr. Nken's lawyers. Because Mr. Nken had a claim of persecution, his argument for irreparable harm did not depend on whether the government had adequate systems for returning those who won their cases. As a result, the real case and controversy on systems for return was between the OSG and the amici. Both were interested in influencing the effect of the Court's holding on future and pending cases. The OSG advocated for a position that would make removal the norm for immigrants with pending petitions for review.²⁵⁵ Meanwhile, amici sought to improve access to stays so that immigrants could vindicate their rights in court and not suffer during the pendency of their court cases.²⁵⁶ In this debate, the amici were limited to voicing their views

²⁵¹ Brief Amicus Curiae of Law Professors in Support of Petitioner at 16–20, *Nken*, 555 U.S. 1042 (No. 08-681), 2008 WL 5433362, at *16–20.

²⁵² Brief for Amici Curiae American Immigration Lawyers Ass'n et al. Supporting Petitioner at 28–29, *Nken*, 555 U.S. 1042 (No. 08-681), 2008 WL 5328392, at *28–29.

²⁵³ *Id.* at 29 (citing AM. IMMIGRATION L. FOUND., *supra* note 76).

²⁵⁴ *Nken v. Holder*, 585 F.3d 818, 821 (4th Cir. 2009).

²⁵⁵ See Brief for Respondent at 28–29, *Nken*, 555 U.S. 1042 (No. 08-681), 2009 WL 45980 (arguing in the alternative for stringent application of the traditional stay test).

²⁵⁶ Brief for Amici Curiae American Immigration Lawyers Ass'n et al. Supporting Petitioner at 28–29, *Nken*, 555 U.S. 1042 (No. 08-681), 2008 WL 5328392 at *28–29; Brief Amicus Curiae of Law Professors in Support of Petitioner at 16–20, *Nken*, 555 U.S. 1042 (No. 08-681), 2008 WL 5433362 at *28–29.

seven days after Mr. Nken's opening brief.²⁵⁷ They had no opportunity to respond (as Mr. Nken did) to the government's statement about its policy and practice. They did not have the chance to highlight how this was a fact question on which the OSG offered little basis for its confident assertions.

Finally, the *Nken* litigation illustrates the difficulty of post-hoc remedies for misstatements to the Court. Due to extensive FOIA litigation, as well as political and media pressure, the government was ultimately required to reveal the basis for its fact statements in *Nken*.²⁵⁸ The FOIA litigation took many years and led to the release of documents showing that the statements to the Court were misleading. But even then, the Court had no clear mechanism for handling the misstatements and did not even docket the letter from counsel for amici responding to the OSG's confession. Later on, the Court chose not to issue any clarifying statement when presented with the opportunity to do so. Although the government said it was sorry and made promises of reform, at the end of the day, it was able to keep the advantage it obtained through its original misstatements.²⁵⁹ Meanwhile, the promises that the OSG made to the Court proved to be hollow. The OSG may have genuinely believed that the proper place to litigate the adequacy of DHS's actual return procedures was in the lower courts. But it relies on OIL to fulfill that promise. OIL has thwarted that promise by citing to *Nken*'s language about irreparable harm in the courts of appeals without providing its procedures. At the end of the day, the OSG maintained much of its doctrinal gain. The language of *Nken* remains on the books and has continued to shape lower court caselaw.²⁶⁰

Altogether, *Nken* should serve as a wake-up call for the need to develop fair rules on the presentation of internal government information during Supreme Court cases. Because the OSG's fact claims have such potential to influence the Court's opinions, systems of protection must be put into place. The Court should either refuse to entertain the

²⁵⁷ For the Supreme Court rule stating that any amicus brief must be filed within seven days of the party brief that the amicus is supporting, see SUP. CT. R. 37(3)(a).

²⁵⁸ See *supra* Part II.D.

²⁵⁹ See *supra* Part II.E (discussing the OIL's use of *Nken* in the wake of the OSG's confession of error).

²⁶⁰ See, e.g., *Leiva-Perez v. Holder*, 640 F.3d 962, 969 (9th Cir. 2011) (after *Nken*, "a noncitizen must show that there is a reason specific to his or her case, as opposed to a reason that would apply equally well to all aliens and all cases, that removal would inflict irreparable harm" (internal citations omitted)); *Rodriguez-Barajas v. Holder*, 624 F.3d 678, 681 (5th Cir. 2010) ("A contrary holding would also conflict with *Nken v. Holder* holding that the burden of removal alone does not by itself constitute irreparable injury for purposes of granting a stay of removal." (citation omitted)).

OSG's fact claims based on internal government information or provide a better opportunity for contesting them.

IV MODELS FOR REFORM

Looking forward, changes need to be instituted so that the kind of problems that arose in *Nken* do not recur. In this Part, I consider three possible models for reforming OSG fact submissions: (1) self-regulation, (2) prohibition, or (3) disclosure and regulation. I also offer proposals for how lower courts should treat precedent that is shown to be premised on misstatements.

The self-regulation model ignores the incentives for the government to win its cases, the enormous disadvantage faced by parties who lack access to internal government information, the difficulty of asking litigators to monitor the statements of interested agencies, and the basic benefits of an adversarial system. Meanwhile, the prohibition model runs against the Court's interest in understanding how the issues before the Court operate in practice.

A disclosure and regulation model, despite its inherent shortcomings, may be the best way out of a bad situation. Regulating when and how extra-record information may be introduced would flag the issue of out-of-record fact statements for the Court and lead to greater fairness and transparency about the nature of the facts on which the Court relies.

A separate question is presented for cases where there is evidence that the Court was misled, as it was in *Nken*. In such situations, lower courts should refuse to attach precedential weight to statements by the Court that were rooted in self-serving factual claims by government counsel based on internal government facts.

A. *Self-Regulation*

In its letter to the Court about *Nken*, the OSG suggested that erroneous statements could be addressed through self-regulation. The letter emphasized that the OSG "recognizes its special obligation to provide this Court with reliable and accurate information at all times."²⁶¹ The OSG sounded a similar theme a year earlier in its public acknowledgement of the OSG's errors in defending the infamous convictions of Gordon Hirabayashi and Fred Korematsu for violations of laws targeting persons of Japanese descent during World War II.²⁶² While admitting that the OSG had knowingly misled the

²⁶¹ Dreeben Letter, *supra* note 5, at 6.

²⁶² See *Katyal Statement*, *supra* note 6.

Supreme Court in those cases, the OSG offered the following assurance: “[O]ur Office takes this history as an important reminder that the ‘special credence’ the Solicitor General enjoys before the Supreme Court requires great responsibility and a duty of absolute candor in our representations to the Court.”²⁶³ In both cases, the OSG took the exposure of the inaccuracy of past statements as an opportunity to remind the Court of the OSG’s prestige and the presumption that the OSG will uphold the highest standards of ethical behavior. In essence, it proposed a system of self-regulation in which errors are assumed to be rare and the professionalism of the OSG is sufficient to prevent errors.

Self-regulation has clear limitations. As the *Nken* example illustrates, the self-regulation model presumes that facts can be developed and presented without bias outside of the traditional safeguards imposed by the adversary process. The *Nken* e-mails demonstrate that the OSG did display some skepticism in the face of equivocation by OIL and DHS. This limited skepticism, however, was not sufficient to stop a fact presentation by the OSG that led the Court to believe that a more robust set of return practices were in place for those noncitizens who succeeded before the courts of appeals. In addition, the fact presentation given by the OSG buried important aspects of what the OSG knew, such as the reality that deported immigrants would be required to pay to return to the United States and so might be effectively precluded from receiving the benefits of a court victory. In *Nken*, as in *Hirabayashi* and *Korematsu*, the final briefs did not disclose all that the OSG knew.

Furthermore, a self-regulation model depends on OSG lawyers engaging in vigorous questioning of information provided by agencies. Fact development is very different from the OSG’s chief task, which is to write appellate briefs. The OSG lawyers might be some of the best appellate lawyers in the country, but that does not mean that they are experienced in identifying weak and self-interested proffers of evidence. Lawyers at the OSG are not tasked with being fact developers and will often lack the background knowledge needed to question the factual information that they are provided.²⁶⁴ OSG attorneys cannot be expected to be familiar with the minute workings of all of the many agencies the OSG represents or the way that statutory and regulatory provisions work on the ground—such as the meaning of the term “parole” in the context of the *Nken* case. Although like all lawyers

²⁶³ *Id.*

²⁶⁴ In the *Korematsu* and *Hirabayashi* cases, such background knowledge was key to the failed efforts of Justice Department lawyers to limit the manipulation of facts.

they have a duty to verify any facts they present to a court, realistically they are likely to rely, as they did in *Nken*, on their agency clients to explain how the agencies operate and what practices they follow on the ground. Without being held accountable to an adversary evaluation of facts, there is little incentive for them to engage fully in independent fact-checking of information coming from those agencies. In *Nken*, immigration lawyers knew from their past experiences that it was extremely difficult to return a deported client.²⁶⁵ But the OSG might have been very ready to believe that the agency would do right by successful litigants. Even if the OSG has an interest in engaging in such investigations, it would have to do so while juggling many responsibilities, foremost of which is to draft high quality briefs. It is unrealistic to expect an appellate legal team to be a truly effective monitor of the quality of information it receives that supports its position.

In any event, a model that allows the government to control fact development while opposing parties lack access to the underlying information is in deep conflict with the core premises of an adversarial system. Our legal system generally eschews inquisitorial fact development, but even inquisitorial fact development is supposed to be neutral. Fact development managed by the government without an opportunity to test the facts runs contrary to the way our legal system is supposed to work.

The *Nken* e-mails demonstrate the weakness of the OSG as a skilled fact developer. It received highly contingent statements of policy unsupported by internal protocols or even examples. It did not uncover important limitations on the agency policy, such as the fact that noncitizens deported pending their appeal could face charges of inadmissibility from the agency simply because they were previously removed from the country. The OSG ultimately admitted that the policy it thought was in place was neither as robust nor as consistent as it had presumed. But it only reached that conclusion after the potential disclosure of its lawyers' e-mails due to FOIA litigation several years after the case was decided by the Court. Such a response under pressure is hardly assurance that self-regulation can prevent the same problem from happening again.

Self-regulation also falls short in the presentation of the facts once they are developed. The *Nken* e-mails illustrate how the OSG can massage the information it obtains and present it in misleading

²⁶⁵ See Brief for American Immigration Lawyers Ass'n et al. as Amici Curiae Supporting Petitioner at 28–29, *Nken*, 555 U.S. 1042 (No. 08-681), 2008 WL 5328392 (describing practice advisory for immigration lawyers); see also *supra* notes 134–51 and accompanying text (describing experience of attorney Joe Hohenstein).

ways. The OSG knew that the policy and practice for return, even as described by the agency, was contingent and included obstacles to return, such as forcing those who had been deported against their will to pay for reentry.²⁶⁶ Yet the OSG presented the policy as one that would provide effective relief for prevailing petitioners.²⁶⁷ Understating the harm caused by a rule that favored removals supported the harsher standard they advocated in *Nken*.

The OSG's letter confessing error in *Nken* illustrates the limits of self-regulation in achieving fair fact development and fact presentation. The OSG letter was written to preserve the Office's reputation for candor, but it remains the work of an advocate. The letter was designed to put a good-faith gloss on the Office's unsupported statements in *Nken*, and to focus on remedial agency procedures that the OSG hoped would eliminate any need for revision in the Court's opinion. But the letter continued to manage fact presentation in a way that served the OSG's interest as an advocate.

The OSG letter did not address facts that were inconvenient (such as the agency's practice of charging those who had been deported with inadmissibility). It did not mention the documents that showed that Mr. Nken himself would have had a hard time returning after prevailing in his case. The OSG selected what to present and what to leave out. The OSG's take on the facts left the Court unaware of the consequences of its broad assertion that removal during a petition for review cannot generally constitute irreparable harm.

Of course, self-regulation can be more robust than what the OSG offered after its confession about *Nken*. For example, the OSG could have affirmatively asked the Court to strike portions of a past opinion. Or the OSG could decline to defend court decisions that relied on the problematic language, much as it does when it confesses that the position it took in a lower court was in error. But the very fact that the OSG did not take such an approach after *Nken* serves as an illustration of the limits of self-regulation. Once the OSG decided not to ask the Court to take any action, it was difficult for others to do so, leaving the problematic judicial language on the books.

As Judge Rakoff suggested in his FOIA opinion ordering the release of the *Nken* e-mails, it is wise to "[t]rust everybody, but cut the cards."²⁶⁸ Absent some system for verification, trust can lead to abuse, or even just an inadvertent skewing of the facts in one side's

²⁶⁶ See *supra* note 187 and accompanying text.

²⁶⁷ See *supra* note 77 and accompanying text.

²⁶⁸ Nat'l Immigration Project of the Nat'l Lawyers Guild v. U.S. Dep't of Homeland Sec., 842 F. Supp. 2d 720, 722 (S.D.N.Y. 2012) (quoting aphorism attributed to Irish-American political commentator Peter Finley Dunne).

favor. Even government attorneys striving to present accurate information in good faith cannot be expected to achieve the results that would be obtained through a contested presentation of the facts. A self-regulation model ignores these realities.

B. Prohibition

A prohibition model would preclude the use of non-public government information that is not part of the record of the case. In a case like *Nken*, the government could have submitted evidence at the court of appeals in its opposition to a stay that outlined the procedures, if any, that it claimed would assure that Mr. Nken would be allowed to return to the United States.²⁶⁹ Mr. Nken's lawyers could have then responded to the claims, and there would have been a factual record about relevant practices to which the OSG could later cite. But having chosen not to make such a record in the case, the OSG would be precluded from introducing such information in the Supreme Court. Absence of prohibition creates the potential for abuse: A party can sit on its arguments in the lower court that is supposed to serve as fact finder and later raise factual claims in the Supreme Court without other parties having a fair opportunity to rebut.²⁷⁰

In his book on the OSG, Lincoln Caplan explained the case for prohibiting out-of-record material.²⁷¹ He quotes one attorney on the dilemma of counsel faced with new facts included in a record "lodged" with the Court:

The Supreme Court is not a trial court. Letting the other side know about new material doesn't cure the central vice. You can't cross-examine the preparer of a report lodged with the Court, so lodging ends up being a tool for the government to wrest some advantage for itself. They can ask agencies to prepare authoritative-sounding material that is not necessarily reliable and the opponent is caught on the horns of a dilemma: he doesn't want to be seen as over-reacting, so he doesn't want to file a motion to strike the stuff that's been lodged with the Court; but he doesn't have a real opportunity to respond to the substance.²⁷²

A prohibition model, however, runs against the Court's interest in understanding the broader factual context in which the case—and

²⁶⁹ See FED. R. APP. P. 27(a)(2)(B) (describing the rule for factual submissions at the appellate level).

²⁷⁰ In *Nken*, for example, the government never made a factual claim about the ability of successful petitioners to return before the Fourth Circuit, leaving that claim to its briefing in the Supreme Court.

²⁷¹ See CAPLAN, *supra* note 21, at 23–24.

²⁷² *Id.*

those like it—arise, as well as facts that are relevant to the consequences of the rules it announces. Indeed, the Court's interest in out-of-record materials has a long history in which the OSG routinely "lodged" such material with the Court even before any rule permitted such lodgings.²⁷³ This practice has long been controversial.²⁷⁴ Yet not only has it survived, it has become embedded in the Supreme Court Rules.²⁷⁵

The Court's acceptance of facts presented by the OSG is part of a broader tendency of courts to treat fact gathering as a neutral process that depends solely on the good will of the party developing the facts.²⁷⁶ Indeed, the Court's thirst for information has led it to search for information on the internet and through inquiries from the Court's library.²⁷⁷ Presumably the Court sees itself and the library staff as neutral parties who are just uncovering some preexisting set of objective facts.

Internal government information is more problematic because it is one-sided. With respect to internet searches, all sides (both within and beyond the Court) are presumably able to search out the same public sources. But when the government declares that it has non-public information about its own policies, practices, or data, there is, by definition, no timely independent access to that information for outsiders. There is, therefore, a case to be made for prohibiting statements about non-public information. It is nonetheless difficult to imagine such a prohibition succeeding. Because the Court is interested in the practical implications of the broader rules it announces, it could substitute questions to the OSG at argument on the same key fact issues. If the answers to these fact issues matter, it is better to set up a system that provides a limited opportunity to submit such

²⁷³ See *id.* at 22–23 (stating that the OSG lodged materials one to two dozen times a year when there was no rule governing this practice).

²⁷⁴ See *id.* at 23–24 (describing opposition and skepticism towards the OSG's practice of lodging facts with the court from private lawyers and Justice Stevens).

²⁷⁵ See SUP. CT. R. 32(3) (setting out the procedure for lodging factual material with the Supreme Court).

²⁷⁶ See Richard A. Posner, *Judicial Opinions and Appellate Advocacy in Federal Courts—One Judge's View*, 51 DUQ. L. REV. 3, 11–12 (2013) (describing problems with fact-finding in appellate briefs).

²⁷⁷ Allison Orr Larsen, *Confronting Supreme Court Fact Finding*, 98 VA. L. REV. 1255, 1260–62 (2012). The Court also has a tendency to ask the parties questions at oral argument about how attorneys work in practice. See, e.g., Nancy Morawetz, *Counterbalancing Distorted Incentives in Supreme Court Pro Bono Practice: Recommendations for the New Supreme Court Pro Bono Bar and Public Interest Practice Communities*, 86 N.Y.U. L. REV. 131, 202 n.350 (2011) (describing Justice Breyer questioning oral advocates about practical questions).

internal government facts, subject to adequate procedural safeguards that allow them to be properly contested.

C. *Disclosure and Regulation*

A third approach is to regulate the use of out-of-record government information through rules requiring disclosure of the bases for new facts within the government's control that are submitted to the Supreme Court together with fair access to information to rebut those fact statements. A disclosure and access system builds on the basic features of an adversary system. It recognizes that facts and their interpretations are contestable and that an adversary system provides the judiciary the opportunity to evaluate competing views of factual issues. In doing so, it acknowledges that the Court will reach beyond record facts even though it is not well suited to resolving factual disputes. This mechanism carries the promise of assisting the Court in recognizing when a factual proposition is self-serving and when it is lacking in adequate support.

1. *Disclosure*

A disclosure model would require the government to disclose any non-public documents that serve as the factual basis for any statements that it makes about government policy, practice, statistics, or other facts. These documents might be internal agency memoranda, data sets, or any other materials that serve as the basis of the government's fact statements. Such access is ordinarily provided through citations to the record or to public documents. When the government chooses to reach beyond these public sources, it would be required to provide access to the materials on which it relies.

Providing access to supporting documents makes a difference. In *Nken*, for example, the OSG made factual claims about the effect of stay standards on the number of petitions for review.²⁷⁸ Its brief cited statistics about rates of filing of petitions for review in different circuits and compared the rates in circuits that applied a tough standard for stays with those that applied a more lenient standard.²⁷⁹ It noted that in the Ninth Circuit, which provided a temporary automatic stay and applied the preliminary injunction standard of review, forty-two percent of those eligible to file a petition for review did so, while in

²⁷⁸ Brief for Respondent at 36, *Nken v. Mukasey*, 555 U.S. 1042 (2009) (No. 08-681), 2009 WL 45980, at *36.

²⁷⁹ *Id.*

the Eleventh Circuit, with no temporary stay and the more stringent standard of review, only nine percent filed a petition for review.²⁸⁰

For this assertion, the OSG offered publically available statistics from the Administrative Office of the United States Courts on the number of petitions filed each year.²⁸¹ Because these documents were publically available, Mr. Nken's lawyers had an opportunity to respond. In their reply brief, they argued that the OSG was confusing "causation with correlation" and cited a study of disparate results across the circuits in immigration cases that provided an alternative theory for the difference in rates of petitions for review.²⁸²

The Court was very interested in this empirical question. At argument, the first question was from Chief Justice Roberts, who asked whether courts typically grant stays in removal cases.²⁸³ His inquiry was followed by a question from Justice Kennedy about the percentage of cases in which a stay is granted and the percentage of cases which are ultimately decided in favor of the government.²⁸⁴

Despite the Court's interest in these empirical questions, at least some justices appeared to recognize that they lacked an adequate record to evaluate them. In his concurrence, Justice Kennedy (joined by Justice Scalia) noted that no party had presented the Court with empirical evidence about the number of stays granted or the success of the underlying petitions. He suggested that this information could be helpful to Congress in evaluating whether the decision to choose the traditional stay standard yielded a "fair and effective result."²⁸⁵

With respect to DHS's policy on returning deported immigrants, simply requiring the government to provide the basis for its fact statement in a timely manner (rather than three years later, after FOIA litigation) would have given the opposing party the opportunity to question whether the statement in the brief truly matched the information provided by the agency. If the basis was nothing more than e-mail communications with an interested agency, the opposing lawyers could have broached this issue and used it to weaken the government's case.

²⁸⁰ *Id.* (analyzing statistics from 2007).

²⁸¹ *Id.*

²⁸² See Reply Brief for Petitioner at 22 n.11, *Nken v. Holder*, 555 U.S. 1042 (2009) (No. 08-681), 2009 WL 106651, at *22 n.11 (suggesting alternate explanations for the disparity such as variations between circuits in the ease of attaining appellate counsel or in agency error).

²⁸³ Transcript of Oral Argument at 2, *Nken v. Filip*, 129 S. Ct. 622 (2009) (No. 08-681), 2009 WL 150418, at *4-5, *decided sub nom.* *Nken v. Holder*, 556 U.S. 418 (2009).

²⁸⁴ *Id.*

²⁸⁵ *Nken*, 556 U.S. at 437 (Kennedy, J., concurring).

Any rule that requires disclosure would undoubtedly change the way that the OSG gathers information. The OSG could not view fact questions to agencies as matters of privilege. If the OSG wanted to add facts on appeal, it would have to seek out the kind of documents that could serve as support for such fact statements. The OSG might refrain from making a fact claim when the only basis for its assertion was as limited as in *Nken*. In this way, a disclosure rule would serve to inhibit poorly supported fact statements.

Provision of documents alone might not be enough. Consider the statistics in *Demore*.²⁸⁶ Presumably, the statistics given to the Court could have been reduced to a document and shared with the other side. There would still be a danger that the statistics were selected for litigation to support a specific point. Thus the document might only provide the same misleading statistics that were offered by the OSG in its brief. A fair opportunity to evaluate those statistics and show their weaknesses would require access to the underlying data and the ability to ask different questions about the effects of mandatory detention. At the very least, it might require the set of questions that prompted the compilation of the statistics and the full responses.

Requiring disclosure and access to underlying data or documents (or an admission that no such documents exist) would improve the ability of the government's adversaries to challenge its assertions, as Mr. *Nken*'s lawyers did with the data on frequency of stays in different circuits. Opposing counsel could make general comments about unreliability. In some situations, they could show that the presentation of the implications of a document was inaccurate. Arguments over whether the documents actually supported the OSG's claim might, as it did with the information on stays, lead the Court to decide that the fact issue did matter and was not yet ready to be resolved.

2. *Rebuttal*

For a disclosure model to be effective, it must be accompanied by a genuine opportunity to rebut the facts presented by the other side. Implementing a fair fact development system in the Supreme Court is far from simple. In lower courts that manage fact development, courts meet with the parties, set discovery schedules, and arbitrate disputes over compliance with discovery rules. The Supreme Court is not set up for this type of fact development. Its rules and practices contemplate that once the Court issues a writ of certiorari, the case will proceed through briefing and argument within the designated Term of the

²⁸⁶ See *supra* note 39 and accompanying text.

Court.²⁸⁷ For cases that are accepted in the Fall, the schedule for briefing and argument leaves little room for extensions of time, let alone the complex processes that take place within trial court discovery.²⁸⁸ As a result, there is little room for robust fact development.

However, a streamlined system for presentation of new government facts could be implemented within the Court's tight time frame by requiring early identification of any new government information that may be introduced. For example, the Court could require that the government provide advance notification of any internal government facts that it intends to use in its submissions together with copies of relevant documents or access to relevant databases. Such advance notice would provide the opposing party and amici with time to analyze the materials and their reliability. In the case of a data set, such as the data introduced in the *Demore* briefs about the time that individuals were held in detention,²⁸⁹ advance notice could provide an opportunity to analyze the data and identify ways in which the government's presentation is distorted.

In addition to providing opponents with an opportunity to respond, a requirement that the OSG identify particular documents or evidence would lead the OSG to evaluate whether its sources could stand up to scrutiny. It is hard to believe, for example, that the OSG would have made its statement in *Nken* if all it could cite to were vague agency statements about its customary practices. The OSG would have been even less likely to have made the statement had it been required to reveal the agency's many caveats to a promise of return for successful litigants.²⁹⁰

The Supreme Court has established precedent for requiring advance notice. In recent revisions, the Court instituted a rule that amici at the certiorari stage file notice of their plan to file a brief ten days in advance of the due date for responding to a petition for writ of certiorari.²⁹¹ The Court did not explain the rationale for this rule, but presumably it serves the function of providing the respondent with an

²⁸⁷ See SUP. CT. R. 25 (setting out the timetable for briefing and other submissions to the Court).

²⁸⁸ See Morawetz, *supra* note 277, at 164 n.157 (describing typical scheduling of briefing and argument at the Supreme Court).

²⁸⁹ See *supra* notes 37–45 and accompanying text.

²⁹⁰ Scholars have identified similar benefits to advanced deliberation in the context of warrants and the Fourth Amendment. See Oren Bar-Gill & Barry Friedman, *Taking Warrants Seriously*, 106 NW. U. L. REV. 1609, 1641–46 (2012); see also Fred Schauer, *Giving Reasons*, 42 STAN. L. REV. 633, 656–59 (1995) (arguing that forcing institutional actors to show their work reduces bias and produces better decisions). A rule that requires citations to the sources of facts requires some deliberation about how well they fit the party's claims.

²⁹¹ SUP. CT. R. 37(2)(a).

opportunity to seek an extension of time to respond to the petition. Although the context is somewhat different, the rule's purpose is to allow for better functioning of the adversarial system.

Adequate rebuttal of government facts may also require an easing of the rules that limit the role of amici. Ordinarily, rebuttal is achieved in the adversary process through statements from the opposing counsel. In *Nken*, for example, the lawyers representing Mr. Nken had a chance to respond to the OSG brief. But the adversary system was not well suited to the systemic aspects of the case. The OSG was primarily interested in the long-term implications of any precedent. Indeed, the government was so uninterested in Mr. Nken's individual stay that it did not oppose the stay on remand. The real opposing parties on the systemic issues were the amici. The amici, however, had no ability under the rules to object to the OSG's fact statement. Because they were supporting Mr. Nken, they had to file their brief within seven days of his brief, and thus had to file before the OSG brief that made the erroneous factual claim.²⁹²

One solution would be to revise the rules on amicus briefs to allow amici to file a reply beyond the seven day deadline under limited circumstances. One such circumstance would be when out-of-record facts have been introduced by the other side to make a point that is not specific to the party in the case. A rule of this sort would recognize that the real contest on the broader implications of a case is not between the parties but is instead between one party and the amici. This is especially true in cases involving the OSG, which, as part of its mandate, looks beyond the individual case to consider the broader interests of the government as a whole.

A disclosure model would be a far cry from the protections at a trial court, where evidence is scrutinized and experts can be cross-examined.²⁹³ But access to the underlying material would in some way mitigate the advantage of the party raising new factual claims. At least there would be some opportunity to examine the basis of the statement and to identify rudimentary ways in which the factual question is more complex and should perhaps be avoided by the Court. In *Nken*, the Court might not have been so ready to proclaim its views on irreparable harm if Mr. Nken or the amici had received a fair opportunity to dispute the OSG's proffered facts.

²⁹² SUP. CT. R. 37(a)(3)(a) (explaining the requirement that an amicus brief be filed within seven days of the principal brief that it supports).

²⁹³ For an argument that any factual issue should be remanded for development in a trial court setting, see Brianne J. Gorod, *The Adversarial Myth: Appellate Court Extra-Record Fact Finding*, 61 DUKE L.J. 1, 75–76 (2011).

D. Remedial Measures

Apart from prophylactic measures, the problem of OSG misstatements of fact could be approached through post-hoc remedies. The *Nken* experience offers lessons on the difficulty with informal extra-judicial remedial approaches and the importance of explicit judicial statements about the implications of a past misstatement on the validity and persuasiveness of past precedent.

The OSG letter in *Nken*, like former Acting Solicitor General Katyal's letter regarding *Hirabayashi* and *Korematsu*, offers a model of internal oversight and confession. The letter admits the error in the OSG's past statement to the Court, but does not propose any change in the treatment of the problematic language in the opinion.²⁹⁴ As a result, courts and litigators who primarily use traditional tools of legal research (such as case law research and *Shepard's Citations*) are not alerted to the factual misrepresentation that affected the Court's ruling. No flag appears because, in our traditional treatment of the persuasiveness of case authority, only case law and statutes are considered to have a bearing on the validity of precedent.

Where the Supreme Court has relied on an unproven government fact that subsequently turns out to be false or to have been presented in a misleading way, there is a powerful case for the Court to issue a statement which casts doubt on the portion of its opinion that relied on the misstatement.²⁹⁵ Such a statement from the Court would provide the necessary flag in legal research sources so that lower courts and attorneys would be aware that the Court had relied on a misleading or inaccurate statement of internal government fact. The lower courts could then judge for themselves whether any subsequent government measures are sufficient to create a different factual record after the fact. Similarly, if lower courts are made aware of the lack of basis for the statement to the Supreme Court, they could reach out and consider the relevant issues in a way that is based on a proven factual record.²⁹⁶

In the *Nken* example, the OSG represented to the Supreme Court that it need not take any corrective action because the issue

²⁹⁴ See *Katyal Statement*, *supra* note 6.

²⁹⁵ For an argument that the Court should repudiate the *Hirabayashi* and *Korematsu* decisions in light of the clear evidence that the government manipulated key evidence, see generally PETER IRONS, UNFINISHED BUSINESS: THE CASE FOR SUPREME COURT REPUDIATION OF THE JAPANESE AMERICAN INTERNMENT CASES (2013), available at <http://lawprofessors.typepad.com/files/case-for-repudiation-1.pdf>.

²⁹⁶ For an argument that lower courts should deny precedential weight to factual statements (irrespective of whether they have been proven to be baseless), see Allison Orr Larsen, *Factual Precedents*, 162 U. PA. L. REV. (forthcoming 2013) (manuscript at 37–44), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2226395.

could be considered by the lower courts. Rather than present the limitations of the actual return practices to the lower courts, however, the Justice Department has taken the position that it need only present more accurate facts when those facts are plainly at issue.²⁹⁷ As a result, its briefs continue to simply recite the *Nken* language without alerting counsel or the courts that this language was obtained through the OSG's misleading *Nken* brief.²⁹⁸ This position illustrates the problem with informal methods for dealing with past misrepresentations. So long as the misrepresentation remains in the decision without any flags or alterations, lower courts and litigants will continue to assume that whatever is stated by the Court is based on fact.

Unless the Court or lower courts take remedial action, the court system is left relying on what is little more than an advisory opinion—a statement of the rule if a hypothetical state of affairs were to exist. This undermines the foundation of our legal system, which requires that courts decide cases and controversies and not hypothetical questions.

CONCLUSION

The *Nken* story is a cautionary tale about the dangers of the Court's reliance on statements of internal government facts by the OSG and the inadequacy of existing mechanisms to counter erroneous, misleading, or incomplete statements by the OSG. In contrast to the OSG, which can summon agencies to answer its questions, opposing parties must seek government information through public documents, discovery, or the Freedom of Information Act. By definition, facts introduced at the Supreme Court come long after any trial court discovery that might be available. There is, therefore, no real opportunity in Supreme Court practice to contest internal government facts in the formal record of the case. Meanwhile, FOIA requests, which are how the public typically obtains agency information, are slow. They certainly do not identify the sources of internal government information quickly enough to match the schedule of Supreme Court briefing. Opposing litigants are therefore placed in the unenviable position of either portraying the government's statements as

²⁹⁷ See Letter from Lauren E. Fascett, Attorney, Office of Immigration Litig., to Marcia M. Waldron, Clerk, U.S. Court of Appeals for the Third Circuit (Mar. 7, 2013) (on file with author) (justifying OIL's decision not to inform the court of the OSG's apology in *Lupera-Espinoza v. Holder*, 2013 U.S. App. LEXIS 10645 (3d Cir. May 28, 2013)).

²⁹⁸ See Brief of the Nat'l Immigration Project of the Nat'l Lawyers Guild et al. as Amici Curiae in Support of Petitioner's Motion for a Stay of Removal at exhibit A, *Contreras-Soto v. Holder*, No. 13-70001 (9th Cir. Apr. 5, 2013) (on file with author) (collecting excerpts of brief filed by OIL in opposition to request for a stay of removal).

irrelevant to their client's situation or as actually supporting their position, since they lack the information needed to directly attack the statements themselves.

Apart from being unfair to the opposing party, untested factual statements lead the Court to decide cases in ways that do not correspond to the actual case and controversy. In *Nken*, the Court issued statements on whether removal alone would constitute irreparable harm in a world where immigrants who win their cases have no trouble returning to the United States. But, as the OSG later admitted, there was good reason to question whether that world had ever existed. The Court's statements in *Nken* thus addressed a hypothetical state of affairs, not the factual scenario that was actually before the Court. Moreover, this hypothetical situation might never come before *any* court. Procedural reforms that highlight new factual claims, provide an opportunity to review the basis for such statements, and provide some opportunity for opposing parties to respond would mitigate the risk of Court pronouncements that, like those in *Nken*, are based on biased and incomplete presentations of the facts at issue.