TRUMP 2.0 REMOVAL CASES & THE NEW SHADOW DOCKET

William N. Eskridge Jr.[*]

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O.C.G. is a gay man who fled his home in Guatemala because of private death threats and official persecution. The Department of Homeland Security (DHS) rejected his petition for asylum and deported him back to Guatemala, from which O.C.G. fled to Mexico, where he was raped and held hostage. O.C.G. re-entered the United States; DHS officers issued a reinstatement-of-removal order against him, again designating Guatemala as the country of removal. On February 19, 2025, an Immigration Judge (IJ) granted his application for withholding of removal to Guatemala because his life would be at risk and for similar reasons refused to designate Mexico as a country of removal. Nonetheless, DHS put O.C.G. on a bus to Mexico, whose authorities sent him back to Guatemala.

Invoking the immigration statute and constitutional due process, O.C.G. and three detained immigrants brought a class action lawsuit for declaratory judgment that DHS must provide notice when it proposes a third country for removal and a meaningful hearing for the immigrant to raise asylum and/or risk-of-torture arguments against such country. On March 28, 2025, District Judge Brian Murphy granted a temporary restraining order (TRO), barring DHS from summary disregard of countries identified in removal orders. The next day, DHS promulgated a new policy: If a country made any "credible" assurance that deported immigrants would not be "persecuted or tortured," then DHS will remove the immigrant to that country without notice. Without such assurances, the new policy assured immigrants of notice of the new country, but not of their rights to raise reasonable fear of torture or persecution, nor of sufficient time to prepare for a hearing if they asked for one.

On April 23, Judge Murphy ruled that the DHS process for switching removal countries was invalid and granted a preliminary injunction, pushing pause on proceedings against immigrants with "non-refoulement" claims based on the Convention Against Torture (CAT). On June 23, 2025, the Supreme Court in *DHS v. D.V.D.* granted an "emergency stay" of injunctive relief during the district court proceedings and continuing through any appeal. The Court's order

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[*] William N. Eskridge Jr. is the Alexander M. Bickel Professor of Public Law, Yale Law School. He appreciates extraordinarily helpful comments from Susan Koniak, Sydney Allard, Jackson Dellinger, Albert Feuer, and Navid Kiassat, as well as excellent editorial assistance from the *University of Chicago Online* team.

came without complete briefing, without oral argument, and in a one-paragraph unsigned statement providing no reasoning to justify the extraordinary relief.

Welcome to the Supreme Court's emergency docket. Like the Twilight Zone, the emergency docket is "the middle ground between light and shadow," and hence is the core of the so-called "shadow docket." Commentators have criticized the Court's shadow-docket interventions: summary orders shirk the Court's responsibility to resolve important legal issues in reasoned opinions informed by complete briefing and oral argument, are unwise because they risk premature decisionmaking before issues percolate in the lower courts, provide insufficient or confusing direction for lower courts, and undermine the Court's legitimacy because of their "shadowy" deliberation. Some critics suggest that the shadow docket is a sneaky way for conservative Justices named by Republican presidents to carry out their regime-change agenda without creating too much publicity.[2] My big problem is that shadow-docket stays deeply (not just technically) undermine the rule of law and violently affect the lives of people like O.C.G. without sufficient legal justification.

Notwithstanding these criticisms, shadow-docket grants skyrocketed after President Obama left office. The first Trump Administration (Trump 1.0) sought forty-one emergency stays—twenty-eight of which were granted by the Supreme Court, including stays of lower court judgments blocking Trump 1.0's rerouting of military appropriations to pay for work on a Mexican border wall, exclusion of transgender persons from military service, and imposition of a broad travel ban for nationals of five Muslim and two other countries. The Biden Administration sought fewer emergency stays, but the Court granted emergency relief blocking workplace COVID rules adopted by Biden's Occupational Safety and Health Administration and tenant-protection rules adopted by Biden's Department of Health and Human Services.

In the last half of the 2024 Term, the second Trump Administration (Trump 2.0) sought emergency stays in no fewer than nineteen significant cases; the Court granted emergency stays in

[2] *But see* Pablo Das, Lee Epstein & Mitu Gulati, *Deep in the Shadows: The Facts About the Emergency Docket*, 109 VA. L. REV. ONLINE 73 (2023) (acknowledging that many pundits criticize the Roberts Court shadow docket orders as implementing a stealth agenda, but finding no empirical support for such a claim).

sixteen cases, including O.C.G.'s case.[3] The shadow docket after January 20, 2025, was both quantitatively and qualitatively different from the much-criticized docket before Trump 2.0. An obvious difference is that the Solicitor General is asking the Court for a lot more emergency stays in order to push pause on an unprecedented number of district court injunctions blocking Trump 2.0 initiatives. Unlike its shadow docket veto of several important Biden Administration measures responding to the genuine COVID emergency, the Court in 2025 entered stays allowing important measures to go forward, notwithstanding legality problems and trumped-up claims of "emergency." Unprecedented in the history of the Supreme Court, divisions in major emergency stay cases in this decade are usually by strict party lines, with six Republican-appointed Justices in the majority and three Democratic-appointed Justices in dissent. Accordingly, the *new shadow docket* is a super-partisan mechanism to whip skeptical judges into conformity with Trump 2.0's massive party-line regime change.

Another important feature of the new shadow docket is that it has become a mechanism that often has the effect of rendering statutory schemes irrelevant and of revising or fudging statutory texts in ways that empower the presidency. A third feature is potentially the most concerning: Emergency stays of lower court injunctions protecting immigrants, government workers, and administrators against unlawful removal create law-free zones that allow or encourage the worst impulses of Trump 2.0 lawyers and that undermine the rule of law itself. The new shadow docket has made clear that the Roberts Court is aligning the judiciary with a coercive, sometimes violent government—and it is doing so with none of the justifications that must accompany a judicial ratification of presidential efforts to silence critics, cleanse the body politic, and upend lawful statutory regimes.

Each of these three features of the new shadow docket is subject to critique, albeit for somewhat different reasons. The Court's summary dismissals of lower court injunctions are allowed by the pyramidal structure contemplated by Article III but are inconsistent with the "reason-giving" requirements of the "judicial Power." Giving reasons is especially important when Trump 2.0 is marshaling executive authority to commit unsanctioned violence against human

[3] Data regarding the 2024 Term's emergency docket are taken from the 113 orders listed in *Emergency Docket 2024–25*, SCOTUSblog (viewed July 26, 2025). As this article goes to press on September 21, I have added *Trump v. Boyle*, *NIH v. Am. Pub. Health Ass'n,* and *Noem v Vasquez Perdomo* to that list.

beings. The Court's statutory avoidance or shadow revision is inconsistent with Article I's vesting Congress with primary authority to create statutory law that judges are required to apply under Article VI. Further, this statutory avoidance is at odds with the textualist approach to statutory interpretation that several Justices believe is suggested or required by Article III. Finally, the Court's acquiescence in Trump 2.0's cavalier treatment of statutory directives, longstanding rules, and binding treaties is inconsistent with the rule of law that pervades the Constitution. By tolerating or even creating expansive black holes in the law, the Court's shadow docket risks unleashing darker forces within the executive branch.

I. The New Shadow Docket and the Unitary Judiciary

The most striking feature of the 2024 Term's shadow docket is its strongly pro-presidential tilt that became a slam after January 2025. Almost half of the emergency stay petitions were made during the Biden Administration. Biden's Solicitor General sought or supported emergency stays in five cases, and the Court granted stays in two cases where the conservative Fifth Circuit had declined to stay injunctions against enforcement of the Corporate Transparency Act and the Horseracing Integrity & Safety Act of 2020. In one order, the 5–4 Court denied two applications to stay preliminary injunctions against controversial Department of Education rules protecting transgender students. In twenty-three cases, companies and trade associations unsuccessfully challenging EPA and other agency rules in lower courts sought emergency stays; Biden's Solicitor General successfully opposed every one of them. The Court rejected applications from former President Trump for emergency stays to veto a gag order and to delay sentencing in federal criminal proceedings against him. The Court rejected all thirty-six applications by death-row inmates for stays of execution in the 2024 Term.

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Starting on January 20, 2025, Trump 2.0 issued a blizzard of executive orders, and his appointees followed with similar policy initiatives. The dominant theme was *regime change* upending landmark statutory schemes and longstanding and mostly bipartisan policies. The primary mechanism was *removal*: the removal of undocumented immigrants such as O.C.G. to either their home countries or, increasingly, last-minute third countries; the removal of tens of thousands of federal employees through reduction-in-force discharges; and removal of agency officials whose jobs were guaranteed by statutory for-cause protections.

What followed the executive orders was a blizzard of lawsuits challenging their validity and/or the processes entailed in their implementation. District court judges, including some appointed by GOP presidents, issued injunctive relief in dozens of cases. The Solicitor General sought stays from courts of appeals, which were unreceptive, and then emergency stays from the Supreme Court, which granted almost all of them.

In O.C.G.'s case, *DHS v. D.V.D.* (US 2025), the Court granted an emergency stay of a preliminary injunction requiring the DHS to provide due process to immigrants before sending them to possibly dangerous countries. Another immigration issue created more problems for Trump 2.0. The President invoked the Alien Enemies Act of 1798 to summarily remove dozens of Venezuelans (almost all in the United States legally) to third countries on the ground that they were allegedly members of a criminal gang invading the United States. By an administrative mistake, DHS deported Kilmer Abrego Garcia (not a gang member) to El Salvador, where he was held in the notorious Centro de Confinamiento del Terrorismo (CECOT) prison. In *Noem v. Garcia*, the Court substantially rejected the Government's application for an emergency stay and confirmed the district court's order for DHS to "facilitate" Garcia's release from hell-prison and return to the United States, where Trump 2.0 sought to deport him to Uganda, then Eswatini, an effort unresolved as we go to press on September 21, 2025. The next month, in *A.A.R.P. v. Donald Trump*, a 7–2 Court granted an emergency stay to Venezuelans scheduled to be removed to third countries; the *per curiam* opinion barred DHS from detaining or removing these persons without notice and a meaningful hearing on the issue of their gang membership. In *National TPS Alliance v. Noem*, an 8–1 Court stayed a district court injunction invalidating Trump 2.0's revocation of protected status for thousands of other Venezuelans under the 1990 immigration statute.

The most controversial Trump 2.0 initiative was the executive order denying birthright citizenship to children born in the United States to parents who were in this country either illegally or temporarily. Several judges issued nationwide injunctions barring enforcement of the order, as a violation of the plain meaning of the Fourteenth Amendment, and three courts of appeals refused to stay their effects. In *Trump v. Casa, Inc.* (2025), the 6–3 Supreme Court, after briefing and oral argument, granted stays upon a finding that nationwide injunctions were not valid exercises of federal courts' remedial authority. Because the Court left open the possibility of class actions or lawsuits by states as potential bases for broad relief, such lawsuits have been brought and certified, with likely stay applications for the Court to address before or when it returns for the 2025 Term.

Trump 2.0 has also removed agency officials notwithstanding for-cause protections sustained against constitutional challenges almost a century ago in *Humphrey's Executor*. Applying existing Supreme Court precedents, lower courts sustained the claims of several officials who refused to go quietly. In *Trump v. Wilcox* (2025), the 6–3 Court entered an emergency stay allowing Trump 2.0 to fire Merit Systems Protection Board Member Cathy Harris and National Labor Relations Board Member Gwynne Wilcox. The *per curiam* was ambiguous as to the Government's likelihood of success on the merits, but doubt was cleared up in *Trump v. Boyle* (2025), where the 6–3 Court granted an emergency stay allowing Trump 2.0 to fire three members of the Consumer Product Safety Commission without cause. In a concurring opinion, Justice Kavanaugh opined that the Court should have set the case down for immediate briefing and argument, so that the constitutional fate of *Humphrey's Executor* could be decided promptly.

The biggest short-term removal since World War II has been the mass discharges of federal employees. On February 11, 2025, Trump 2.0 issued an executive order mandating a "critical transformation" of the federal government, to be accomplished by "eliminat[ing] or consolidat[ing]" existing agencies and ordering agency heads to "promptly undertake preparations to initiate large-scale reductions in force [RIFs]." Under the supervision of the Office Management & Budget (OMB) and the ad hoc Department of Government Efficiency (DOGE), different agencies discharged large numbers of employees. In *Trump v. American Federation of Government Employees (AFGE)*, an 8–1 Court granted an emergency stay to allow Trump 2.0 agencies to formulate final RIF plans that could then be reviewed. Previous emergency stays had protected DOGE and specific agencies from preliminary injunctions, and less than a week after the *AFGE* stay, the 6–3 Court granted the Secretary of Education her own emergency stay, notwithstanding strong evidence that she was charged and proceeding with a dismantling of her agency. In *Department of Education v. California* (2025), the Court held that school districts seeking statutorily required payments had to proceed in Tucker Act lawsuits in the Court of Claims. In *United States v. Shilling* (2025), the 6–3 Court granted an emergency stay allowing Trump 2.0 to proceed with discharging transgender persons who had lawfully joined the armed forces under earlier administrations.

The shadow docket cases reveal the same partisan split that one finds in high-profile decisions on the regular merits docket: Six Justices appointed by Republican Presidents favor a unitary presidential authority to control the executive branch and defer to presidential initiatives involving foreign affairs and immigration,

while three Democratic-appointed Justices support an independent merit-based administration and do not defer when they believe the executive branch violates due process and human rights protections.

What is even more innovative about the Trump 2.0 shadow docket is the majority's super-aggressive exercise of its hierarchical position at the apex of the judicial branch of government. Like the President as commander at the apex of an increasingly partisan "unitary executive," the party-line Supreme Court majority sits atop a "unitary judiciary." This was made explicit in *NIH v. American Public Health Association* (2025), where a 5–4 Court issued an emergency stay to override a lower court injunction requiring payment of statutory grants supporting science research. The majority admonished the lower court for not adhering strictly to the Court's one-paragraph order in *Department of Education v. California*. The lower court and Chief Justice Roberts believed the NIH case was honestly distinguishable, but Justice Gorsuch, in a concurring opinion joined by Justice Kavanaugh, scolded the lower court and others that had defied Trump 2.0. "Whatever their own views, judges are duty-bound to respect 'the hierarchy of the federal court system created by the Constitution and Congress.'"

In context, that was a demand that lower courts become mind-readers, divining signals from the Supreme Court's short *per curiam* orders and then applying them to new cases. Recall that in *Trump v. Boyle*, the unsigned 6–3 order scolded the lower court for not reading the tea leaves in its 6–3 order in *Trump v. Wilcox* and, instead, following *Humphrey's Executor v. United States* (US 1935), a binding precedent that was not discussed in *Wilcox*. Longstanding doctrine requires lower courts to continue to apply binding Supreme Court precedent until it is overruled, which is exactly what the lower courts had been doing in the agency-removal cases until rebuked by the summary order in *Boyle*.

Parallel to Trump 2.0's cleansing the executive branch of officials and employees and its expulsion from the country of unauthorized immigrants, the Roberts Court is whipping Trump-skeptical "inferior courts" into line—by nullifying their injunctions and often by humiliating lower court judges with personal attacks on their good faith. The best statement of the majority's rationale is one made by Justice Kavanaugh in *Casa*:

> One of this Court's roles, in justiciable cases, is to resolve major legal questions of national importance and ensure uniformity of federal law. So a default policy of off-loading to lower courts the final word on whether to green-light or block major new federal statutes and executive actions for the several-year interim until

> a final ruling on the merits would seem to amount to an abdication of this Court's proper role.

In short, the shadow docket has emerged as a mechanism of Supreme Court assertion of its authority against massive dissension within the judiciary—and one that does not require the Court to set down every case for full briefing, oral argument, and contentious opinion writing. As they did in *Casa*, the nationwide injunction case, the 6–3 majority can choose the occasions where they turn an emergency stay issue into a complete Article III production, and they can leave the other occasions to resolution by one-paragraph, unsigned orders. Admittedly, this new development in the shadow docket is a product of a unique confluence of (1) regime change aggressively pursued by Trump 2.0, (2) which is viewed with alarm by most lower court judges, (3) but not by the block of six GOP-appointed Justices who have constituted a relatively stable Supreme Court majority. But it is undeniably "new."

Also in service of a unitary judiciary serving a presidential regime change is a novel test for emergency stays. The long-prevailing rule for appellate stays started with a presumption against them except in "emergencies" and then required the moving party to show that (1) it was likely to prevail on the merits of its appeal, (2) it would be irreparably injured by denying the stay, (3) the balance of equities (harm if the stay were granted versus harm if it were not) tipped decisively in favor of the stay, and (4) the public interest supported the stay. In the new shadow docket, the first factor (previously considered the most important) has faded or sometimes disappeared, and the last three have been revised to reflect massive deference to presidential preferences. When the *per curiam* orders accompanying stays have mentioned the traditional test, they have treated presidential preferences as dispositive of injury to the government and of the public interest.[5]

My concern with the foregoing developments is that they sacrifice the most important legitimating feature of the judicial branch.

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[5] *Compare Noem v. Vasquez Perdomo*, 606 U.S. ___, ___ (2025) (Kavanaugh, J., concurring) (applying the traditional test, with emphasis on presidential administration), with *id.* at ___ (Sotomayor, J., dissenting) (strongly objecting to the Court's recent adjustment of the traditional test for appellate stays). *Compare also Trump v. Wilcox,* 145 S.Ct. 1415 (2025) (6–3 majority, approving a stay), with *id.* at 1416–20 (2025) (Kagan, J., dissenting) (objecting that stays of orders protecting against at-will removals are at odds with traditional limitation of stays to orders that went beyond existing law and to orders disturbing the status quo and a broadly understood public interest).

Recall Justice Kavanaugh's cogent observation that the Supreme Court is ultimately responsible for whether to "green-light or block" major "executive actions." But under *Marbury v. Madison* (US 1803) and the longstanding standard for emergency stays, the role of the Court is not to green-light executive actions that are probably unlawful. Are all of the Trump 2.0 actions probably lawful? Not by a long shot—yet almost all of them got the benefit of Justice Kavanaugh's "several-year interim," which pretty much runs the course of a presidential term.

What is most problematic about this novelty is that six Justices are exercising supervisory power over the lower courts without providing the legal and constitutional reasoning that has long been the nation's (and the Court's) understanding of Article III's "judicial Power." Congress and the President exercise power by imposing their political "will" on the country, but if the Supreme Court were to "exercise WILL instead of JUDGMENT," it would be acting contrary to the original public meaning of Article III. The best evidence of judgment is a rigorous statement of reasons well-grounded in legal and constitutional authority. Most of the Trump 2.0 emergency stays have no legal reasoning, and the few that make an effort do a poor job.

II. The New Shadow Docket and Statutory Avoidance

The new shadow docket has effected a revolution in appellate procedure. Although the most important factor for granting a stay has long been the applicant's likelihood of success on the merits, Trump 2.0 stay applications have had little to say on the statutory and constitutional merits and have instead relied on judicial deference to its "grab bag of jurisdictional and remedial arguments." These arguments have a distinguished lineage, as they were celebrated by the late Professor Alexander Bickel as "passive virtues" that enabled the judiciary (Bickel's "least dangerous branch") to avoid thorny political entanglements and premature judgments of law through cautious process. There is a thin line between a passive virtue and a passive vice, and it is a line that has been obliterated in the Trump 2.0 removal cases. For one thing, the emergency stay upends the status quo and is usually not an example of caution. Indeed, the abandonment of caution has been accompanied by a formal revision of established procedural rules and guardrails.

Indeed, the new shadow docket has become a mechanism for "statutory avoidance," namely, the marginalization of statutory commands and limitations. In O.C.G.'s case, for example, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) established a process for designating the country to which a

detained immigrant is to be removed. The statute requires DHS to give the immigrant an opportunity to explain why the country designated for removal would pose statutory risks and bars removal if an IJ decides that the immigrant's "life or freedom would be threatened in that country." Relatedly, CAT protects illegal immigrants against removal to countries where they are likely to be tortured or persecuted. The foregoing statutory requirements were mocked rather than followed by Trump 2.0—yet the 6–3 Court stayed the injunction in one paragraph. The statute and the treaty vanished under the blur of the emergency stay.

Recall, too, the Venezuelans removed to El Salvador's hell-prison under the AEA. The Act provides:

> Any invasion or predatory incursion is perpetrated, attempted, or threatened against the territory of the United States by any *foreign nation or government*, and the President makes public proclamation of the event, all natives, citizens, denizens, or subjects of the hostile nation or government * * * who shall be within the United States and not actually naturalized, shall be liable to be apprehended, restrained, secured, and removed as alien enemies.

Trump 2.0 relied on this statute to target alleged members of Tren de Aragua (TdA), a Venezuelan gang.

The statutory text does not authorize this. According to the AEA, a "foreign nation or government" is an entity with "citizens, denizens, or subjects" and is capable of entering into "treaties" with the United States. Venezuela qualifies; TdA does not. Briefly addressing this inconvenience in her application for an emergency stay in *Trump v. J.G.G.* (2025), the Solicitor General asserted that TdA has created a "hybrid criminal state" that is "closely aligned with" Venezuelan President Maduro's government and has "infiltrated" its "military and law enforcement apparatus." This "hybrid criminal state," President Trump determined, "is perpetrating an invasion of and predatory incursion into the United States," posing "a substantial danger" to this country.

Under no criteria recognized in international or domestic American law is TdA a "foreign nation or government." Following the Montevideo Convention (1933), the Third Restatement of Foreign Relations Law requires that a "state" must have a defined territory, a permanent population, a government apparatus, and the capacity to enter into treaties with other states. As the Supreme Court held in *Ludecke v. Watkins* (1948), Congress enacted the AEA under its *war* powers. Because the United States can only declare "war" against a

"hostile nation" and not against a criminal gang, Trump 2.0's assertion was ultra vires.

The Solicitor General's fallback argument was that TdA was a "de facto arm" of the Maduro regime. Even if true that TdA had "infiltrated" the government, it would not be an "arm" of that government without some evidence of authorization. The Federalist Society has "infiltrated" the United States government by sponsoring judicial nominations and clerkships and has, reportedly, executed a "takeover" of the Supreme Court. Although legally silly, the case for the Federalist Society as a de facto arm of the United States is no worse than the case for TdA as a de facto arm of Venezuela. By the way, if TdA were actually an arm or department of the government of Venezuela, it would be entitled to sovereign immunity if it were sued in American courts.[6] It is virtually inconceivable that the State Department or the Supreme Court would support immunity for TdA.

The Solicitor General's Humpty Dumpty version of textualism came at the end of a memorandum asserting a grab bag of procedural objections, one of which the Court accepted. Citing one case saying that habeas was the only relief for immigrants excluded under the Immigration Act of 1917, which precluded judicial review of admissibility decisions, the 5–4 Court concluded that immigrants legally present in this country could only challenge the legality of AEA removal through habeas petitions brought in the district of their confinement, which was a moving target. Every premise of the conclusion was questionable and required further analysis: *Ludecke* held that courts must be available to evaluate claims about the AEA's interpretation, the AEA explicitly vests American courts with jurisdiction to order removal but only with "sufficient cause," and the AEA is a different statutory scheme than the Immigration Act of 1917, which had been enacted against a background of executive discretion in immigration-admission decisions. Thus, AEA and habeas review were complements in such situations.

The Solicitor General and the 5–4 Court did not parse either the statute or the precedents carefully. In dicta, the Court opined that Venezuelans could not be removed without notice and a meaningful hearing. Some textual analysis applying the war-powers measure against an asserted private gang would have provided a needed red

[6] Foreign Sovereign Immunity Act, P.L. 94–583, §4(a)–(b), 90 Stat. 2892 (Oct. 21, 1976), codified at 28 U.S.C. § 1603(a)–(b) ("foreign state" can include formal subdivisions as well as commercial enterprises owned or controlled by a foreign state).

flag against precipitous removals in the inevitable habeas proceedings. If the Supreme Court felt it was applying a passive virtue in not addressing the plain meaning of the AEA, I beg to differ. Allowing Trump 2.0 to get away with a lawless interpretation of a statute and farming out disputes to scattered habeas proceedings risks entrenching that lawless interpretation and emboldening further executive exercises of power beyond traditional authorization. The Court that refused to let President Biden "get away" with student loan forgiveness (good for the Court) and workplace COVID protections (not good, as the statute authorized the executive action) needs to hold Trump 2.0 to exercise authority consistent with actual statutory authorizations and with congressional primacy in the arenas of immigration, taxation, and regulation.

The marginalization of statutory schemes reflected in *J.G.G.* has been a recurring theme in the new shadow docket. For another example, in *New York v. McMahon* (2025), the district court's detailed findings of fact established that executive orders and administrative directives were dismantling entire offices that had been created, and in most cases entrenched, by the 1979 statute creating the Department of Education. The Department was, according to unrefuted findings of fact, defaulting on statutory payments and duties owed to school districts and states. Arguing a lack of standing for state and private plaintiffs, the Solicitor General sought and received an emergency stay—but the 6–3 Court's order gave no indication which objection justified the stay.

Yet other examples can be found in the statutory grant litigation. In *Department of Education v. California*, the 5–4 Court's dubious holding (announced in three sentences) that illegal diversion of appropriated monies had to be litigated piecemeal in the Court of Claims meant that not a word was said, in the *per curiam* order, about Trump 2.0's violation of specific statutory payment requirements and the openly intended effect to hollow out statutory programs administered by the disappearing Department of Education. The same statutory avoidance recurred in the NIH litigation, where Justice Gorsuch expressed outrage that lower courts would even pay attention to statutory requirements as a reason not to follow ambiguous *per curiam* signals.

The new shadow docket undermines statutory schemes in another way, for another characteristic of the new shadow docket is the way in which procedure interacts with an aggressive substantive agenda, specifically, one inspired by Friedrich von Hayek. Hayek

preached against big government and collective rights.[7] Trump 2.0's massive reductions in force are a prelude to massive deregulation: There is no one to administer some programs, other policies will be dropped or unenforced by Trump 2.0 loyalists being installed at every level of government, and administrative rules considered burdensome are being reconsidered and many of them revoked. The Court's shadow docket activism is an ex ante encouragement to both lower court judges and Trump 2.0—the former to go along, the latter to run up the ladder to secure quick emergency stays.

The more subtle Hayekian effect of the new shadow docket is to discourage wholesale (group) litigation and encourage retail (individual) litigation. Thus, the Court showed mercy on Abrego Garcia, but the decision in *Casa* would bar Venezuelans like him from seeking a nationwide injunction against the Trump 2.0 use of the AEA. Lawsuits by unions objecting to massive reductions in force have been put on hold, while individuals who have lost their jobs can pursue administrative remedies under the Civil Service Reform Act—albeit remedies that are increasingly pointless based on emergency stays allowing Trump 2.0 to pack the administrative process with loyalists. And Trump 2.0's seizure of Congress's spending power by withholding statutory payments to public schools and science research centers, the 5–4 Court has ruled, cannot be challenged wholesale under the APA but must be litigated, payment by payment, as refunds under Tucker Act proceedings in the Court of Claims.

Under Article II, Section 3 of the Constitution, the President is supposed to "take Care that the laws be faithfully executed." The relevant "laws" are statutes enacted by Congress. When Presidents seem to be shirking their take Care duties, Congress has given federal courts jurisdiction and statutory causes of action to engage in judicial review so that the executive branch can be accountable and statutory schemes can be preserved. The new shadow docket undermines both accountability and statutory schemes for indefinite periods of time, in most cases with little or no statutory analysis by the Court.

III. The New Shadow Docket and Violence Without Law

The most concerning feature of the new shadow docket is that it is undermining the rule of law in several deep ways. Start with an

[7] 1 F.A. HAYEK, LAW, LEGISLATION AND LIBERTY 31, 36–39, 48 (1973) (describing the socio-economic case against "planned" societies); Keith W. Diener, *The Road to Discrimination: Implications of the Thought of F.A. Hayek for Equal Employment Law*, 14 ACAD. LEGAL STUD. BUS. J. EMP. & LABOR L. 30, 34–36 (2013) (critiquing "collectivist" government and "collective" rights).

infamous political theory: Nazi-era political philosopher Carl Schmitt argued that liberal democracies would inevitably sacrifice the rule of law, as ever-grabby chief executives would invoke "emergencies" to successfully justify legal "grey holes" allowing executive discretion and "black holes," or law-free zones.[8]

Schmitt argued that courts (fearful of political discipline) would go along, and the Roberts Court has exceeded the most ambitious Schmittian fantasy. In *Trump v. United States* (2024), the Court created black holes for the President when acting under his much-expanded core Article II authority and presumptive black holes for other official presidential acts, vaguely defined. Predictably, President Trump has behaved with less sense of legal constraint in his second term than he did during his first term. And when federal district judges have called out Trump 2.0 directives and policies on statutory or constitutional grounds, emergency stays have allowed the administration to continue those policies, usually with little or no assurance that they are legal. And the GOP majority on the Court has said virtually nothing about the lawless acts of the executive branch, while demonizing lower court judges who are actually studying the statutes and trying to enforce the primacy of Congress.

Because emergency stays are in place for the duration of the trial court litigation and on active appeal, the Trump 2.0 lawyers have every incentive to draw things out—which allows them to ignore the law for long periods of time. In *D.V.D.*, for example, before the Supreme Court had stayed its preliminary injunction, the district court had required DHS to provide a CAT hearing to eight immigrants being held in Djibouti, a country in east Africa, before they could be sent to South Sudan, a dangerous country eight-hundred miles due west. When the district court tried to protect the eight from an illegal removal to South Sudan, the Solicitor General returned to the Supreme Court, where a 7–2 majority ruled that the stay applied to the eight convicted felons. Because this was a putative class action—whose certification the Government opposed—the stay had a broad effect, insulating Trump 2.0 from any judicial supervision of the bait-and-switch game it has been playing with third-country removals. On Independence Day 2025, DHS delivered all eight "barbaric criminal aliens" (according to its press release) to South Sudan, where their fate is uncertain.

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[8] *See* ERIC A. POSNER, THE DEMAGOGUE'S PLAYBOOK: THE BATTLE FOR AMERICAN DEMOCRACY FROM THE FOUNDERS TO TRUMP (2020) (finding disturbing parallels between the demagogic Presidency of Andrew Jackson and that of Trump 1.0).

From the perspective of Trump 2.0, delay serves another purpose, as it gives the White House time to defenestrate structures that would administer the due process the Supreme Court sometimes requires. Recall that IJs listened to O.C.G. and treated him lawfully. But IJs can be replaced at will by the Attorney General, who in the first half of 2025 fired a leading IJ and dozens of other Department of Justice (DOJ) attorneys based upon apparently partisan or other nonprofessional reasons. The DOJ lawyer who admitted that Kilmer Abrego Garcia had been removed to El Salvador by mistake was fired—and he has testified that DOJ attorneys were pressured to mislead judges and evade court orders. Other whistleblowers have come forward to confirm that senior DOJ official Emil Bove directed lawyers to ignore specific judicial orders and suggested that they should take a "f___ you" attitude toward judges who would impede efforts to carry out law-free immigration policies.

The purge of nonloyalists is illegal, but statutory protections are enfeebled by emergency stays and statutory avoidance. The Civil Service Reform Act of 1978 (CSRA), structures our modern merit-based federal civil service:

> [I]n order to provide the people of the United States with a competent, honest, and productive Federal work force reflective of the Nation's diversity, and to improve the quality of public service, Federal personnel management should be implemented consistent with merit system principles and free from prohibited personnel practices.

Among the prohibited practices is "arbitrary action, personal favoritism, or coercion for partisan political purposes." Federal employees whose adverse treatment violates that policy have a remedy within the executive branch, namely, the Merit Systems Protection Board (MSPB). The Board's three members are removable only for "inefficiency, neglect of duty, or malfeasance in office."

In February 2025, the White House removed Cathy Harris (the only Democrat) from the MSPB. Because Harris was an adjudicative official, Trump 2.0 was challenging not only *Humphrey's Executor*, but also *Wiener v. United States* (1958), which held that presidents could not remove judges of the War Claims Commission, because its adjudicatory role required strict impartiality. With no mention of either *Humphrey's* or *Wiener,* the Court on May 22, 2025, granted an emergency stay in *Trump v. Wilcox*. Almost six weeks later, the Court granted an emergency stay allowing Trump 2.0 to remove three members of the Consumer Product Safety Commission. In *Trump v. Boyle*, the 6–3 majority chided lower courts for continuing to follow

Humphrey's and seemed to suggest that they were free to disregard some constitutional precedents.

Wiener remains unmentioned in the shadow docket cases, but its overruling would be especially significant because tenure protection for quasi-judicial officials (like Harris) not only serves statutory goals (a merit-based civil service) but also constitutional due process requirements. The Government cannot deprive federal employees of their job interests without (1) notice and (2) a meaningful hearing (3) before an impartial decisionmaker. For adjudicators such as those on the MSPB, impartiality is not just a policy goal, but a constitutional requirement—and White House capture of the Board would explode the appearance of impartiality. By the way, that insight also underwrites the Administrative Procedure Act of 1946 (APA), which has (as amended) created the administrative law judge as a key figure in the Social Security Administration and other agencies. So add the APA and the Social Security Act as statutes the Supreme Court probably slighted or ignored in considering the emergency stay in Harris's case.

At the same time immigrants and agency officials have been illegally removed, tens of thousands of federal employees have been subject to reductions in force that may violate the CRSA and will surely eviscerate statutory schemes, even if less completely than has already been accomplished with the Education Department. Emergency stays have been granted to push pause on lower court orders protecting against mass civil servant removals. As noted above, tens of thousands of federal employees have been terminated, some for apparently partisan reasons that would violate CSRA. Effective protection against a spoils system requires, at a minimum, an appeals process that would neutrally apply the CSRA policy, principles, and specific rules. But if a President can reconstitute the board at will, the system Congress established in the CRSA and that assures due process and respect for law is virtually meaningless.

The threat of the new shadow docket to the rule of law is deeper than simply the creation of law-free black holes and the evisceration of statutory protections. Because of its apparently partisan slant, the new shadow docket aligns the Supreme Court with Trump 2.0's assault on the culture of rule-following. Trump 2.0's playbook for both politics and litigation is strikingly similar to the strategic philosophy of Trump's longtime lawyer and mentor, the late Roy Cohn. Especially when he or his client was violating a clear legal mandate, Cohn's approach to litigation was to deny, delay, and attack; to lob unfounded personal attacks in the press against lawyers, judges, and witnesses; to depict himself and his clients as victims of an elite "establishment"; to cheat,

exaggerate, or lie when convenient; and to declare victory whatever the result. With Trump 2.0 loyalists running the White House, the Department of Justice, the FBI, and most departments and agencies, Trump's top-down approach to governance is inspiring or rewarding officials who twist or ignore statutes and treaties that would slow down the headline-grabbing policy agenda and who are willing to follow a sanitized version of the Roy Cohn playbook. When prominent executive department officials operate under Cohnian ethics and judges look the other way, people of all ages notice.

Surely, this process affects public culture. as the founding generation appreciated. Consider the wisdom of *The Federalist No. 78*: "The benefits of the integrity and moderation of the judiciary," in standing against unlawful political actions are critical to the success of the country, "and though they may have displeased those whose sinister expectations they may have disappointed, they must have commanded the esteem and applause of all the virtuous and disinterested." Everyone, regardless of political party,

> ought to prize whatever will tend to beget or fortify that temper in the courts: as no man can be sure that he may not be to-morrow the victim of a spirit of injustice, by which he may be a gainer to-day. And every man must now feel, that the inevitable tendency of such a spirit is to sap the foundations of public and private confidence, and to introduce in its stead universal distrust and distress.

There is also a meta-philosophical angle for this concern. "Legal interpretation," Bob Cover taught us, "takes place in a field of pain and death." This is because law is coercive and therefore backed up by law-enforcement violence. "Legal interpretive acts signal and occasion the imposition of violence upon others: A judge articulates her understanding of a text, and as a result, somebody loses his freedom, his property, his children, even his life," as was the case for thirty-six death-row inmates whose emergency stays were denied in the 2024 Term. "When interpreters have finished their work, they frequently leave behind victims whose lives have been torn apart by these organized, social practices of violence," as illustrated by the treatment of O.C.G. and other immigrants unlawfully deported to hostile environments.

Law's coercion and especially its violence require justification, and in our country the justification must normally derive from democratically legitimate authority, mainly the Constitution and statutes. A central role for courts generally and the Supreme Court in

particular is to require law-based justification when the government engages in coercive acts such as removals. And when courts generally and the Supreme Court in particular veto, delay, or confirm governmental coercion and violence, they must provide law-based justifications. The new shadow docket fails on both fronts. With thin or no legal justification, emergency stays confirm executive actions resting upon thin legal analysis or fabricated factual pronouncements, or both, as in the AEA cases.

The Roberts Court may view its acquiescence in Trump 2.0 initiatives as a sober display of the "passive virtues" Bickel applauded. But the new shadow docket has sometimes inverted such judicial statesmanship. In the AEA cases, the Court went out of its way to impose constitutional due process requirements on executive removal of alleged Venezuelan gang members—constitutional activism that could have been "passively" avoided by applying the statutory text as written and as understood in both 1798 and today. Judicial passivity is least defensible when it

> align[s] the interpretive acts of judges with the acts and interests of those who control the means of violence. The more that judges use their interpretive acts to oppose the violence of the governors, the more nearly do they approximate a 'least dangerous branch' with neither sword nor purse, and the less clearly are they bound up in the violent suppression of law.

* * *

In six months, the shadow docket has been transformed from a legal process embarrassment into a threat to the rule of law in our constitutional republic. By failing to subject careless or lawless executive actions to serious legal scrutiny, the Roberts Court has on more than one occasion expanded presidential black holes in the law, authorized coercive and violent acts lacking legal justification, and opened Pandora's box by legitimating a cheaters' club, spoils system approach to governance.

What demons and ills will fly out of Pandora's box? And how quickly? I do not know. The consequences may be limited by the resilience of American culture or ultimately by electoral blowback. But the possibly malign longer-term consequences ought not be ignored. Among them are the corruption of public culture by acquiescing in or glorifying kleptocracy and mendacity, the unleashing of anger by persons who witness or suffer from unjustified legal coercion and violence, and (perhaps most important) diversion of public resources

and attention away from the staggering long-term problems faced by people in America and the world.

What should be done? And what might the Court do, as it moves forward? For starters, the Court ought to apply its "major questions doctrine" to emergency stays. If the President or an agency is making a big move with major consequences and lower courts carefully justify preliminary relief against probably unlawful action, the Court's presumption in favor of an emergency stay should either be nullified (no presumption) or even reversed (as the Court did with President Biden's COVID policies). And the Court ought to take seriously the equitable factors traditionally required for any kind of stay—and count statutory policies created by Congress as a significant factor that will often counterbalance executive policies favored by the White House.

Second, probability of success on the merits is a requirement that ought to be taken seriously for emergency stays. If the majority are exercising their supervisory authority as a "court," they must do so through "judgment" and actual legal reasoning. Justice Barrett worries that the Court will be perceived as a "bunch of partisan hacks," a charge she believes unfounded. That charge hangs in the air every time the Court imposes its will on the lower courts, without legal explanation that can pass for a law-based judgment. The more important the issue, the greater the requirement of legal reasoning.

Third, the Court ought to reconsider its neo-Hayekian commitment to piecemeal rather than collective litigation. Admittedly, this is both the hardest and the most important ask, because the six majority Justices seem existentially committed to individual rather than group litigation. When important public policies and serious constitutional or statutory issues are in play, piecemeal litigation plus emergency stays risk the perseverance of lawless executive actions for the duration of a presidential term—which is precisely the Cohnian strategy of deny, attack, delay. The current Court sometimes addresses this problem effectively, as illustrated by its orders in the Abrego Garcia and other AEA cases. Writing strong opinions (with reasons) rebuking unlawful actions and allowing classwide relief are mechanisms that a textualist, original public meaning Court ought to engage more often.