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**SHADOW BOXING: THE SUPREME COURT FIGHTING AGAINST ITS OWN PRECEDENT**

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## SHADOW BOXING: THE SUPREME COURT FIGHTING AGAINST ITS OWN PRECEDENT

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### INTRODUCTION

During both of President Donald Trump’s administrations, the federal government sought an unprecedented number of emergency stays from the United States Supreme Court.<sup>2</sup> The frequency with which significant constitutional questions are being resolved through emergency orders suggests a shift in how the Court’s emergency powers affect the balance between the legislative and the executive branch.<sup>3</sup> The Court’s increasingly frequent use of its emergency power presents a notable and dangerous shift in the Court’s practice.

Much of this activity occurs on what scholars describe as the “Shadow Docket,”<sup>4</sup> where decisions are issued without full briefing, oral argument, or detailed opinions.<sup>5</sup> The subject matter of these emergency dockets has been wide-ranging, including the executive’s power of appointment and removal, immigration enforcement, and constitutional limitations such as standing requirements and Fourth Amendment protections.<sup>6</sup> The resolution of

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<sup>2</sup> William N. Eskridge Jr., *Trump 2.0 Removal Cases & the New Shadow Docket*, U. CHI. L. REV. ONLINE 1, 2 (Sept. 23, 2025), [lawreview.uchicago.edu/sites/default/files/202509/Eskridge\\_New%20Shadow%20Docket.pdf](https://www.lawreview.uchicago.edu/sites/default/files/202509/Eskridge_New%20Shadow%20Docket.pdf) (on file with the UNT Dallas Law Review).

<sup>3</sup> *Trump v. Slaughter*, 146 S. Ct. 18, 19 (2025) (Kagan, J., dissenting).

<sup>4</sup> See William Baude, *Foreword: The Supreme Court’s Shadow Docket*, 9 N.Y.U. J.L. & LIBERTY 1, 5 (2015).

<sup>5</sup> Alicia Bannon, Stephen Spaulding & Harry Isaiah Black, *The Supreme Court “Shadow Docket” Explained*, BRENNAN CTR. FOR JUST. (Feb. 13, 2026), <https://www.brennancenter.org/our-work/research-reports/supreme-court-shadow-docket> (on file with the UNT Dallas Law Review).

<sup>6</sup> Ashleigh Maciolek & Alicia Bannon, *Supreme Court Shadow Docket Tracker — Challenges to Trump Administration Actions*, BRENNAN CTR. FOR JUST. (Oct. 21, 2025), <https://www.brennancenter.org/our-work/research-reports/supreme-court-shadow-docket-tracker-challenges-trump-administration> (on file with the UNT Dallas Law Review); Sharon Brett, Case Comment, *Lyons, Remedies, and the Fourth Amendment in Noem v.*

consequential constitutional questions through these subversive emergency procedures raises serious concerns about the Court's adherence to stare decisis.

### I. HISTORY OF THE SHADOW DOCKET

The emergency docket is as old as the Supreme Court itself. An understanding of the emergency docket's origin is instrumental in evaluating whether the recent uses of this expedited process were proper. The constitutional framework derives from Article III, Section 2 of the United States Constitution, granting the Court "appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."<sup>7</sup> Pursuant to this power, Congress codified 28 U.S.C. §1651, authorizing federal courts to issue "all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law" and for each Justice to stay cases pending judicial review.<sup>8</sup> Historically, the overwhelming majority of relief sought under this authority took the form of preliminary injunctions or requests to stay lower court injunctions, offering only temporary relief in extraordinary circumstances.<sup>9</sup>

For most of the twentieth century, these orders were procedural and uncontroversial.<sup>10</sup> When a case appeared on the emergency docket, it was assigned to the individual Justice of that circuit, and they would hear an oral argument before issuing an order explaining their judgment.<sup>11</sup> This preserved the basic accountability that judicial legitimacy demands. That practice changed in the 1980s, when the Court began holding a continuous session all year instead of adjourning in the summer.<sup>12</sup> As a result, Justices began addressing emergency matters collectively rather than individually.<sup>13</sup> No doubt due to this burden of cases that were now shifted onto every Justice,

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*Vasquez Perdomo*, N.Y.U. L. Rev. 1, 2 (Feb. 12, 2026), <https://nyulawreview.org/case-comments/lyons-remedies-and-the-fourth-amendment-in-noem-v-vasquez-perdomo/> (on file with the UNT Dallas Law Review); *Trump v. Wilcox*, 145 S. Ct. 1415, 1418(2025).

<sup>7</sup> U.S. Const. art. III, § 2, cl. 2.

<sup>8</sup> 28 U.S.C. §§ 1651(a)–(b), 2101(f).

<sup>9</sup> Rachel Reed, *Shedding Light on the Supreme Court's Shadow Docket*, HARV. L. TODAY, Mar. 4, 2026, <https://hls.harvard.edu/today/shedding-light-on-the-supreme-courts-shadow-docket/> (on file with the UNT Dallas Law Review).

<sup>10</sup> Stephen I. Vladeck, *Putting the "Shadow Docket" in Perspective*, 17 HARV. L. & POL'Y REV. 289, 291 (2023) (on file with the UNT Dallas Law Review).

<sup>11</sup> Maciolek & Bannon, *supra* note 6, at 3–4.

<sup>12</sup> Bannon et al., *supra* note 5, at 4.

<sup>13</sup> *Id.*

full hearings stopped entirely and the Court began issuing unsigned, unexplained orders in with markedly increased regularity.<sup>14</sup>

## II. RECENT EMERGENCY DOCKET CASES ARE SILENTLY OVERTURNING PAST PRECEDENT AND STATUTES

Paradoxically, stays issued without explanation, briefing, or oral argument are just as binding as any other Supreme Court action. As a result, when lower court judges are forced to apply rulings that offer neither a principle, standard, nor any guidance for future cases.<sup>15</sup>

### A. *Removal of Independent Agency Officials: Trump v. Wilcox*

The foundational precedent governing executive removal power over independent agencies was *Humphrey's Executor v. United States*, decided in 1935.<sup>16</sup> A unanimous Supreme Court blocked President FDR's action to fire William Humphrey of the Federal Trade Commission because of policy adversity.<sup>17</sup> The Court upheld Congress's Article I powers to create independent agencies and to insulate members from at-will presidential removal.<sup>18</sup> The standard set forth for firing independent agency members was "inefficiency, neglect of duty, or malfeasance in office," not political conflict with the current administration.<sup>19</sup>

This holding stood as a structural cornerstone for independent agencies for nearly 90 years until *Seila Law LLC v. CFPB* unexpectedly narrowed, but still preserved, this rule by limiting it to multi-member bodies exercising quasi-legislative or quasi-judicial functions.<sup>20</sup> But in *Trump v. Wilcox*, the Court issued an emergency stay allowing President Trump to remove members of the National Labor Relations Board and the Merit Systems Protection Board—both independent agencies—notwithstanding the for-cause protections of *Humphrey's Executor*.<sup>21</sup> The Court left the orders unsigned and offered no explanation whether it was overruling or distinguishing *Humphrey's Executor* or *Seila Law*. Accordingly, the removals were allowed to proceed.

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<sup>14</sup> Eskridge Jr., *supra* note 2, at 5.

<sup>15</sup> Bannon et al., *supra* note 5.

<sup>16</sup> *Humphrey's Ex'r v. United States*, 295 U.S. 602, 632 (1935).

<sup>17</sup> *Id.* at 618.

<sup>18</sup> *Id.* at 626.

<sup>19</sup> *Id.* at 620.

<sup>20</sup> *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 591 U.S. 197, 217 (2020).

<sup>21</sup> *Trump v. Wilcox*, 145 S. Ct. 1415, 1415 (2025).

In response, Justice Kagan, joined by Justices Sotomayor and Jackson, dissented sharply: “Our emergency docket, while fit for some things, should not be used to overrule or revise existing law.”<sup>22</sup> Noting the unprecedented departure from the established case law, Kagan’s dissent criticizes the majority’s reluctance to directly overturn *Humphrey’s*, but tacitly doing so without a full-merit decision.<sup>23</sup> Overturning case law without explanation which has been operative for nearly 90 years and designed to free independent agencies from political influence reflects the current Supreme Court landscape of silently overturning precedent to expand the influence of the executive at every branch of government. With more decided, pending, and applied cases coming on the heels of this decision like *Trump v. Cook*, *Trump v. Slaughter*, *Trump v. Boyle*, and *Bessent v. Dellinger*,<sup>24</sup> the departure from traditional judicial review based on stare decisis is a foregone conclusion.<sup>25</sup>

*B. Lawful Immigration Stops Based on Protective Class: Noem v. Vasquez Perdomo*

The Supreme Court’s shadow docket ruling in *Noem v. Vasquez Perdomo* carries a profound statutory and constitutional implication without a merit-based review to assess the consequences of the Court’s decision. By staying an injunction that barred investigative stops by Immigration Enforcement Agency agents based on the “apparent race or ethnicity,” language, workplace, and location of individuals suspected to be illegal aliens, the Court used racial characteristics as a proxy to satisfy the Fourth Amendment’s requirement for “particularized” reasonable suspicion.<sup>26</sup> Scholars now refer to these as “Kavanaugh” stops.<sup>27</sup> The stay came not only after the two lower courts had already denied the government’s request for relief, but where Trump had “an especially heavy burden” to show its likelihood of success on the merits and likelihood of irreparable harm.”<sup>28</sup>

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<sup>22</sup> *Id.* at 1418 (Kagan, J., Dissenting).

<sup>23</sup> *Id.* at 1418–19.

<sup>24</sup> Maciolek & Bannon, *supra* note 6, at 3–4.

<sup>25</sup> Ashleigh Maciolek & Alicia Bannon, *Supreme Court Abuse of the Shadow Docket Under Trump*, BRENNAN CTR. FOR JUST. (Mar. 3, 2026), <https://www.brennancenter.org/our-work/analysis-opinion/supreme-court-abuse-shadow-docket-under-trump> (on file with the UNT Dallas Law Review).

<sup>26</sup> *Noem v. Vasquez Perdomo*, 146 S. Ct. 1 (2025);

<sup>27</sup> Brionna Bolaños, *The Supreme Court’s Shadow Docket Signaling and the Racial Politics of Immigration Enforcement*, STAN. CTR. FOR RACIAL JUST. (Jan. 22, 2026), <https://law.stanford.edu/2026/01/22/the-supreme-courts-shadow-docket-signaling-and-the-racial-politics-of-immigration-enforcement/> (on file with the UNT Dallas Law Review).

<sup>28</sup> *Id.*

Trump succeeded on in this case even though Justice Sotomayor, dissenting, argued the government “provided no evidence” that these immigration stops were based on particularized facts besides circumstantial racial characteristics, violating the Fourth Amendment’s individualized suspicion requirements, and that the government failed to establish irreparable harm as required for an injunction.<sup>29</sup>

Additionally, as Justice Sotomayor warned in her dissent, this decision is “another grave misuse of our emergency docket,” highlighting the Court’s pattern of suspending constitutional protections through the shadow docket.<sup>30</sup> Because *Perdomo* displaces the Fourth Amendment’s core protection against unreasonable searches and seizures through a summary stay rather than a full-merit deliberation by the Court, the shadow docket has exceeded the bounds of its original intent.

### III. CURRENT STATE OF THE EMERGENCY DOCKET

In present times, unsigned and unexplained orders, ranging from immigration to administrative power, have increased in frequency with major consequences. The Court now issues “[s]ignificant rulings without explanation,” threatening the basic understanding of judicial decisions resting on precedent rather than mere institutional authority.<sup>31</sup> What began as a narrowly tailored mechanism to address genuine emergencies has become a tool in which precedent is effectively revised without the deliberative process that stare decisis demands.

The danger of this is apparent. Research shows that when the Court operates in this shadow, the political composition of the majority may carry more predictive weight than the content of prior judicial rulings.<sup>32</sup> This signals a troubling situation for an institution whose legitimacy lies within the governance and predictability of established law, not politics. And in the current administration, where the Court’s makeup is a 6–3 conservative majority, the increasing volume of emergency applications, coupled with the

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<sup>29</sup> *Perdomo*, 146 S. Ct. at 7, 15 (Sotomayor, J., Dissenting); see *Los Angeles v. Lyons*, 461 U.S. 95 (1983) (requiring a “real and immediate threat” of future injury for injunctive relief); see also *Terry v. Ohio*, 392 U.S. 1 (1968) (requiring “specific and articulable facts” for reasonable suspicion under the Fourth Amendment).

<sup>30</sup> *Perdomo*, 146 S. Ct. at 6, 11 (Sotomayor, J., Dissenting).

<sup>31</sup> Erwin Chemerinsky, *Why the Shadow Docket Should Concern Us All*, SCOTUSBLOG (Aug. 4, 2025, 09:53), <https://www.scotusblog.com/2025/08/why-the-shadow-docket-should-concern-us-all/> (on file with the UNT Dallas Law Review).

<sup>32</sup> Pablo Das, Lee Epstein & Mitu Gulati, *Deep in the Shadows?: The Facts About the Emergency Docket*, 109 VA. L. REV. 73, 79–80 (2023).

Court's frequent intervention on behalf of the federal government, raises concerns about the Court's institutional neutrality and its relationship with the executive branch.<sup>33</sup> Scholars have described this trend as the "unitary judiciary" problem: that the shadow docket functions as an institutional ally of the executive branch, systematically reversing lower court injunctions that obstruct the current administration's aggressive policies.<sup>34</sup>

As a consequence, the current state of the emergency docket functions as an extension of executive branch, usurping the separation of powers and creating one political hierarchy. Major cases that should be decided on their merits are instead being fast-tracked to favor executive policies.

#### IV. PROPOSED REFORM: THE SHADOW DOCKET SUNLIGHT ACT

The Shadow Docket Sunlight Act of 2025 (the "Act") was a direct response by Congress to bring the shadow docket into the light. This Act, introduced by the 118<sup>th</sup> Congress, would command the Supreme Court to provide both written explanations on injunctive relief orders and publicly record each Justice's vote.<sup>35</sup> By mandating these disclosures, the bill seeks to restore the Court's institutional credibility and, more practically, provide lower courts with substantive reasoning necessary to apply Supreme Court rulings.<sup>36</sup>

This mandate for transparency operates on two compelling grounds. First, requiring Justices to write a formal opinion ensures significant shifts in jurisprudence do not occur without justification from the Court. For example, when the Court's actions implicitly overrule established precedent such as *Trump v. Wilcox* and *Humphrey's Executor*, a written record allows the public and affected parties to understand the legal shift.<sup>37</sup> Furthermore, with public view comes public scrutiny, which is a necessary check when the

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<sup>33</sup> Andrew Chung, *Trump Finds Victories at the Supreme Court in Rush of Emergency Cases*, Reuters (June 13, 2025, 05:40 CDT), <https://www.reuters.com/world/us/trump-finds-victories-supreme-court-rush-emergency-cases-2025-06-13/> (on file with the UNT Dallas Law Review).

<sup>34</sup> Eskridge, *supra* note 2.

<sup>35</sup> S. 4388, 118th Cong. (2024), <https://www.congress.gov/bill/118th-congress/senate-bill/4388/text> (on file with UNT Dallas Law Review).

<sup>36</sup> Press Release, Sen. Richard Blumenthal, Blumenthal Leads Group of Thirteen Senators Introducing New Legislation to Shine Light on the Supreme Court's Shadow Docket (May 22, 2024), <https://www.blumenthal.senate.gov/newsroom/press/release/blumenthal-leads-group-of-thirteen-senators-introducing-new-legislation-to-shine-light-on-the-supreme-courts-shadow-docket> (on file with UNT Dallas Law Review).

<sup>37</sup> *Id.*

impartiality of the Court is called into question. Second, the Act would end the practice of anonymous voting on politically contentious stays.<sup>38</sup> Under the current practice, a Justice who votes to grant a controversial stay suffers no professional or public consequence. Conversely, recording votes would restore the relationship between decision-making and accountability that has been a central component of the standard merits-based judicial process.<sup>39</sup>

Critics argue that exposing Justices to individualized scrutiny might hinder the speed or decisiveness required in emergency stays, especially when the Court must act on a “short fuse without benefit of full briefing and oral argument.”<sup>40</sup> Under this view, the timeline for relief is necessarily “dictated by the urgency of the underlying dispute,” and further scrutiny risks paralyzing a process already criticized for the “scanty review” it provides. To the contrary, the Shadow Docket Sunlight Act likely does not demand the lengthy deliberation like a full merit review. Instead, it ensures that the “emergency” nature of a case is not used as a shield for majority overreach, especially by requiring that orders be accompanied by recorded dissents to preserve the integrity of the judicial record.<sup>42</sup>

## V. CONCLUSION

The Supreme Court’s emergency docket has, in recent times, moved from an obscure, historically procedural tool to a primary instrument of the executive branch to legitimize aggressive policies without the safeguards provided by apolitical accountability and adjudication on the merits. As illustrated in cases like *Trump v. Wilcox*, the Court has used the shadow docket to depart from longstanding precedent protecting the independence of administrative agencies, yet it has done so through orders that provide little explanation of the legal rationale. Similarly, the Court’s intervention in *Noem v. Perdomo* further demonstrates how consequential constitutional questions may now be addressed through summary orders rather than through the traditional process of briefing, argument, and reasoned opinion. This practice puts the Supreme Court in a position to pander to the wishes of the executive office.

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<sup>38</sup> S. 4388.

<sup>39</sup> Maciolek & Bannon, *supra* note 6.

<sup>40</sup> E. Garrett West, *Taming the Shadow Docket*, 112 VA. L. REV. 347, 368–69 (2026), <https://virginialawreview.org/articles/taming-the-shadow-docket/> (on file with UNT Dallas Law Review).

<sup>42</sup> S. 4388.

When emergency orders resolve disputes of far-reaching influence without reasoning, lower courts are left with limited guidance about how existing precedent should be applied. Over time, this practice risks undermining the stability and predictability that *stare decisis* is intended to provide. The growing reliance on unexplained emergency relief raises important institutional questions about transparency, accountability, and the Court's role within the separation of powers framework.

While the Shadow Docket Sunlight Act would require the Court to deliver a written opinion for orders granting or denying emergency relief and to record the votes of each individual Justice, it would not alter the Court's authority to act quickly in genuine emergencies. Instead, the Act would promote transparency and provide the legal reasoning necessary for lower courts, litigants, and the American people to understand the Court's decisions.

Greater transparency alone will not solve every controversy surrounding the emergency docket. Nevertheless, requiring an opinion and voting disclosure among the Justices would help further preserve the legitimacy of the Court's emergency decision making process while ensuring that significant constitutional developments remain visible, reasonable, and consistent with judicial principles.