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Author
Leal-Schuman, Elijah V

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AN EMBOLDENED EXECUTIVE

The Second Trump Administration and the Rule of Law

By Elijah V. Leal-Schuman

This paper investigates how the rule of law has been reconstituted, rather than dismantled, during the first nine months of Donald Trump's second presidency. Drawing on an aggregate quantitative analysis of federal court rulings, it finds that while district and, to a lesser extent, appellate courts have frequently rebuked the administration, the Supreme Court has repeatedly intervened through its emergency—or "shadow"—docket to legitimize expansive assertions of executive authority. These interventions have not only consolidated presidential power but also altered judicial procedure and intensified divisions within the judiciary itself. Rather than signaling the collapse of legality, the Court's jurisprudence amounts to a broad redefinition of lawful executive power, with the Supreme Court emerging as a willing architect of the president's agenda. The paper concludes that this convergence portends a critical reordering of the American constitutional system—an illiberal turn that, paradoxically but in keeping with historical precedent, may provoke a renewed reckoning with executive power.

I. Introduction

On July 1, 2024, the Supreme Court held in *Trump v. United States* that a sitting president enjoys broad immunity from criminal prosecution for official acts, prompting Justice Sotomayor to warn in dissent that the decision made the President "a king above the law."[1] Yet the ruling did not authorize the president to violate the law; instead, it redefined legality itself to encompass far broader expressions of presidential authority.

The presidential immunity ruling, divided 6–3 along ideological lines, marked a momentous victory in the conservative legal movement's decades-long project to consolidate presidential power. That project is animated by the current Supreme Court majority's espousal of the "unitary executive theory." Originating in Justice Antonin Scalia's "lone wolf" dissent in *Morrison v. Olson* (1988) and now treated as if "handed down from the mountaintop," this theory reads the Constitution as vesting all executive power in the president alone.[2,3] In doing so, it seeks to reconfigure the nation's checks and balances both vertically—by weakening independent agencies and shifting authority from the administrative state to the White House—and horizontally, by strengthening presidential control over the other branches.[4] In the unitary executive account, the seemingly spare command in

1 "Trump v. United States, Certiorari to the United States Court of Appeals for the District of Columbia Circuit," Supreme Court of the United States, July 1, 2024, https://www.supremecourt.gov/opinions/23pdf/23-939_e2pg.pdf.

2 Anastasia Boden, "The Lone Wolf," *SCOTUSblog*, June 17, 2025, https://www.scotusblog.com/2025/06/the-lone-wolf/.

3 Kate Shaw et al., "'Hypercharged' Is the Only Word for This Supreme Court," *The New York Times*, September 30, 2025, https://www.nytimes.com/2025/09/30/opinion/supreme-court-john-roberts-trump.html?smid=nytcore-ios-share&referringSource=articleShare.

4 Ezra Klein, "The Supreme Court Is Backing Trump's Power Grab," *The New York Times*, September 2, 2025, https://www.nytimes.com/2025/09/02/opinion/ezra-klein-podcast-kate-shaw.html.

Article II, Section 1 that "the executive Power shall be vested in a President of the United States of America" is read as a sweeping grant of undivided authority, such that all exercises of executive power must be traceable to, and ultimately controllable by, the president.[5,6] This conception renders long-standing constraints on presidential control over the administrative state and other institutional checks constitutionally suspect and ripe for revision, and provides the ideological backdrop from which *Trump v. United States* "evaporated any ambivalence" about the majority's stance on executive power.[7] It also marked the inception of an unprecedented alignment between the Supreme Court and the executive branch, one where the justices furnish the constitutional language and doctrinal authority for a more centralized presidency.

The Court's embrace of the unitary executive theory in *Trump v. United States* did not emerge in a vacuum, as the conservative political establishment has also long envisioned an empowered presidency under the same theory. Following Trump's 2020 electoral defeat, the conservative Heritage Foundation think tank formulated *Project 2025*—a sprawling, nine-hundred-page "mandate for leadership" that codified seven pillars for confronting the rule of law and fortifying executive power. In its vision, the boundaries of legitimate governance would be redrawn by eroding agency independence, weaponizing federal law enforcement, replacing nonpartisan expertise with loyalist patronage (particularly within the Department of Justice), circumventing congressional controls, suppressing dissent and press freedom, exploiting emergency powers, and neutralizing the Senate's advisory role.[8] The second Trump administration's actions have mirrored these strategies with remarkable fidelity: in nine months, what was once a blueprint is becoming operational orthodoxy, and the present constitutional dynamic increasingly resembles not an aberration, but the predictable fulfillment of a deliberate agenda.

Controversy abounds as the administration has begun to translate this agenda into practice, with recent data revealing both popular and institutional skepticism toward executive overreach and the judiciary's capacity to circumscribe it. An October 2025 Washington Post–ABC News–Ipsos poll found that 64 percent of Americans think Trump is "going too far in expanding presidential power," while an ideologically balanced D.C. legal establishment survey from the same time revealed near unanimity: forty-nine of fifty experts believe Trump's second term poses a "greater or much greater threat to the rule of law than his first."[9,10] Moreover, public confidence in the judiciary stands at a record-low 35 percent—well below the 55 percent OECD average—and 67 percent of Americans fear a "constitutional showdown" in which the courts become powerless to enforce rulings against the executive branch.[11,12] Although opinions diverge sharply along partisan lines, the American state of mind is "collectively grim"—but do the legal outcomes justify this disillusionment?[13]

The federal judiciary remains divided over whether the second Trump administration is violating the rule of law; yet, according to its ultimate arbiters—the Supreme Court—the administration has largely operated legally thus far. Despite hundreds of challenges and frequent rebukes from lower courts, the Supreme Court

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5 Cass R. Sunstein and Adrian Vermeule, "The Unitary Executive: Past, Present, Future," *The Supreme Court Review* 2020, no. 1 (2020), https://doi.org/10.1086/714860.

6 "Article II," in *The Constitution of the United States*, Legal Information Institute, Cornell Law School, accessed December 11, 2025, https://www.law.cornell.edu/constitution/articleii.

7 Joan Biskupic, "How the Roberts Court Became the Trump Court," *CNN*, September 24, 2025, https://www.cnn.com/2025/09/24/politics/john-roberts-20-years-legacy-trump.

8 Michael Sozan and Ben Olinsky, "Project 2025 Would Destroy the U.S. System of Checks and Balances and Create an Imperial Presidency," Center for American Progress, October 1, 2024, https://www.americanprogress.org/article/project-2025-would-destroy-the-u-s-system-of-checks-and-balances-and-create-an-imperial-presidency/.

9 Emily Bazelon, "'Bow to the Emperor': We Asked 50 Legal Experts About the Impact of President Trump's Second Term on the Rule of Law," *The New York Times*, October 6, 2025, https://www.nytimes.com/2025/10/06/magazine/legal-experts-trump-justice-department.html?smid=nytcore-ios-share&referringSource=articleShare.

10 "The Oct. 24-28, 2025 Washington Post-ABC News-Ipsos Poll," *The Washington Post*, October 30, 2025, https://www.washingtonpost.com/tablet/2025/10/30/oct-24-28-2025-washington-post-abc-news-ipsos-poll/.

11 Jason Husser and Zak Kramer, "Elon University Poll: Two-Thirds of Americans Fear Constitutional Crisis Between the Trump Administration and the Courts," *Today at Elon*, Elon University, April 24, 2025, https://www.elon.edu/u/news/2025/04/24/elon-university-poll-two-thirds-of-americans-fear-constitutional-crisis.

12 Benedict Vigers and Lydia Saad, "Americans Pass Judgment on Their Courts," *Gallup News*, Gallup, December 17, 2024, https://news.gallup.com/poll/653897/americans-pass-judgment-courts.aspx.

13 "Supreme Court Emergency Orders Related to the Trump Administration," *Ballotpedia*, last modified 2025, https://ballotpedia.org/Supreme_Court_emergency_orders_related_to_the_Trump_administration,_2025.

has repeatedly granted emergency applications, rendering contested executive actions temporarily lawful while full adjudication continues in lower courts.[14] In effect, the law is not being broken but redefined—deliberately molded in the image of the unitary executive under judicial sanction and defended in the justices' rulings as a necessary correction of past errors and a restoration of the Constitution's "original" allocation of executive power.[15,16] Beyond formal doctrinal and precedential shifts, the Court's alignment with the executive has hastened the erosion of informal constitutional norms, compounding the consequences for democratic governance and the lived experience of constitutionalism in the United States. This paper examines how that alignment operates in practice, and whether it amounts to a reconstitution, rather than a collapse, of the rule of law in Trump's second term.

II. The Second Trump Administration's Scorecard in Federal Court

At the district level—where Georgetown University Law Center professor Steve Vladeck notes that judges are "moving heaven and earth to provide lengthy, written rationales for their decisions"—the second Trump administration has faced "historic resistance."[17,18] Because record-keeping is decentralized and many challenges remain pending, precise accounting is difficult; nonetheless, synthesizing 2025 litigation trackers (*Ballotpedia*, *Lawfare*, *Just Security*, and Skadden Arps) and federal dockets yields a provisional aggregate of the administration's first nine months in court. *Total cases* filed challenging Trump administration policies: ~350; Government *win rate*: ~15%; *Loss rate* (injunctions or rulings against): ~80%; *Mixed* outcomes: ~5%.[19,20,21,22] "Forum shopping"—litigants strategically suing in favorable district courts and appellate jurisdictions—partly explains the administration's poor showing. For instance, in the New England district courts, which feed into the First Circuit, seventeen of twenty active district judges are Democratic appointees as are all five members of the appellate panel. Unsurprisingly, the administration lost forty-six of fifty-one district-level challenges filed in this jurisdiction between January 20 and October 13, and twelve of the fifteen subsequently reviewed by the First Circuit.[23] Adam Bonica—a Stanford political scientist who has closely analyzed district court behavior throughout Trump's second term—observes that, even after accounting for forum shopping, the sheer volume and consistency of district-level rebukes underscores how lower courts have emerged as the "primary arena of meaningful judicial friction" and "cross-ideological resistance" to executive power. Yet he cautions that this "surge must be viewed soberly," for the "pattern inverts" dramatically at the circuit level.[24]

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14 Matt Grossmann, "The Supreme Court Is Enabling Trump's Executive Power," Niskanen Center, October 15, 2025, https://www.niskanencenter.org/the-supreme-court-is-enabling-trumps-executive-power/.

15 "Loper Bright Enterprises v. Raimondo, 603 U.S. ___ (2024)," Justia U.S. Supreme Court Center, accessed December 11, 2025, https://supreme.justia.com/cases/federal/us/603/22-451/.

16 Jeremy Rozansky, "Precedent and the Conservative Court," *National Affairs*, no. 46 (2021), https://nationalaffairs.com/publications/detail/precedent-and-the-conservative-test.

17 Adam Bonica, "The 96% Rebellion: District Courts Mount Historic Resistance, but the Supreme Court Looms," *On Data and Democracy*, May 24, 2025, https://data4democracy.substack.com/p/the-96-rebellion-district-courts.

18 Shaw et al., "'Hypercharged' Is the Only Word."

19 John D. Sauer, *Application to Stay the Order Issue by the United States District Court for the Northern District of Illinois and Request for an Immediate Administrative Stay*, Supreme Court of the United States, October 17, 2025, https://www.supremecourt.gov/DocketPDF/25/25A443/379964/20251017155210488_Trump%20v.%20Illinois%20No.%2025A__%20-%20Stay%20Application%20-%20Final.pdf.

20 "Tracker: Litigation and Legal Challenges to Trump Administration Actions," *Just Security*, last modified 2025, https://www.justsecurity.org/107087/tracker-litigation-legal-challenges-trump-administration/.

21 "Tracking Trump Administration Litigation," *Lawfare*, last modified 2025, https://www.lawfaremedia.org/projects-series/trials-of-the-trump-administration/tracking-trump-administration-litigation.

22 "Trump Administration Regulatory Litigation Tracker," Skadden, Arps, Slate, Meagher & Flom LLP, last modified October 10, 2025, https://www.skadden.com/insights/publications/executive-briefing/trump-administration-regulatory-litigation-tracker.

23 Nate Raymond, "New England Courts Become a Battleground for Challenges to Trump," *Reuters*, October 13, 2025, https://www.reuters.com/legal/government/new-england-courts-become-battleground-challenges-trump-2025-10-13/.

24 Bonica, "The 96% Rebellion."

Outcomes in the federal *courts of appeals*—where Trump appointees now constitute nearly one-third (54 of 179) of all active judges—show increasing deference to the administration.[25] *Total cases* reaching the appellate level: ~105; Government *win rate*: ~45%; *Loss rate*: ~40%; *Mixed* outcomes: ~15%. This near-even success rate underscores the centrality of "who presides" to judicial outcomes. As of mid-July, "every single ruling by an appeals court that the administration had won included at least one Trump-appointed judge on the panel," and only twice has a Trump-appointed appellate judge ruled against the administration. According to trend data aggregated by *Forbes* on July 9, 2025, across both the district and appellate levels, the Trump administration prevailed in 31 percent of cases overall—but in 76 percent when a Trump-appointed judge presided, either alone in district court or as part of an appellate panel. By contrast, rulings issued by non-Trump appointees—including other Republican judges—favored the administration only 14 percent of the time.[26] Nonetheless, this pattern of increasing success on appeal culminates at the Supreme Court, where the 6–3 conservative majority has moved almost uniformly to normalize expansive executive authority within procedural bounds.

Despite the absence of formal merits decisions thus far, the Supreme Court—through "hypercharged" action in both volume and impact on its emergency, or "shadow," docket—has almost invariably subordinated itself to the imperatives of presidential power.[27] *Total cases* reaching the Supreme Court: 28; Government *win rate*: ~80%; *Loss rate*: ~12%; *Mixed* outcomes: ~8%. The second Trump administration's success rate dwarfs the Biden administration's 53 percent—a figure already inflated by the prior administration's practice of only filing applications with "fair prospects" of approval—prompting concern among court watchers about bias in what reporters already describe as a "hyper-partisan era."[28] Further troubling, the expedited timelines deny the justices an opportunity to deliberate and "forge consensus," making partisanship "more apt to influence outcomes." Thus far, the outcomes corroborate this analysis: "in almost every instance" of Trump's success, the justices have divided 6–3 along ideological lines.[29] The high court has drawn sharp criticism for both its reliance on the emergency docket and its outcomes, with opponents decrying its temporary rulings as circumventing procedural norms and embracing partisanship to buttress the presidency. "Should They Just Go Ahead and Put Up a Gold Trump Sign on the Supreme Court?" reads one mid-October editorial; another, penned by a former US Attorney General, declares the Court a "broken institution."[30,31]

Defenders, by contrast, contend that the Court is merely "at the mercy" of circumstances created by the administration's "flood-the-zone" legal strategy.[32] The twenty-eight emergency applications filed by the Trump administration in its first nine months exceed those filed by the Bush, Obama, and Biden administrations over their entire terms combined (twenty-seven)—an unprecedented volume.[33] Yet the justices are not obligated to grant such requests, and their willingness to do so repeatedly reflects a choice to privilege governmental continuity over the harms imposed on those affected while litigation plays out. The same defenders also invoke a theory of "conserving constitutional capital": by siding with Trump in many interim disputes, the justices purportedly

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25 *Courts, Confirmations & Consequences: How Trump Restructured the Federal Judiciary and Ushered in a Climate of Unprecedented Hostility Toward LGBTQ+ People and Civil Rights*, Lambda Legal, January, 2021, https://lambdalegal.org/wp-content/uploads/2021/01/judicial_report_2020-1.pdf.

26 Alison Durkee, "Trump's Success Rate in the Courts So Far: 31%," *Forbes*, July 9, 2025, https://www.forbes.com/sites/alisondurkee/2025/07/09/trumps-success-rate-in-the-courts-so-far-31/.

27 Shaw et al., "'Hypercharged' Is the Only Word."

28 Adam Liptak, "On the Supreme Court's Emergency Docket, Sharp Partisan Divides," *The New York Times*, September 14, 2025, https://www.nytimes.com/2025/09/14/us/politics/supreme-court-emergency-docket-partisan.html?smid=nytcore-ios-share&referringSource=articleShare.

29 Erwin Chemerinsky, "The Trump Docket," *SCOTUSblog*, October 7, 2025, https://www.scotusblog.com/2025/10/the-trump-docket/.

30 Emily Bazelon and David French, "Should They Just Go Ahead and Put Up a Gold Trump Sign on the Supreme Court?" *The New York Times*, October 9, 2025, https://www.nytimes.com/2025/10/09/opinion/trump-supreme-court-term.html.

31 Tara Suter, "Holder Pushes Democrats to Consider Reforming 'Broken' Supreme Court," *The Hill*, November 4, 2025, https://www.thehill.com/regulation/court-battles/5589304-eric-holder-supreme-court-reform/.

32 Mattathias Schwartz and Zach Montague, "Federal Judges, Warning of 'Judicial Crisis,' Fault Supreme Court's Emergency Orders," *The New York Times*, October 11, 2025, https://www.nytimes.com/2025/10/11/us/politics/judicial-crisis-supreme-court-trump.html?smid=nytcore-ios-share&referringSource=articleShare.

33 Ballotpedia, "Supreme Court Emergency Orders."

build the credibility and leverage they will need should they confront him summarily on the merits docket.[34] But repeated grants of emergency relief embolden the very assertions of executive power they are ostensibly stockpiling capital to restrain and reinforce a new baseline of presidential authority in the meantime. Controversy and complications aside, emergency jurisprudence (see section IV, subsection C) via the shadow docket remains the only lens through which the Supreme Court has so far addressed the legality of Trump's second term. The administration's interim success reveals an institutional convergence between executive and judicial priorities, transforming both the substance of executive power and the procedures of judicial review through unconventional yet lawful strategies.

III. Supreme Court Merits Docket Predictions

The Supreme Court has sanctioned the vast majority of the second Trump administration's actions on procedural, temporary grounds, but these emergency orders do not address cases on their legal merits. Thus, the true test of this new alignment between the Supreme Court and the presidency will come on the merits docket. These forthcoming decisions will reveal whether the justices intend to calcify the redefinition of lawful executive power signaled by their emergency orders, or instead reimpose boundaries once the underlying legality of Trump's policies is squarely before them. Some experts foresee "major headwinds" for Trump once the underlying legality of pending challenges is adjudicated, while others—whether due to "coincidence, ideology, or pragmatism"—expect the justices' "wish to placate the president" to prevail.[35,36] The Court has already agreed to hear several consequential cases on its merits docket beginning in November 2025 and is likely to accept others before Trump leaves office. While expert opinions vary, the following overview provides the closest approximation of a "consensus" on the probable outcomes and their implications, synthesizing legal scholarship, expert commentary, and algorithmic prediction models.

The paired tariffs cases—*Learning Resources v. Trump* and *Trump v. V.O.S. Selections*—are the first challenges to the second Trump administration's policies to reach the Supreme Court's merits docket, with oral arguments held on November 5, 2025. Uniquely positioned as "ground zero," the cases carry profound implications for the president's economic and constitutional authority, with legal commentators warning that a win for the administration would create a "Tariff King" and "cement presidential primacy" in tax and trade matters, usurping both Congressional and judicial powers.[37] The tariff cases also function as a potential "referendum" on the Court's "legitimacy dilemma," stemming from its majority's perceived pro-Trump bias—it is the justices' first opportunity to "say 'no' to Trump in a lasting way."[38,39] The administration rushed to ensure that the tariffs cases were heard first, expecting to prevail largely because of Justice Kavanaugh's prior assertion that the "major questions" and "nondelegation" doctrines—traditional constraints on presidential discretion—do not apply in "national security or foreign policy contexts."[40] Although initial expert predictions corroborated the administration's confidence, the

34 Klein, "The Supreme Court."

35 "The New SCOTUS Term Will Reshape America's Constitution," *The Economist*, October 2, 2025, https://www.economist.com/leaders/2025/10/02/the-new-scotus-term-will-reshape-americas-constitution?giftId=656e9d61-c293-4c62-8d95-60e9ea9a76ee&utm_campaign=gifted_article.

36 Liptak, "On the Supreme Court's Emergency Docket."

37 Louise Radnofsky, "The Tariff King and the Supreme Court," *The Wall Street Journal*, November 3, 2025, https://www.wsj.com/opinion/donald-trump-tariff-cases-supreme-court-ieepa-9aa1e9e0.

38 Tara Leigh Grove, "The Supreme Court's Legitimacy Dilemma," review of *Law and Legitimacy in the Supreme Court*, by Richard H. Fallon, Jr., *Harvard Law Review* 132, no. 8 (2019), https://harvardlawreview.org/print/vol-132/the-supreme-courts-legitimacy-dilemma/.

39 Ann E. Marimow, "Supreme Court Confronts Trump and His Tariffs in Test of Presidential Power," *The New York Times*, November 3, 2025, https://www.nytimes.com/2025/11/03/us/politics/supreme-court-trump-tariffs.html?smid=nytcore-ios-share&referringSource=articleShare.

40 Mark Sherman, "A Major Question for the Supreme Court: Will It Treat Trump as It Did Biden?" *Associated Press*, November 3, 2025, https://www.apnews.com/article/supreme-court-tariffs-7c44eedbf32bec35fc638e9953db2aeb.

justices' remarkably skeptical questioning on November 5 tipped the scales, leaving the outcome far from assured for the Trump administration.[41]

Nonetheless, a Trump victory would affirm that the International Emergency Economic Powers Act's "import regulation" provision authorizes the president to unilaterally adjust US tariff schedules, even though the statute contains no direct mention of tariffs.[42] Congress's bedrock "power of the purse" would be "wished away" merely by invoking the words "foreign policy," extending the unitary executive approach into the realm of economic regulation by allowing "the president's foreign affairs power [to] trump basic Congressional power." In practical terms, the president could "raise enormous amounts of revenue through effective taxes under the guise of regulating a foreign emergency."[43] Judicial oversight would likewise be curtailed by placing the discretion to "declare an emergency" exclusively within presidential purview—subverting the "major questions" and "non-delegation" doctrines, which prescribe deference to judicial determination where authorizing statutes fail to "speak clearly enough" on matters of "vast economic and political significance."[44] The multi-pronged implications for the separation of powers—combined with the material reality that "tariffs are taxes on Americans"—make *Learning Resources* among the "most consequential" pending merits docket cases.[45] Yet the legality of Trump's unilateral tariff authority is now expected to be an extremely "close call," contrary to earlier expectations more favorable to the president.[46]

With oral arguments held on December 8, 2025, *Trump v. Slaughter* will determine whether "congressional statutes can protect the heads of independent agencies from direct presidential control." External analyses—and signals from the Supreme Court in oral argument and prior emergency docket proceedings—suggest that Trump is likely to secure a favorable ruling in *Slaughter*, vertically extending the unitary executive theory into the core of agency independence.[47] Such a ruling would upend both the statutory protections in the Federal Trade Commission Act (1914) that limit removals to "inefficiency, neglect of duty, or malfeasance" and the ninety-year-old precedent affirming agency independence, first articulated when the Court rejected President Roosevelt's attempt to dismiss an FTC commissioner in *Humphrey's Executor v. United States* (1935).[48] In that unanimous decision, the Court upheld Congress's power to insulate commissioners of independent agencies from at-will presidential removal, and in the decades since, it has served as a cornerstone of the modern administrative state by securing a measure of autonomy for multimember commissions. A ruling in Trump's favor further means that federal courts would no longer have authority over the executive branch to order the reinstatement or retention of removed officials. In immediate terms, Trump could lawfully terminate FTC Commissioner Rebecca Slaughter, along with leaders of the FCC, NLRB, and MSPB. More broadly, a Trump victory would eradicate what remains of agency independence by granting the president sweeping discretion to remove commissioners at will under the "unitary executive" theory—as Justice Kagan put it in dissent, "transferring governmental authority from Congress to the President, thus reshaping our Nation's separation of powers."[49]

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41 Jonathan Turley, "Supreme Court Ruling on Trump Tariffs Comes Down to a Numbers Game," *Fox News*, November 6, 2025, https://www.foxnews.com/opinion/jonathan-turley-supreme-court-ruling-trump-tariffs-comes-down-numbers-game.

42 Christopher A. Casey et al., *The International Emergency Economic Powers Act: Origins, Evolution, and Use*, Congressional Research Service, 2025, https://www.congress.gov/crs_external_products/R/PDF/R45618/R45618.16.pdf.

43 Jack Goldsmith and John Guida, "Why It Will Be Hard for Five Justices to Bless Trump's Tariffs," *The New York Times*, November 5, 2025, https://www.nytimes.com/2025/11/05/opinion/supreme-court-tariffs-trump.html.

44 Matt Ford, "The Roberts Court Is Winning Its War on American Democracy," *The New Republic*, September 22, 2025, https://newrepublic.com/article/199773/roberts-court-winning-war-american-democracy.

45 Ben Werschkul, "Are Tariffs Taxes on Americans? The Fate of Blanket Tariffs Appears to Hinge on Questions Trump Has Evaded for Years," *Yahoo Finance*, November 5, 2025, https://finance.yahoo.com/news/are-tariffs-taxes-on-americans-the-fate-of-blanket-tariffs-appears-to-hinge-on-questions-trump-has-evaded-for-years-203827145.html.

46 Goldsmith and Guida, "Why It Will Be Hard."

47 "The President's Agenda Looks Safe at the Supreme Court—with a Few Exceptions," *The Economist*, October 2, 2025, https://www.economist.com/united-states/2025/10/02/the-presidents-agenda-looks-safe-at-the-supreme-court-with-a-few-exceptions.

48 Amy Howe, "Supreme Court Allows Trump to Fire FTC Commissioner," *SCOTUSblog*, September 22, 2025, https://www.scotusblog.com/2025/09/supreme-court-allows-trump-to-fire-ftc-commissioner/.

49 J. Kagan, "Donald J. Trump, President of the United States, et al. v. Rebecca Kelly Slaughter, et al. on Application for Stay," Supreme Court of the United States, September 22, 2025, https://www.supremecourt.gov/opinions/24pdf/25a264_o759.pdf.

In the seemingly analogous *Trump v. Cook*, however, a Trump defeat appears all but foregone. The Court will hear oral arguments in January 2026, but has already distinguished the Federal Reserve as a "uniquely structured, quasi-private entity," in light of the Fed's specialized mandate to manage monetary policy at some remove from day-to-day political control. That characterization, adopted in a May 22, 2025, emergency order that permitted Trump's firings at the NLRB and MSPB, has been used to justify distinct, higher standards for removals at the Fed.[50] Unlike *Trump v. Slaughter*, the administration is seeking to remove Cook "for cause," yet the justices appear unconvinced that alleged mortgage fraud occurring before Cook took office constitutes sufficient cause for dismissal.[51] On the question of judicial legitimacy, Georgetown law professor and federal-courts expert Steve Vladeck argues that this "bespoke exception" for Fed removals is "fatal" to the coherence of the unitary executive theory—applied selectively, he contends, to serve the president's will where the impact on public perception is not too daunting.[52] It renders the theory an ad-hoc political tool rather than an authoritatively consistent legal doctrine, a judgement that extends to its wielders, the Supreme Court justices, who can leverage it to reshape the presidency in their preferred political image. Nonetheless, a former staff attorney in the Reagan Solicitor General's office maintains that this Federal Reserve case—or the forthcoming challenge to birthright citizenship—must be where the Supreme Court "draws the line," viewing a Trump victory as highly improbable and, in a case of success, utterly subversive to the rule of law and judicial legitimacy.[53]

Confirmed for the Supreme Court's merits docket and set to begin sometime in early 2026, the decision on the underlying legality of birthright citizenship promises to be a watershed legal and political moment of the second Trump presidency. In advance of that merits ruling, the justices issued an emergency order in *Trump v. CASA* that bars federal courts from granting "nationwide injunctions" against executive policies after hearing limited oral argument. That order held that injunctions may bind only the specific parties before the court, protecting no one else—a jarring departure from how federal injunctions have long operated and, in Justice Sotomayor's dissenting words, "nothing less than an open invitation for the government to bypass the Constitution," because adverse rulings against nationwide executive actions no longer yield nationwide relief.[54] At the same time, that emergency order upheld the lower-court stay against the president's birthright-citizenship order but declined to address its constitutionality directly, where a loss for the Trump administration is practically assured.[55] The Fourteenth Amendment unequivocally guarantees citizenship to "all persons born or naturalized in the United States, and subject to the jurisdiction thereof," a line that has anchored more than a century of consensus on birthright citizenship's breadth and was interpreted in *United States v. Wong Kim Ark* (1898) to confer citizenship on nearly all children born on US soil.[56] Thus, a reading of the Fourteenth Amendment that produces a Trump victory would represent not only a flagrant rupture with long-settled constitutional interpretation but, in the eyes of many scholars and civil-rights advocates, a profound redefinition of what it means to "be an American."[57]

Signs indicate a mixed—but generally unfavorable—outlook for the Trump administration's expedited deportations to an El Salvadorian super-prison, implemented without due process under the Alien Enemies Act of 1798, a wartime statute that authorizes the president to detain and deport non-citizens from "enemy" nations based solely on their nationality.[58] While the justices have not yet agreed to hear the issue on its merits and the

50 "Donald J. Trump, President of the United States, et al. v. Gwynne A. Wilcox, et al. on Application for Stay," Supreme Court of the United States, May 22, 2025, https://www.supremecourt.gov/opinions/24pdf/24a966_1b8e.pdf.

51 Mark Sherman, "Trump Asks the Supreme Court for an Emergency Order to Remove Lisa Cook from the Fed Board," *Associated Press*, October 1, 2025, https://apnews.com/article/supreme-court-trump-lisa-cook-federal-reserve-d7cd7bf7b8bca591b1748591836c3645.

52 Shaw, "'Hypercharged' Is the Only Word."

53 Bazelon, "'Bow to the Emperor.'"

54 "Trump, President of the United States, et al. v. CASA, INC., et al. on Application for Stay," Supreme Court of the United States, June 27, 2025, https://www.supremecourt.gov/opinions/24pdf/24a884_8n59.pdf.

55 Justin Jouvenal, "Supreme Court and Trump Are Headed for a Reckoning in New Term," *The Washington Post*, October 5, 2025, https://www.washingtonpost.com/politics/2025/10/05/supreme-court-trump-tariffs-immigration-economy/.

56 "Fourteenth Amendment," in *The Constitution of the United States*, Library of Congress, accessed November 7, 2025, https://constitution.congress.gov/constitution/amendment-14/.

57 Abbie VanSickle, "Trump Administration Asks Supreme Court to Allow End of Birthright Citizenship," *The New York Times*, September 26, 2025, https://www.nytimes.com/2025/09/26/us/politics/supreme-court-birthright-citizenship.html.

58 The Economist, "The President's Agenda Looks Safe."

outcome is not a foregone conclusion, these expedited deportations implicate the fundamental right to due process and raise significant separation-of-powers concerns, chiefly the unilateral executive authority over detention and removal without judicial oversight. The White House appears cognizant of these stakes, having refrained from pressing its Alien Enemies Act deportations to the Supreme Court, which remain blocked by the Fifth Circuit Court of Appeals.[59] Past lower court decisions (though mixed) and emergency docket rulings—with the justices demanding that the government provide detainees "constitutionally adequate notice" and the opportunity to challenge removal in court through an April 19 order—underscore that detentions and deportations lacking robust procedural safeguards face serious constitutional jeopardy.[60] In such circumstances, the Court is likely to reaffirm due process protections and reject arbitrary circumventions.

As with the domestic campaigns to redefine legality, Trump's second term has also reconstituted the effective limits on presidential uses of lethal force beyond US borders. President Trump's maritime war against alleged Venezuelan "narco-terrorists" is yet to face a legal challenge aiming to stop the deadly boat strikes in any court.[61] This is because foreign victims killed in international waters (especially those now deceased) face significant barriers to suing in US courts, while sovereign immunity, the political question doctrine, and Pentagon policies deliberately repatriating survivors or sending them to third countries so they "do not enter the US detention or legal system," and therefore have no standing to sue, have so far insulated the campaign from meaningful judicial review.[62] Thus, the boat strikes—twenty-two as of early December 2025, resulting in eighty-seven deaths—make salient the widening gap between the law in the books and the law in action.[63] This series of operations—though viewed by most experts as blatantly unlawful under prevailing standards for lawful self-defense and armed conflict—has proceeded since September 2, 2025, and is openly celebrated by the administration, all without any court passing on its legality.

Nonetheless, any account of the rule of law under Trump's second term would be incomplete without considering his notorious boat strikes, even if only through a hypothetical merits ruling. International law specialists, former Justice Department officials, and senior military lawyers have deemed the missile attacks on suspected drug boats in international waters "patently illegal" premeditated extrajudicial killings that would almost certainly falter under judicial review in a domestic or international tribunal.[64] In peacetime, deliberately targeting civilians—even purported criminals—who pose no imminent threat is murder under US statutory law and "arbitrary deprivation of life" under international human rights law.[65] Moreover, the administration's assertion that drug-cartel smuggling "constitute[s] an armed attack against the United States," and that there exists a "legal state of armed conflict" permitting the treatment of smugglers as enemy combatants, has been widely rebuked as legally untenable.[66] Journalists and legislators have underscored that the administration's late-September notice to Congress offers "no legal theory" to support the armed conflict determination—lacking engagement with international or domestic law, or citation of precedents—revealing how easily a president can circumvent the

59 Kyle Cheney and Josh Gerstein, "Appeals Court Rejects Trump's Bid to Deport Venezuelan Immigrants He Deems 'Alien Enemies,'" *Politico*, September 3, 2025, https://www.politico.com/news/2025/09/03/fifth-circuit-ruling-trump-alien-enemies-00541115.

60 Nina Totenberg, "Supreme Court Blocks, for Now, New Deportations under 18th Century Wartime Law," *NPR*, April 19, 2025, https://www.npr.org/2025/04/19/g-s1-61385/supreme-court-block-deportations.

61 "Trump Says Boat Crews Are Narco-Terrorists. The Truth Is More Nuanced, AP Finds," *Associated Press*, *NPR*, November 8, 2025, https://www.npr.org/2025/11/08/nx-s1-5602884/drug-smuggling-boats.

62 Damien Cave et al., "Inside the Pentagon's Scramble to Deal with Boat Strike Survivors," *The New York Times*, December 9, 2025, https://www.nytimes.com/2025/12/09/us/politics/pentagon-boat-strike-survivors.html.

63 Dani Anguiano and Robert Mackey, "Pentagon Announces It Has Killed Four Men in Another Boat Strike in Pacific," *The Guardian*, December 4, 2025, https://www.theguardian.com/us-news/2025/dec/04/pentagon-boat-strike-pacific.

64 Charlie Savage, "The Peril of a White House That Flaunts Its Indifference to the Law," *The New York Times*, October 24, 2025, https://www.nytimes.com/2025/10/24/us/politics/white-house-boats-law.html.

65 "Arbitrary Deprivation of Life," United Nations Office on Drugs and Crime, July, 2018, https://www.unodc.org/e4j/en/terrorism/module-8/key-issues/arbitrary-deprivation-of-life.html.

66 Franco Ordoñez and Ryan Lucas, "As Strikes on Alleged Drug Boats Grow, So Do Questions About Their Legality," *NPR*, October 24, 2025, https://www.npr.org/2025/10/24/nx-s1-5584173/trump-drug-boats-venezuela-maduro.

traditional expectation that contested uses of lethal force be backed by substantive legal rationale.[67] Nonetheless, even in the case of an armed conflict, the strikes still constitute a war crime. As put by the *New York Times*, Trump is "transmuting acts of crime into acts of war" and "dictat[ing] his own factual and legal realities" to wield "one of the rawest uses of executive authority" without satisfying the usual thresholds for self-defense or the existence of an armed conflict.[68,69] Taken together, the boat-strike campaign shows how, when victims are foreign, offshore, and structurally unable to reach US courts, formally binding domestic and international limits on the use of force can be effectively reconstituted as optional constraints. Trump's fictitious "war" on narcoterrorism vividly illustrates how an emboldened executive can wield lethal force in clear tension with the rule of law without definitively violating it while judicial review remains, at best, hypothetical.

Other consequential challenges—ranging from the impoundment of congressionally appropriated funds to domestic military deployments, ICE arrests, and deportations of academics implicating the First Amendment—could also reach the Supreme Court's merits docket. Regardless of which cases ultimately advance, both the nine black-robed rulers and President Trump are "headed for a reckoning" in the Court's new term.[70] Profound shifts in agency independence—with the notable Federal Reserve exception—appear imminent under the aegis of the unitary executive theory, while challenges more directly implicating the Constitution, such as due process and birthright citizenship claims, will likely falter. Tariff authority, initially in the administration's favor, now appears jeopardized.

Thus far, the president has assumed an "indulgent attitude" toward the Court's ideological receptivity to the unitary executive theory, actively "exploiting it" through relentless appeals to the Court's emergency docket—a tactic that "combines the theory with a method" aimed at reshaping the separation of powers.[71] Yet attempting to read the justices' minds remains an imposing endeavor. Taken together, the new merits docket will "force the justices to either embrace Trump's sweeping assertions of power or curb them," presenting a "major test" for both the Supreme Court's increasingly political reputation and the durability of the president's agenda. Substantial time will be spent "contemplating and writing about the separation of powers," with outcomes that could supplant the current constitutional order with one that "looks very different" for executive power, the judiciary as an institution, and the lived realities of everyday Americans.[72,73]

IV. Implications for the Constitutional Order

The jurisprudential project to expand presidential power via the unitary executive theory, first prominently advanced before the Supreme Court in Justice Scalia's 1988 dissent in *Morrison v. Olson*, reached a historic inflection point in 2024 with the Supreme Court's decision in *Trump v. United States*, which granted broad immunity to the sitting president. If the first nine months of the second Trump administration are any indication, the US laws governing presidential power are likely to look markedly different by January 20, 2029. As the Supreme Court's emergency-docket scorecard and anticipated merits rulings discussed earlier reveal, the emerging pattern of highest Court's decisions consistently shifts the effective boundaries of presidential authority in the executive's favor. Yet the exceptional character of the American constitutional system lies not only in its Bill of Rights—the freedoms it enumerates—but in its architecture: a design, as Justice Scalia himself observed, meant "to protect liberty by diffusing power among the different branches."[74] By dispersing authority across the legislative, executive, and judicial branches, the separation of powers keeps the government dynamic, preserving

67 "[Title unavailable – confidential Justice Department memorandum on 'drug boat' strikes]," U.S. Department of Justice, memorandum reproduced in *The New York Times* document archive, accessed December 11, 2025, https://static01.nyt.com/newsgraphics/documenttools/ed9a9b14a6fde33b/3ce6c48b-full.pdf.

68 Julian E. Barnes and Tyler Pager, "Trump Administration Authorizes Covert C.I.A. Action in Venezuela," *The New York Times*, October 15, 2025, https://www.nytimes.com/2025/10/15/us/politics/trump-covert-cia-action-venezuela.html.

69 Savage, "The Peril of a White House."

70 Jouvenal, "Supreme Court and Trump."

71 The Economist, "The New SCOTUS Term."

72 The Economist, "The New SCOTUS Term."

73 Jouvenal, "Supreme Court and Trump."

74 Boden, "The Lone Wolf."

the lived experience of constitutionalism—even when individual rights come under strain from one branch—through structural checks and balances as well as internal norms. In this sense, what is at stake in the second Trump administration is not simply the fate of particular rights and presidential prerogatives, but the future equilibrium of that constitutional architecture and the extent to which it continues to constrain an emboldened executive. The current developments do not signal the collapse of legality, but its reconstitution. They reshape the practical limits on presidential power, the expectations surrounding obedience to the courts, and the judiciary's own capacity to circumscribe the executive.

A. New Norms, No Restraint

The second Trump administration has not subverted the rule of law or the constitutional balance outright; it has refined and accelerated what historians call the "slow, century-long drift of authority toward the presidency."[75] What distinguishes this moment is the Supreme Court's ready willingness to ratify that drift, even if just tentatively in theory. The administration's success on the emergency docket suggests that the justices "are more concerned with lower courts preventing Trump from doing things that are facially unconstitutional than about Trump actually taking illegal action"—a "strange" and troubling priority, observes constitutional law scholar and ABC News Supreme Court contributor Kate Shaw of the University of Pennsylvania.[76] These developments indicate not a sudden constitutional rupture, but a redefinition of baseline expectations about how far and by what means presidential power may be pushed in the first place before courts intervene, and on what terms they do so. Both the presidency's heightened willingness to test the limits of its authority and the Court's altered posture toward reviewing those tests contribute to this emerging shift of norms.

Dissenting from the Court's emergency ruling in *Wilcox*, Justice Sotomayor noted that while "other litigants must follow the rules, the administration has the Supreme Court on speed dial," a reality Trump's legal team is readily exploiting.[77] By "blitzing" a Court increasingly sympathetic to executive power with emergency applications designed to preempt lower-court rejections, the administration "stretches presidential authority to its limit without waiting to see if the courts check it," seeking to redefine the boundaries of lawful governance.[78,79] While not outright defiance, this approach reflects little deference toward a branch of government meant to be "coequal" to the presidency—a posture that directly contravenes the informal norms and customs surrounding legal procedure that have traditionally served as an internal restraint on executive power.

Critics have described Trump's posture as one of "shamelessness and contempt for institutional norms," extending beyond his rapid emergency appeals to the Supreme Court into more personal affronts.[80] He and Attorney General Pam Bondi have "vindictively and selectively" directed the Department of Justice to prosecute perceived enemies—including James Comey, Leticia James, John Bolton, and the Open Society Foundations—by installing compliant attorneys; a federal district judge later dismissed the Comey and James indictments, ruling the prosecutor—former personal Trump lawyer Lindsey Halligan—was unlawfully appointed.[81,82] Trump has publicly berated "radical" lower-court judges on social media, at times demanding impeachment and prompting the filing

75 The Economist, "The New SCOTUS Term."
76 Klein, "The Supreme Court."
77 Supreme Court of the United States, "Donald J. Trump v. Gwynne A. Wilcox."
78 Breanne Deppisch, "Trump Administration Swarms SCOTUS with Emergency Requests and Sees Surprising Success," *Fox News*, July 3, 2025, https://www.foxnews.com/politics/trump-administration-torpedoes-scotus-emergency-requests-sees-surprising-success.
79 The Economist, "The New SCOTUS Term."
80 Ross Douthat, "Will Trump's Imperial Presidency Last?" *The New York Times*, September 6, 2025, https://www.nytimes.com/2025/09/06/opinion/trump-caesar-imperial-presidency.html.
81 Chris Stein, "'Dangerous Abuse of Power': Lawmakers Sound Alarm over Comey Indictment," *The Guardian*, September 26, 2025, https://www.theguardian.com/us-news/2025/sep/26/james-comey-indictment-reaction.
82 Dareh Gregorian et al., "Judge Dismisses Cases Against James Comey, Letitia James After Finding Prosecutor Was Unlawfully Appointed," *NBC News*, November 24, 2025, https://www.nbcnews.com/politics/justice-department/judge-dismisses-cases-james-comey-letitia-james-finding-prosecutor-was-rcna244775.

of official articles by Republican lawmakers, seeking to pressure them into issuing favorable rulings.[83,84] He issued a February 18, 2025 executive order, "Ensuring Accountability for All Agencies," declaring that "the president and attorney general's opinions on questions of law are controlling on all employees in the conduct of their official duties"; scores of career civil servants have been fired as a result of this effective ideological-conformity mandate, with many more resigning.[85,86] Taken together, these episodes show how presidential norm-breaking within and around the justice system can simultaneously reconfigure the practical constraints on executive power without immediately crossing formal legal lines. Emboldened behavior that dances around the law—such as selective prosecution, judicial intimidation, and internal demands for conformity—changes how the law itself operates in practice.

Beyond this behavior more directly adjacent to the rule of law, the administration has wielded legally dubious but decisively norm-defying loyalty pressures against other institutions that have traditionally functioned as checks on presidential power. The administration has withheld federal funding to pressure law firms, universities, and media organizations into adopting its "anti-DEI" agenda, while making reporter access to the White House and unclassified Pentagon materials contingent on accepting stringent monitoring and loyalty-style conditions, prompting a New York Times lawsuit challenging these restrictions on press access.[87,88] President Trump has politically pressed state legislators to gerrymander US House maps before the 2026 midterm elections to preserve his conservative majority.[89] As Pulitzer Prize-winning journalist on authoritarianism M. Gessen warns, this broader shift in posture makes clear that "the price of admission to Trump's America is aggressive compliance"—that is, a willingness by institutions to align their speech, policies, and even district maps with executive preferences in order to avoid retaliation.[90] Consequently, these abnormal pressures on funding, media, and elections reinforce the legal reconstitution of presidential power by reshaping the costs of otherwise lawful resistance.

Such unorthodox manipulation of legal-adjacent and institutional constraints underscore that "the rule of law within the White House depends chiefly on norms," yet President Trump's tendency to flaunt tradition is unmistakable.[91] They also expose the "structural weakness of the law (in isolation) as a check on the presidency": formal rules do little on their own if presidents are willing to manipulate them and other institutions hesitate to respond. The recent erosion of informal rules—about whom the Department of Justice prosecutes, how the White House treats the press, and how presidents speak about judges—shows how quickly legal "reality" can shift when procedural and institutional norms are no longer observed. Both formally and informally, "the powers that Trump has deployed in a provisional and legally dubious manner" reveal how "the executive can just do a lot of things before constitutional restraints catch up with him," and how conduct that remains technically legal, such as sustained antagonistic rhetorical and conformity pressure, can still carry concrete consequences for institutions and individuals.[92] In this sense, the second Trump administration illustrates how deeply shared expectations and

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83 Jack Fink, "Texas Congressman Files Impeachment Articles vs. Judge Who Blocked Mass Deportations," *CBS News*, March 26, 2025, https://www.cbsnews.com/texas/news/texas-congressman-brandon-gills-impeachment-articles-judge-james-boasberg-blocked-president-trump-mass-deportation/.

84 Jan Wolfe, "In 20 Years Under John Roberts, a Dramatic Rightward Turn for the U.S. Supreme Court," *Reuters*, September 8, 2025, https://www.reuters.com/legal/government/20-years-under-john-roberts-dramatic-rightward-turn-us-supreme-court-2025-09-08/.

85 "Ensuring Accountability for All Agencies," The White House, February 18, 2025, https://www.whitehouse.gov/presidential-actions/2025/02/ensuring-accountability-for-all-agencies/.

86 Bazelon, "'Bow to the Emperor.'"

87 Masha Gessen, "This Is the Feeling of Losing a Country. I Know It Well," *The New York Times*, September 21, 2025, https://www.nytimes.com/2025/09/21/opinion/trump-kirk-trans-people-russia.html.

88 David E. Sanger, "The Pentagon, the Press and the Fight to Control National Security Coverage," *The New York Times*, September 24, 2025, https://www.nytimes.com/2025/09/24/us/politics/pentagon-reporters.html.

89 Yunior Rivas, "Trump Intensifies Pressure on Indiana Republicans to Gerrymander," *Democracy Docket*, November 17, 2025, https://www.democracydocket.com/news-alerts/trump-intensifies-pressure-on-indiana-republicans-to-gerrymander/.

90 Gessen, "This Is the Feeling."

91 Savage, "The Peril of a White House."

92 Douthat, "Will Trump's Imperial Presidency Last?"

habits of restraint are interwoven with the written law itself, and how the constitutional order depends on both at once. That dependence makes the reconstitution of legality through norm erosion both possible and perilous.

B. Compliance with Court Rulings

The Trump administration's approach to judicial oversight reflects Trump's personal contempt for norms via a pattern of selective compliance: it treats the Supreme Court as the only tribunal to which it must fully defer, while testing how far it can disregard or dilute adverse rulings from lower courts without provoking decisive sanctions. According to a Washington Post empirical analysis, in 57 cases out of 165 where lower courts ruled against Trump's policies—about 35 percent—administration officials were accused of defying or frustrating court oversight by delaying compliance, misrepresenting facts, withholding evidence, or quietly working around injunctions.[93] Despite a lack of formal contempt orders or sanctions in most of these cases, the data show widespread exploitation of the gray areas of lower court rulings by the executive branch—briefly continuing legally enjoined actions or adopting the narrowest possible reading of orders—to evade immediate repercussions. In one high-profile instance, after a district judge blocked deportations without due process under the Alien Enemies Act in March, the administration refused to turn around planes carrying Venezuelan migrants already en route to El Salvador. The court later found Trump officials in "willful disregard" of its order and initiated contempt proceedings.[94] These practices reconstitute the practical meaning of judicial review by normalizing partial obedience to lower courts while reserving full compliance for the Supreme Court alone.

District courts—which Trump has derided as instruments of "judicial tyranny"—have borne the brunt of this selective foot-dragging and noncompliance strategy, particularly with respect to national guard deployments, deportation, funding, and the reinstatement of dismissed federal employees. In its Chicago national guard deployment emergency application, the administration even insisted that lower courts "may not review the president's judgment at all," an argument applied in other challenges as well.[95] Moreover, when pressed for public comment over concerns of cooperation and adherence to legality, the White House has asserted that "the real threat to the rule of law is these lower court judges who are consistently ignoring the law in service of their own political agendas," reaffirming its pugnacious stance toward the trial bench. A former chief justice of the Florida Supreme Court has likened this kind of sustained political attack on lower courts to historical efforts by foreign leaders to weaken judicial independence warning—albeit in stark terms—that "all you have to do is look back on what occurred in Nazi Germany."[96] This analogy refers narrowly to Trump's treatment of the judiciary, not the administration as a whole. Nonetheless, in light of the president's contempt for lower courts, the administration continues to obey the Supreme Court in full, which it has tacitly deemed the only legitimate arbiter of the legality of executive actions.

But even the judiciary's conservative justices and current Supreme Court majority, publicly committed to expanding presidential power, could ultimately find themselves under siege. After losing the 2020 election, Trump wrote on his social media platform, Truth Social, that certain circumstances "allow for the termination of all rules, regulations, and articles, even those found in the Constitution."[97] His claim that "he who saves his country does not violate any laws" distills an absolutist conception of executive necessity—one that collapses legality into loyalty by treating the leader's asserted sense of national salvation as its own justification for breaking the law.[98] If this view were to take deeper hold beyond Trump's core supporters, constitutional limits

93 Justin Jouvenal, "Trump Officials Accused of Defying 1 in 3 Judges Who Ruled Against Him," *The Washington Post*, July 21, 2025, https://www.washingtonpost.com/politics/2025/07/21/trump-court-orders-defy-noncompliance-marshals-judges/.

94 Jouvenal, "Trump Officials Accused of Defying."

95 Sauer, *Application to Stay the Order Issue*.

96 Brianna Tucker, "Retired Judges Warn That the Rule of Law Is Unraveling," *The Washington Post*, November 28, 2025, https://www.washingtonpost.com/politics/2025/11/28/judges-trump-administration-rule-of-law/.

97 "Trump Claims Grounds for 'Termination' of U.S. Constitution," *CBS News*, December 5, 2022, https://www.cbsnews.com/news/donald-trump-claims-grounds-termination-us-constitution-twitter/.

98 J. Michael Luttig, "President for Life," *The Atlantic*, December 2025, https://www.theatlantic.com/magazine/archive/2025/12/trump-third-term-authoritarianism/684616/.

would risk becoming contingent on the president's perceived righteousness rather than on any independent legal or institutional check. His vice president, J.D. Vance, has echoed this ethos, invoking Andrew Jackson's defiant taunt that "when the courts intervene, tell the country that the chief justice has made his ruling; now let him enforce it."[99] The peril of such reasoning is laid bare in an anonymous letter sent to a lower-court judge and quoted in their blistering hundred-page ruling against Trump's speech-based deportation efforts targeting Palestinian protesters: "Trump has pardons and tanks . . . what do you have?"[100] Together, these statements and threats crystallize a vision of executive power that treats judicial authority and presidential compliance as conditional on the character and objectives of the president themself. To date, the evidence points to selective noncompliance with lower-court orders alongside obedience to the Supreme Court, but this precarious pattern of deference and defiance—reinforced by the administration's own rhetoric about suspending legal constraints—underscores how close the system may be to more open confrontation. Such a constitutional showdown could either entrench a more authoritarian understanding of the presidency or provoke a renewed reckoning with its limits, reconstituting or reaffirming the balance of power between the judiciary and the executive.

C. Legal Procedure and Precedent

Beyond the new formal and informal powers asserted within and outside the judiciary's purview, the president's reliance on emergency applications—and the Supreme Court's willingness to hear and grant them—is effectuating a quiet but consequential transformation of US legal procedure. In her dissent from the Court's interim decision permitting the US withholding of foreign aid, Justice Elena Kagan warned that this once obscure mode of "emergency jurisprudence" no longer "meets the gravity of the moment." Cases of "far less import," she observed, receive "far more process and reflection" on the merits docket, while the Court now "breezily resolves weighty questions of presidential authority without discussion and barely a word of justification."[101] In essence, this increasingly dominant mode of decision-making advances the broader project of reconstituting legal procedure and the law itself, allowing expedited interim rulings to exert outsized, opaque control over the development of precedent and over the daily lives of those subject to the president's policies.

The Supreme Court's emergency orders are procedural and impermanent, addressing how lower courts reach their conclusions, not underlying legality. These cases are handled on an expedited basis, with limited briefing, no oral argument, and typically unsigned orders offering scant or no explanation—hence the colloquial label, the "shadow docket"; all of the verbal deliberation, written articulation, and procedural clarity that supplies democratic legitimacy for the otherwise least democratic branch is nonexistent on the shadow docket.[102] Moreover, the Court is meant to intervene via emergency jurisprudence only when a lower court has committed an "abuse of discretion." Yet as UC Berkeley Law's Dean Erwin Chemerinsky reports, the justices have "paid little attention to the rules" during Trump's second term.[103] They have also utilized the emergency docket more than ever before: during the 2024–2025 term, the Court issued 140 emergency rulings—including 31 grants of emergency relief, 25 tied directly to the Trump administration's executive actions—compared to 122, 76, 72, and just 66 total in the previous four terms. Over the same 2024–2025 period, it released only 55 merits docket opinions.[104] These figures reflect a significant shift in US legal procedure, with the Court increasingly conducting its business through emergency orders rather than through the traditional merits docket. As leading federal-courts scholar Steve

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99 Ruth Marcus, "J. D. Vance Warns Courts to Get in Line," *The New Yorker*, May 25, 2025, https://www.newyorker.com/news/the-lede/j-d-vance-warns-courts-to-get-in-line.

100 "Civil Action No. 25-10685-WGY, Findings of Fact and Rulings of Law, Pursuant to Fed. R. Civ. P. 52(A)," District of Massachussetts, United States District Court, September 30, 2025, https://storage.courtlistener.com/recap/gov.uscourts.mad.282460/gov.uscourts.mad.282460.261.0.pdf.

101 J. Kagan, "Department of State, et al. v. AIDS Vaccine Advocacy Coalition, et al. on Application for Stay," Supreme Court of the United States, September 26, 2025, https://www.supremecourt.gov/opinions/24pdf/25a269_bp7c.pdf.

102 Stephen Vladeck, *The Shadow Docket: How the Supreme Court Uses Stealth Rulings to Amass Power and Undermine the Republic* (Basic Books, 2023).

103 Erwin Chemerinsky, "By the Numbers," *SCOTUSblog*, July 1, 2025, https://www.scotusblog.com/2025/07/by-the-numbers/.

104 Steve Vladeck, "182. Closing the Book on OT2024," *One First*, October 6, 2025, https://www.stevevladeck.com/p/181-closing-the-book-on-ot2024.

Vladeck observes, "both quantitatively and qualitatively, the shadow docket is crowding out the merits docket" as the Court's principal venue, increasingly deciding its "most important" questions through emergency orders.[105]

The Court's increasing reliance on emergency orders also carries stark consequences for ordinary lives—"the daily physical, economic, and psychic experiences" now imperiled by these provisional rulings.[106] These orders authorize potentially unlawful actions with immediate, concrete, and often irreparable human effects. The Court's early-September emergency order sanctioning racial profiling in federal policing, for example, has been followed by reports of majority-Latino enclaves in southern California turning into spectral "ghost towns," as residents—legal or otherwise—confine themselves to self-imposed house arrest for fear of ICE encounters.[107,108] The order permitting $4 billion in withheld foreign aid likewise alters lived realities amid unresolved legality. In Burundi, to illustrate, a mother laments that her "son died because of AIDS cuts," as the local health center lacked US-funded antibiotics for his infection; in Uganda, a family bartered their thirteen-year-old daughter for a $140 "bride price" to afford food.[109] Moreover, it is virtually impossible to bring individuals removed from the country under the administration's expedited removal policy back to the US once they are gone, meaning that even short-lived emergency rulings can generate permanent repercussions. These accounts do not purport to be statistically representative of all communities affected by executive branch actions, but they render explicit how formally interim orders can reorder core aspects of people's lives on the ground while their legality remains contested. These dynamics show how emergency jurisprudence recasts the rule of law at the level of lived experience, even as the formal precedential status of these orders remains contested within the judiciary.

Doctrinally, a further disquieting development is that a mechanism once reserved for interim relief alone is now being treated, at least by some Justices, as a vehicle for establishing precedent. As Justice Kagan warned in her dissent from the emergency order permitting the FTC commissioner's removal in *Trump v. Slaughter*, the Court is exploiting the shadow docket "to permit what (its) own precedent bars," effectively "making new law" out of thin air.[110] That order illustrates a growing tension in the Court's approach, because it authorizes the commissioner's firing in a manner difficult to reconcile with *Humphrey's Executor* (1935) and yet is treated as carrying precedential force, even though the extent to which shadow-docket rulings can overturn or create new precedent remains contested. These practices naturally beget a broader question about the Court's fidelity to its own decisions: if it is willing to disregard or reshape its prior rulings through emergency orders, how stable is precedent more generally in its contemporary jurisprudence?

Although the Roberts Court has formally overruled fewer precedents per term than its Warren, Burger, or Rehnquist predecessors, simple counts of explicit overrulings obscure the true scope of its reworkings of settled law.[111] In practice, the Court increasingly engages in what one scholar terms "stealth reversals," whereby a decision leaves a precedent officially on the books while draining its core tenets of practical effect.[112] These discrete reversals function as "precedent evasion and reclamation" that bolster the Court's short-term institutional efficacy by purporting to adhere to precedent even as they enable unpopular shifts in doctrine; they hollow out existing legal constraints rather than openly repudiate them. Furthermore, stealth reversals have become a "defining feature" of the Court's calculated constitutional and statutory jurisprudence in ideologically split,

105 Vladeck, "182. Closing the Book."

106 Gessen, "This Is the Feeling."

107 Cindy Carcamo et al., "'I'm Scared to Death to Leave My House': Immigrants Are Disappearing from the Streets – Can US Cities Survive?" *The Guardian*, June 23, 2025, https://www.theguardian.com/us-news/2025/jun/23/immigrants-disappearing-us-cities.

108 J. Kavanaugh, "Kristi Noem, Secretary, Department of Homeland Security, et al. v. Pedro Vasquez Perdomo, et al., on Application for Stay," Supreme Court of the United States, September 8, 2025, https://www.supremecourt.gov/opinions/24pdf/25a169_5h25.pdf.

109 Nicholas Kristof, "The Lives and Money We Are Wasting," *The New York Times*, September 24, 2025, https://www.nytimes.com/2025/09/24/opinion/trump-aid-cuts.html.

110 Kagan, "Donald J. Trump v. Rebecca Kelly Slaughter."

111 "The Thrust and Parry of Stare Decisis in the Roberts Court," *Harvard Law Review* 137, no. 2 (2023), https://harvardlawreview.org/print/vol-137/the-thrust-and-parry-of-stare-decisis-in-the-roberts-court/.

112 Duncan Hosie, "Stealth Reversals: Precedent Evasion in the Roberts Court and Constitutional Reclamation," *UC Davis Law Review* 58, no. 3 (2025), https://lawreview.law.ucdavis.edu/sites/g/files/dgvnsk15026/files/2025-02/58-3_Hosie.pdf.

conservative-leaning disputes.[113] Blockbuster decisions that jettison once-foundational frameworks—including *Dobbs v. Jackson* (2022), abandoning the half-century-old right to abortion, and *Loper Bright Enterprises v. Raimondo* (2024), overturning *Chevron's* longstanding deference to administrative agencies, with *Trump v. Slaughter* poised to similarly curtail agency independence—underscore how much precedential upheaval escapes rigid quantitative analysis. In a broader sense, both precedentially ambiguous emergency jurisprudence and substantive stealth reversals reconstitute the rule of law from within, preserving the appearance of continuity while quietly transforming what the law requires in practice. The result is not merely procedural drift, but the onset of a deeper judicial crisis.

D. Judicial Responses, Dysfunction, and Legitimacy:

Emergency jurisprudence—born of Trump's legal strategy and the Supreme Court's receptivity—has imposed immense "strains on the federal judicial system." In a recent *New York Times* survey, lower court judges described the "mystical, overly blunt, and incredibly demoralizing" effects of the Court's emergency orders, saying they have turned the federal judiciary into a "war zone."[114] Many report feeling trapped in limbo, struggling to interpret opaque directives while being instructed by the Court to treat these orders as precedential guidance and publicly reprimanded to do a better job of "reading between the lines."[115] The majority has chastised district courts for misapplying these rulings—something it may have the "raw power" to do—but such conduct is not just "profoundly disrespectful."[116] It is, as one judge warned, "enabling an increasingly loud anti-judiciary narrative on the right," one that imperils what remains of judicial legitimacy if the Supreme Court "keeps handing down high-profile, divisive rulings without providing even a modicum of explanation, all while expecting lower-court judges to nevertheless follow them and the American people to accept them."[117]

Stanford political scientist Adam Bonica warns that this publicized judicial strife marks a break with the traditional role of the Supreme Court, putting it "at war with the federal judiciary's core constitutional function."[118] In his view, the Court has aligned itself with the Trump administration, using its control over emergency orders to shield executive actions and to undercut the authority of lower courts that attempt to constrain them. The judiciary's defining role—outside of the Supreme Court itself—of serving as a check on the political branches is being hollowed out from the top down, not because lower courts have disappeared or are willfully abdicating their duties, but because the Justices have chosen to limit what those courts are effectively able to do. These developments reconstitute the rule of law inside the judiciary itself, subverting lower courts' capacity to constrain executive power and to justify outcomes through transparent reasoning without fear of castigation from above.

Historically, the Framers understood such concentration of unchecked authority in one branch as antithetical to a republic grounded in the supremacy of law rather than of rulers. As the presidential immunity ruling portended, the conservative majority has increasingly assumed the role of "kingmaker"—a position that echoes the monarchical arrangements the Founders sought to avoid, in which law is actively bent around the person of the executive.[119] In Thomas Paine's *Common Sense* formulation, "in absolute governments the King is law, so in free countries the law ought to be King; and there ought to be no other."[120] Read in light of the current Court's posture toward presidential power and its disempowerment of lower-court review, Paine's warning underscores the stakes: whether the rule of law will continue to mediate between the branches and protect individuals from abuses of presidential power, or be reconstituted in practice as an instrument of executive will.

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113 Hosie, "Stealth Reversals."
114 Schwartz and Montague, "Federal Judges."
115 Shaw, "'Hypercharged' Is the Only Word."
116 Steve Vladeck, "174. Justice Gorsuch's Attack on Lower Courts," *One First*, August 25, 2025, https://www.stevevladeck.com/p/174-justice-gorsuchs-attack-on-lower.
117 Shaw, "'Hypercharged' Is the Only Word."
118 Adam Bonica, "The Supreme Court Is at War with Its Own Judiciary," *On Data and Democracy*, June 25, 2025, https://data4democracy.substack.com/p/the-supreme-court-is-at-war-with.
119 Lincoln Caplan, "What Trump Means for John Roberts's Legacy," *Harvard Magazine*, October 8, 2025, https://www.harvardmagazine.com/legal/supreme-court-chief-justice-john-roberts-trump-united-states.
120 Luttig, "President for Life."

V. Conclusion

Viewed in full, the interactions between the second Trump administration and the rule of law have yielded a cumulative and profound transformation—"a new vision of the constitutional order" rather than its dissolution.[121] The dissenting vision of a "unitary executive," once confined to Justice Scalia's 1988 "lone wolf" opinion, is now being elevated into operative doctrine.[122] On the surface, the laws governing presidential authority are being stress-tested by a zealous executive and reinterpreted by a Supreme Court that "has largely given the president its imprimatur to continue his power grab."[123] In effect, the emerging constitutional order places the presidency closer to the apex of the separation of powers and less constrained by traditional norms of conduct. This presidential ascendancy is reinforced by the conservative Supreme Court majority's subscription to the unitary executive theory, grant of broad immunity for official acts, and willingness to treat prior limits on executive power as "demonstrably erroneous" constitutional interpretations to be corrected rather than settlements to be respected.[124] Within this framework, the president stands on the brink of securing unilateral authority to remake tariff schedules, remove formerly independent agency leaders at will, and insulate sweeping "determinations" about emergencies, invasions, and armed conflict from meaningful lower-court scrutiny. The consequence is not anarchy, but an emboldened executive, with invigorated formal powers over congressional and judicial checks.

Yet the transformation extends beyond the formal structure of law to the informal norms and procedures that sustain its legitimacy. Emergency jurisprudence has "enabled the immediate implementation of controversial policies" where the "legal battle is fought with the policy already in effect."[125] The Court's cryptic rulings, coupled with the majority's open rebuke of lower judges, have deepened a legitimacy deficit that threatens the judiciary from within. In this environment, both the president and the public are learning that defiance can be recast as legality, and that contempt for lower courts, once rhetorical, may yet become standard practice. Should this dynamic escalate into categorical resistance to adverse Supreme Court rulings, the United States risks a genuine confrontation between law and power—a "constitutional crisis" in which the rule of law is no longer a constraint on the presidency but its instrument.[126]

As Princeton's Paul Starr notes, "The institutional independence of the [Supreme] Court enabled it either to limit Trumpism or to protect and advance it."[127] With the "political and legal wings of right-wing ascendency" now in unprecedented alignment, Trump's second term poses the potential to effectuate a regime change in which "liberalism and progressivism are shut down for the long term." Yet the illiberal and democratic tides have been "vying for supremacy" throughout US history, with repeated eras of reaction and of progress.[128] Each moment of institutional overreach—from Reconstruction's betrayal to McCarthyism's paranoia—has ultimately provoked a renewal of democratic energy. History suggests that the danger this research has traced—a rule of law reconstituted as an instrument of presidential power rather than a constraint upon it—can itself become the catalyst for a broader reckoning. In that sense, the second Trump administration's enduring legacy may be to instigate a progressive rebuttal that moves America in the opposite direction from Trumpism, awakening "America's sleeping giant," as put by former US Labor Secretary Robert Reich.[129] The rule of law, though altered, remains a living system—capable of degradation, but also of self-correction. As Martin Luther King Jr. reminded

121 Shaw, "'Hypercharged' Is the Only Word."
122 Boden, "The Lone Wolf."
123 Luttig, "President for Life."
124 Rozansky, "Precedent and the Conservative Court."
125 Andrew Chung, "Supreme Court Expands 'Emergency' Docket — and Trump's Power," *The Daily Record*, October 8, 2025. https://www.thedailyrecord.com/2025/10/08/supreme-court-trump-emergency-docket/.
126 Klein, "The Supreme Court."
127 Paul Starr, *American Contradiction: Revolution and Revenge from the 1950s to Now* (Yale University Press, 2025).
128 John Fabian Witt, "How to Save the American Experiment," *The New York Times*, October 6, 2025, https://www.nytimes.com/2025/10/06/opinion/politics/how-to-save-the-american-experiment.html.
129 Robert Reich, "The Sleeping Giant Is Awakening," *Robert Reich* (newsletter), September 23, 2025, https://robertreich.substack.com/p/the-sleeping-giant-is-awakening.

the nation in a darker hour, "the arc of the moral universe is long, but it bends toward justice."[130] The task now is to ensure that, in this reconstituted constitutional order, it is the law that shapes the presidency rather than the presidency that shapes the law.

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