

Presidential Power and the Supreme Court's Shadow Docket

By Prof. Tom Jorde, November 9, 2025

I. Intro

- Firehose! Flood the zone! Claims of Presidential power in so many realms
- As of November 6, 2025, President Donald Trump (R) had signed 212 executive orders, 54 memoranda, and 104 proclamations in his second presidential term, which began on January 20, 2025. (Ballotpedia).
- EOs have the force of law; and are reviewed by courts for unconstitutionality or lack of authority from legislation
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- Our main issues for discussion today are :
 - the expansion of Presidential power through EOs
 - the Supreme Court's expansion of its own powers of review using its Shadow Docket,
 - And how these two developments have worked together expand executive authority.
 - I will discuss a number of cases along the way
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- Finally, time permitting, I will discuss the Brennan Center for Justice, which I co-founded 30 years ago to fight for Democracy. Today, more important than ever. A source of information for democracy issues.
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- **Note:** I will post a detailed Outline of my talk on the Symposium Website, so you don't have to take notes now
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II. How is the President exercising executive power to an extent not seen before: What are the sources of power claimed by the President?

(1) Broad reading of Executive authority from the Constitution Art. 2 governing the President

- **Article II, §1:** “The executive Power shall be vested in a President of the United States.” (Which includes foreign policy)
- **Article II, §3:** “He shall take Care that the Laws be faithfully executed.”
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- Unitary Executive Theory is a fancy term for a Strong Executive
 - Since executive power vests in the President of the United States, and the President shall take care that the laws be faithfully executed, the Unitary Executive Theory argues the President has tremendous power to control how the United States government goes about doing things, and how the President has control over everybody in the Executive Branch or in agencies exercising Executive power.
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 - Congress cannot hamstring the Executive by telling the President how to manage agencies or setting up its own terms/conditions governing agencies that Congress establishes

(2) Broad reading of authority from statutes

- Congress can specify powers it wants the President to exercise, and in the area of foreign affairs or national security, those powers will be broadly interpreted, giving difference to the President’s assertions
- Sometimes both Constitutional and Statutory power claimed

III. How are these sources of power being challenged ? The role of Federal Courts, with an emphasis on the Supreme Court's Shadow Docket

- **Primer on basic litigation procedure in Federal Courts:**
 - The Executive takes some form of action, for example withholding congressionally authorized funds from USAID, which is then challenged in a Federal District Court (the trial court in the federal system) by an aggrieved party. The challenger asks the Court to issue an injunction to stop the executive action immediately, and keep it stopped while the merits of the case are litigated.
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 - If the Court finds that the petitioner/plaintiff (a) is likely to prevail on the merits, and (b) the balance of harms and equities favor the plaintiff, then the Court will issue an injunction ordering the Executive to stop the action being challenged.
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 - The injunction preserves the status quo. It is not a decision on the merits. That will still require litigation. During this time, the President will not be able to carry out the Executive Order / his agenda-policies attached to that EO
 - This could easily be for a year or more.
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 - Normally the Government will then seek an immediate appeal to the Circuit Court of Appeal covering the particular District Court (there are 11 geographic areas - ours in the Ninth Circuit). The Government is asking the appellate court to stay the injunction, which — if granted — would then allow the Executive to continue with the activity that has been blocked by the District Court. But, if the Court of Appeals agrees with the trial court that an injunction is

appropriate, it will deny the Government's appeal, and let the injunction to stand, pending litigation on the merits.

- At this point, the Supreme's Court's Shadow Docket comes into play

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- **What is the Shadow Docket and how does it work?**

- The Government asks the Supreme Court for an emergency stay of the injunctive that is now blocking the executive action.
 - This is considered "the shadow docket" because it is not the normal docket where the Court takes cases to decide them on the merits (80+ each Term)
 - It is an emergency docket. Far more emergency relief cases are being decided in shadow docket today than at any time before in the Court's history
- To obtain a stay from the Supreme Court of the lower court injunction, the Government must make "a strong showing" that it will likely succeed on the merits, that it will be irreparably harmed absent a stay, and that the balance of the equities (including the public interest) favors a stay.

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- President Trump has had great success at the Shadow Docket ([Brennan Center Shadow Docket Tracker](#))
 - Since January 20, 2025, the Supreme Court has issued 22 decisions on the shadow docket concerning executive actions.
 - 19 ruled for the administration at least partially (83%)
 - 3 ruled against the administration
 - Four shadow docket applications are currently pending.
 - These include the important cases, and the fact that emergency relief not granted (which means the trial court's injunction remains in effect pending litigation on the merits) indicates the merits decision might be up in the air.

- **Comments:**
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- Shadow Docket rulings are **not on the merits, but** a stay of the lower court injunction, pending merits litigation, is usually the whole game - the damage done and really can't be undone later
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- Important constitutional or statutory questions are being resolved — at least in an interim fashion — with little or no reasoning.
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- Supreme Court Shadow Docket support of the President's expansion of executive power by giving generous emergency relief from lower court injunctions has costs:
 - Feeds the perception that their rulings are predicated on political ideology rather than judicial principles
 - Creates confusion among lower courts as to which shadow docket decisions count as precedent
 - Encourages even more aggressive action by the President (until the limits finally found!)
 - And at the same time reduces the Court's own authority by making the Court look political.
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IV. Examples of Aggressive Executive Action and Supreme Court responses at the Shadow Docket

- **(1) Termination and Reorganization of Federal Employees at Agencies**
 - Dramatic structural overhaul ordered by Executive Order No. 14210 that directs that nearly all federal agencies “promptly undertake preparations to initiate large-scale reductions in force (RIFs)” and agency reorganizations
 - District Court enjoined the termination of 12,000 employees and reorganization plans for 11 Cabinet departments and 20 Agencies.
 - The Ninth Circuit allowed injunction to stand
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 - President appealed to Supreme Court for immediate relief
 - President asserted Constitutional Executive Powers + Unitary Executive Theory and said existing Congressional statutes were being followed
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 - The Supreme Court stayed the injunction in Trump v. American Federation of Government Employees Court, stating
 - “Under our Constitution, the ‘executive Power’ — all of it — is ‘vested in a President,’ who must ‘take Care that the Laws be faithfully executed.’”
 - Here there should be considerable deference to President as head of the Executive Branch
 - Controlling the personnel of the executive branch, including terminations, reorganizations, and reductions in force, lies at the “heartland” of the President’s Article II authority.
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 - That argument is essentially a strong **unitary executive** approach: the President must have control over the entire executive branch so that the laws are faithfully executed.

- Courts should not try to strip Executive control/management over employees
- "Employees can seek reinstatement and backpay through the proper channels."
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- Practical effect of stay: This executive action promises mass employee terminations, widespread cancellation of federal programs and services, and the dismantling of much of the Federal Government as Congress has created it. Strong Exec!
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- **(2) Termination of Agency Board Members ("for cause" protections in statutes)**
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- **(A) Termination of Agency Board Members involving NLRB and MSPB— Slaughter/Wilcox (Merit Systems Protection Board)**
 - President issued removal orders, and then lower courts issued injunctions against the President because congressional statutes creating the agencies had said Members could only be removed "for cause"
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 - The President contended that the dispute implicates an important constitutional question: the president's ability to supervise the agency heads who exercise power on his behalf. Congress cannot infringe on the President's core authority
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 - The Supreme Court stayed those injunctions, pending merits litigation, because the Constitution vests the executive power in the President, see Art. II, §1, cl. 1, he may remove without cause executive officers who exercise that power on his behalf, subject to narrow exceptions recognized by our precedents. These agencies "exercise considerable executive power."
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- Of course, since it will take a long time for the merits to be resolved, the damage is done.
- Plaintiffs have procedural rights: they can still pursue their suits for reinstatement and back pay, APA.
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- Essentially overrules Humphrey's Executor which held 90 years ago that the President does NOT have the power to remove agency members, except for cause, when so protected by statutory language. Congressional judgment in favor of independence of certain Federal agencies that have special expertise, and are quasi-legislative or quasi-judicial bodies.
 - The Emergency Docket is not fit for overruling or revising existing law.
 - Note the Majority did not even mention Humphrey's
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- **(B) Lisa Cook case involves Trump's effort to fire FED (Federal Reserve is the US Central Banking) Board member Lisa Cook**
- Here the Supreme Court took a different tack
 - Lower courts had enjoined the President but the Supreme Court did not stay the injunction. Rare.
 - Set oral argument on the merits in January.
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- Note that previously in the NRLB/MSPB cases the Supreme Court distinguished the FED agency members, because of Fed independence: The Fed "is a uniquely structured, quasi-private entity that follows in the distinct historical tradition of the First and Second Banks of the United States." (Court made explicit in Wilcox case)

There are many more important Shadow Docket cases that could be discussed, but we won't have time during my presentation. Perhaps in the Questions session. In any case, These are covered in my notes below.

Let turn now to the Tariffs case:

(3) President's Tariffs under the International Emergency Economic Powers Act 1977 (IEEPA)

- Just argued 11/5/25 at the Supreme Court for a decision on the merits.
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- Not a Shadow Docket case, but important for relationship between the President, Congress and the Court
- - Supreme Court decision on the merits will determine statutory interpretation congressional grant of emergency power to President, but in the background is President's authority in foreign affairs
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- Case gets to Court via petition for cert on expedited basis:
 - The two lower courts have ruled against the President, but have stayed injunctive relief during the appeals period.
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 - Thus, the tariffs continue until a decision on the merits
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 - Since only questions of law exist, Supreme Court granted the Petition and set expedited briefing and argument schedule
 - Argued Wednesday, 11/5, for three hours!
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- Congress powers in Article I provides that "Congress shall have Power" not only to "regulate Commerce with foreign Nations," but also to "lay and collect Taxes, Duties, Imposts

and Excises.” U.S. Const. art.I, § 8, cls. 1, 3. Tariffs are part of those “legislative Powers” to tax.

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- Big Question: When Congress passed the International Emergency Economic Powers Act (IEEPA) to give the President authority to deal with certain emergencies, did it mean to extend the power to issue tariffs without bounds:
 - no time limits, no limits/caps on amounts, no justifications required?
 - Statue has one year limit and comprehensive reporting to Congress requirement
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- Congress gave presidents sweeping powers to deal with any “unusual and extraordinary threat with respect to which a national emergency has been declared.”
- IEEPA, however, is extremely broad. It says the president can, “by means of instructions, licenses, or otherwise . . . regulate . . . nullify, void, prevent or prohibit, any . . . importation or exportation of . . . any property in which any foreign country or a national thereof has any interest.” There are time limits on emergencies and procedures for congressional review of actions taken under IEEPA, but little else in the way of limitations on executive authority.
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- For the first time, a President has claimed authority under the International Emergency Economic Powers Act (IEEPA) to issue tariffs on any country, in any amount, and for any duration. 50 years and 10 Presidents have not seen such a broad statutory claim to levy tariffs under IEEPA.
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- Key argument of President: the delegated power to “regulate . . . importation” includes tariffs. Does it? NO
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- If Congress wanted to empower the President to unilaterally impose **tariffs** of virtually unlimited size, scope, and duration

—a power to essentially reshape the entire U.S. economy—it would have said so. Thus, **Major Question Doctrine** violated- need clear congressional language in a statute if the executive is using the statute to have a major impact on the economy

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- **If tariffs are viewed as a tax**, the Chief Justice Roberts couldn't be more clear in his questions that they are — then Congress would have to be very specific about the delegation of such a core power to the President. **Since that is not present, it violates the major question doctrine**
 - [Court used doctrine to strike down Biden student loan forgiveness (\$430B)
 - The tariffs impact is far greater than the student loan forgiveness program
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- But President's lawyers argued tariffs are critical to his foreign policy and tariffs really not a tax for revenue — only for regulation! Revenue incidental. (Tell that to the Boss!)
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- `Will the Supreme Court decide that “deference” is warranted to the President in context where the meaning of “regulate ... importation” is ambiguous? Or will Major Question Doctrine doctrine put an end to Trump's tariff regime?
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- We will know soon. Court will probably rule quickly, but the end of the year
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- Will probably rule against the President on Major Question basis
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- Which will demonstrate independence and importance of the Supreme Court and help to restore its own authority and reputation

- A ruling against the Trump administration may have less of an effect than it seems. Even if the administration cannot invoke IEEPA for future tariffs, it could try to rely on other tariff statutes that are more specific in grants of authority to the President.

	Reason for imposing tariffs	Federal agency investigation required?	Limit on duration of action	Limit on tariff rate
Section 232	Threat to national security	Yes, by Commerce Department	None	None
Section 201	Injury to domestic industry	Yes, by International Trade Commission	Four years. May be extended to a maximum of eight years.	50% increase. Phasedown required after one year.
Section 301	Discrimination against US businesses or violation of US rights under trade agreements	Yes, by US Trade Representative	Four years. May be extended with no maximum limit.	None
Section 122	International payments problem	No	150 days. Can be extended with Congressional approval.	15%
Section 338	Discrimination against US commerce	No	None	50%

Source: Congressional Research Service, Bloomberg.

- Section 232 tariffs can only be used to target specific industry sectors, and require an investigation by the Commerce Department. Trump has used Section 232 this year to raise border taxes on autos, auto parts, steel, aluminum, copper and furniture, among others.
- And Trump already initiated several ongoing investigations that could result in higher levies on a slew of other goods.
- Refund claims at Court of Claims? By US importers
- Maybe Supreme Court somehow preserves the current state of collected tariffs

Other Shadow Docket Examples:

(4) Impoundment: withholding congressionally appropriated funds; or repurposing/redirecting funds

- Both Unitary Executive Theory and statutory interpretation involved
- The Court on **September 26 2025** granted the government's request to allow President Donald J. Trump's administration to withhold about **\$4 billion** in foreign-aid funding that had been appropriated by Congress.
- A stunning disregard for Congress's power of the purse,
- "The Government, at this early stage, has made a sufficient showing that the Impoundment Control Act precludes respondents' suit, brought pursuant to the Administrative Procedure Act, to enforce the appropriations at issue here. The Government has also made a sufficient showing that mandamus relief is unavailable to respondents. And, on the record before the Court, the asserted harms to the Executive's conduct of foreign affairs appear to outweigh the potential harm faced by respondents. This order should not be read as a final determination on the merits. The relief granted by the Court today reflects our preliminary view, consistent with the standards for interim relief."
 - Foreign policy and national security are special
 - Interaction between unitary executive and statutory interpretation
 - See also, President's redirecting military R&D to fund troops payments during shut down
- Same discretion to withhold or redirect funds may not apply to domestic programs
- A look at Russell Vought's influence and his push to reshape the government The flurry of litigation reflects not only the administration's aggressive effort to wrest control of spending, but the Republican-controlled Congress' unwillingness to push back, "Congress seems to be following its partisan

interests more than its institutional interests, and that puts a lot of pressure on court.”

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(5) Immigration - statutory interpretation and unitary executive

- Government efforts to use the AEA to deport noncitizens to El Salvador has been blocked by lower courts AND the SCt. — but likely to return after trial on merits
- **AEA - Alien Enemy Act** requires a “predatory incursion” or “invasion” for Venezuelan gang members
- *Vasquez Perdomo*: District Court had blocked ICE stops and arrests that were based *solely* on (1) the individual’s “apparent race or ethnicity”; (2) the fact that they speak Spanish or English with a heavy accent; (3) their presence at a particular location; or (4) the type of work they do—in a 52-page opinion that relied upon 21 sworn declarations, including from individuals who had been subjected to the stops.⁶² Ninth Circuit filed extensive opinion upholding District Court injunction. Supreme Court issues a stay and substitutes its own view of the record, calling the stops brief investigatory stops, with prompt release if legality established.
- Reports that even more aggressive raids after the Supreme Court sided with the President in *Perdomo*

(6) Deployment of troops (Nat’l Guard) to LA, Portland, Chicago

- 10 U.S. Code § 12406 - National Guard in Federal service:
- Whenever—
- **(1)** the United States, or any of the Commonwealths or possessions, is invaded or is in danger of invasion by a foreign nation;
- **(2)** there is a rebellion or danger of a rebellion against the authority of the Government of the United States; or
- **(3)** the President is unable with the **regular forces** to execute the laws of the United States;

- the President may call into Federal service members and units of the National Guard of any State in such numbers as he considers necessary to repel the invasion, suppress the rebellion, or execute those laws. Orders for these purposes shall be issued through the governors of the States or, in the case of the District of Columbia, through the commanding general of the National Guard of the District of Columbia.
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- Chicago: The 7th Circuit upheld injunction re no troops in Chicago (As for the merits, critically, the panel agreed with the Ninth Circuit’s earlier ruling in Newsom v. Trump “that the **President should be granted ‘a great level of deference’** on the question of whether one of the statutory predicates exists.” It **nevertheless** held that the Trump administration was unlikely to prevail largely because it concluded that the district court’s key factual findings were not “clearly erroneous.”)
- Oct. 29 Supreme Court ordered additional briefing on the question whether “regular forces” as used in 10 US Code includes civilian forces such as ICE, or means the military. In the meantime, lets stand the 7th Circuit affirmation of the district court’s injunction and finding of fact (not clearly erroneous)
 - Unusual and important - shows that the Court will carefully review statutes
 - Compare and add the revised 9th Circuit decision taking back the deference it had granted the President because of no factual support required by the Nat’l Guard Statute, 10 U.S. Code § 12406 - National Guard in Federal service. President’s lawyers misstated facts in earlier briefs/ declarations about need for the Guard (fewer federal agents in Portland, so not as great a problem for national federal enforcement)

- Oregon lower federal court said President's claims were "untethered from any facts" and just entered permanent injunction
- Los Angeles 9th Circuit deferential to the President, permitted National Guard and military deployment
- Note: the courts are getting involved in determining whether statutory requirements have been met
- Compare **The Insurrection Act (1792)** use of military in civilian circumstances - the President could try this next
 - Re powers and requirements: [Brennan Center Insurrection Act Explainer](#)
 - Invoking the Insurrection Act temporarily suspends the Posse Comitatus rule and allows the president to deploy the military to assist civilian authorities with law enforcement. That might involve soldiers doing anything from enforcing a federal court order to suppressing an uprising against the government.
 - Nothing in the text of the Insurrection Act defines "insurrection," "rebellion," "domestic violence," or any of the other key terms used in setting forth the prerequisites for deployment.
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 - **(7) Federal grant terminations - Supreme Court stayed injunctions**
 - Education, health
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(8) Passport sex selection case:

On Thursday the Supreme Court stayed lower court injunction against Trump's EO change to require that sex be reported on Passport the same as the person's birth certificate.

Trump ordered elimination of self-identity of X - for transgender and non-binary
 Balance of harms? What harm would the Executive suffer by delay for trial on the merits of plaintiffs' of discrimination and unequal treatment

(9) SNAP - Friday another stay,

- But by Justice Jackson!
 - Procedural reasons, to give 1st Circuit time to complete its analysis - probably until Monday
 - Supreme Court granted stay of injunction. Ag Sec had said earlier in the day that the Government would comply with full funding. Supreme Court acted swiftly to give First Circuit time to decide.
- In the SNAP case, the lower court required President to spend funds — during shut down — already allocated and/or available
- Executive Branch was conforming for funds from SNAP emergency funds, but appealing new order (Friday) to fund entire amount by taking money for a related but not actual funding source for benefits.
- In its appeal to the Supreme Court, the Trump administration said that the lower court order forcing it to send full food stamp payments “makes a mockery of the separation of powers.
- No real issue of domestic impoundment in the case; also complex because of government shutdown
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- **(10) [Drug boat extra-judicial killings without Congressional declaration of War - Otherwise should only be short term before reporting back to Congress]**
- Not at the Shadow Docket yet
- Trump says not needed because these are strikes against the cartels - not at war with another country.

Other Key decisions in background where Supreme Court has already favored the President

- In 2024, in the major decision of **Trump v. United States**, the Court held that the **President has broad immunity** from criminal prosecution for official acts taken in office.
 - Presidential immunity from criminal (and civil) liability
 - Absolute for core functions (most certainly will include foreign policy and war)
 - Presumption for others in outer scope of powers
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- In 2025, in **Trump v. CASA (Birthright citizenship cases)**, the Court decided that District Courts could not issue national injunctions
 - But injunctions in class actions still possible; or if needed for complete relief; or if under APA remedies
 - On the merits of the President's claim, the 1st and 9th Circuits have declared the Trump Ex. Order unconstitutional, and these cases will surely be appealed to the Supreme Court.
 - Note Biden and other presidents had also wanted to limit or end universal injunctions, because with forum shopping, his own EOs have been enjoined. Eg. Student loan cancellation (five months earlier)
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- **It is the combination of the President's aggressive and broad interpretation of Executive Authority + the Supreme Court's willingness to balance the equities in favor of the President when those broad interpretations are challenged, that has gotten us where we are today**

V. Brennan Center for Justice — for information and opinion on matters of democracy

- Jorde co-founder 30 years ago
- Annual budget = \$65MM; staff = 195
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- Democracy and Justice issues - premier national organization
 - Subject areas: Constitutional separation of powers, Presidential power, Voting rights, Election security, Redistricting, Criminal justice
- Explainers, data reports, articles -
 - **See Website for examples: brennancenter.org**
 - E.g., Shadow Docket Tracker -
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- Involvement in current challenges to presidential claims of executive authority
 - Amicus briefs to the Appellate Courts and Supreme Court - listed on the website
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- Tariffs case amicus brief, relied on in George Will column WP
 - Can the Pres. individually set tariffs? No
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VI. Conclusion

- It is my hope that you now be in a better position to evaluate what you read in print or online about legal developments concerning claims of Presidential power
- Also, I hope you will consider the BCJ as a resource for additional information to keep you informed
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- Big Picture: One can make the case that all three Branches are failing us: (1) The President is asserting power and control that is radically more aggressive than in the past ,and stretches the reach of Executive power; (2) Congress is acquiescing in the President's claims of authority, and thus failing to exercise it's independent Constitutional powers to check the Executive; and

finally (3) the Supreme Court's use and expansion of the Shadow Docket is facilitating the growth and primacy of Presidency.

- These are features of our current democracy that lead some to argue that we are becoming more authoritarian
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- But Note: The President has not disobeyed lower court orders stopping or interfering with his Executive Orders. He and his lawyers have followed legal procedures for appeals from negative District Court orders to the Circuit Courts, and then, if necessary, to the Supreme Court. To be sure the Supreme Court has been generous toward the President, granting him requested relief from injunctions in the vast majority of the President's emergency appeals. But that is because a majority of the Justices believe that the President will prevail on the merits of the litigation. And why do they believe that? Because they will be the ones to eventually decide in the end, and they already know that they will decide in favor of the President's view of the merits.
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- I have not yet given up.: There is still time for the Supreme Court to act in ways that might reign in and constrain some of the more aggressive Presidential actions. Most immediately, for example, the Tariffs case and the National Guard cases give the Court an opportunity to reign in President's excesses.
- If the Court does rule against the President, I believe the President will abide by the Supreme Court's decision and we will still have our Democracy
 - For me the RED line has always been whether the President defies the Supreme Court. If he does, the line will have been crossed and we will no longer have the Constitutional democracy as we know it.
- And what if the Supreme Court does not constrain the President in these more obvious cases, where we might think it clear that the President has gone too far? Do we still have a

democracy? Perhaps yes, but not the kind that we have known.

- Other areas of importance in the future:
 - Voting Rights cases, restrictive procedures for voting, gerrymandering
 - Weaponization of the DOJ
 - Use of the military in domestic affairs, in violation of posse comitatus, Brennan Center Explainer

Questions from Audience

Are we still a democracy if the supreme court affirms the various assertions of presidential power? — Yes, just different

But remember: Elections matter. And having secure, fair and broadly inclusive elections is at the heart of a functioning democracy.

Does the modern world require a more nimble executive because 1) Congress is incompetent and non-functioning, and 2) issues change quickly and the “Government” needs to be able to respond?