

# US Supreme Court's shadow docket attack on the Constitution

**John Burton****14 September 2025**

On September 8, the six-justice fascist majority on the United States Supreme Court repudiated with no explanation whatsoever the constitutional principle that government agents must have individualized “reasonable suspicion” based on something more than ethnicity, employment or whereabouts to seize a person for investigation of immigration status.

This appalling ruling adds to the growing list of recent Supreme Court “emergency” interventions in pending lawsuits, most of which favor the Republican Party and particularly the expansion of executive powers under President Donald Trump, who openly seeks to wield dictatorial power.

Traditionally, the Supreme Court presides above the nation’s lower courts like a Colossus of Rhodes, granting “petitions for certiorari” to review between 50 and 100 cases of the several thousand submitted that term, starting on the first Monday of October and ending before the July 4 holiday. Each case should have already been fully litigated in the lower courts and present an important question of law that is either in conflict or unsettled in the lower courts. The resulting decisions are published in detailed written opinions that serve as binding legal precedents for future cases and, not infrequently, are accompanied by concurrences or dissents to elaborate on the reasoning of individual justices.

Until quite recently, the Supreme Court rarely granted emergency petitions, an “extraordinary” judicial power that is supposed to be used sparingly, and only to maintain the “status quo” and to prevent “irreparable injury” while the glacial judicial processes work themselves out. The rampant use—and abuse—of this “shadow docket” exploded after Trump’s three appointees during his first term solidified the current six-vote far-right majority on the Supreme Court.

The previous administrations of George W. Bush and Barack Obama filed only eight emergency petitions over

the first 16 years of this century. The Trump administration filed 41 during his first term, generally to swat away challenges to extensions of executive power, and the Supreme Court granted 28.

When Joe Biden became president in 2021, however, the Supreme Court reversed course, repeatedly granting emergency petitions opposed by the administration. The two most notorious rulings, both during his first year in office, terminated an eviction moratorium intended to stop the spread of COVID-19 and forced immigrants seeking asylum to remain in Mexico while their applications were pending.

Later in Biden’s term, the Supreme Court majority used the shadow docket to vacate a lower court ruling by a three-judge panel that included two Trump appointees, reinstating Alabama pro-Republican congressional gerrymandering, preventing US Border Patrol agents from removing razor wire laid along the the Rio Grande at the direction of Texas Governor Greg Abbott, and blocking the restoration of 1,600 voters summarily struck from Virginia voter rolls under a Republican-backed program targeting supposed noncitizens.

In its first 20 weeks, the current Trump administration filed 19 emergency petitions, the same number the Biden administration filed over four years, and the Supreme Court ruled for Trump on 84 percent of them.

Particular outrage followed last week’s shadow docket order that blocked a temporary restraining order (TRO) entered last July by Los Angeles federal judge Maame Ewusi-Mensah Frimpong to prevent roving ICE patrols from seizing people based solely on “(1) apparent race or ethnicity, (2) speaking Spanish or speaking English with an accent; (3) presence at a particular location; or (4) the type of work one does,” and then holding them without access to courts or their attorneys.

The majority’s shadow docket order says absolutely nothing about Judge Frimpong’s 52-page explanation for

her TRO, nor the Ninth Circuit's 61-page order upholding it. Both are grounded in the Fourth Amendment's explicit requirement of "probable cause," which expresses the fundamental democratic principle that the government cannot seize human beings without "individualized suspicion" that they engaged in unlawful activities, as well as the Fifth Amendment's guarantee of due process, including access to courts and legal counsel.

Although there was no opinion for "the Court," Associate Justice Brett Kavanaugh filed a concurring opinion claiming that racial and employment profiling is justified because "10 percent of the people in the Los Angeles region," which he estimates to be 2 million, are "illegal immigrants" responsible for "myriad significant economic and social problems."

Kavanaugh's numbers are vague and inflated. US Census estimates for 2023 are that undocumented immigrants comprise 7.1 percent of the greater Los Angeles population, about a million people, which includes growing percentages from all regions of Asia, Europe and Africa, as well as Latin America.

Kavanaugh's claim of "myriad significant economic and social problems" derives from right-wing talking points, not evidence. A recent study by the University of California Merced reports that for California as a whole, only 22 percent of undocumented immigrants have less than five years of residency. Nearly two-thirds have lived in the state for more than a decade, including 44 percent with over 20 years of residence. The value of their labor to California's economy is estimated at \$275 billion annually.

Kavanaugh dismissed the litany of horror stories recounted in the lower court record about the methods used by ICE agents during their arbitrary sweeps, claiming without evidence that for "stops of those individuals who are legally in the country, the questioning in those circumstances is typically brief, and those individuals may promptly go free after making clear to the immigration officers that they are US citizens or otherwise legally in the United States."

For Kavanaugh, and presumably the other five fascists who voted with him, the Fourth Amendment requirement of probable cause allows Trump's ICE Gestapo to demand, "Your papers, please!" based solely on someone's ethnic appearance, language or accent, employment or whereabouts.

"To the extent that excessive force has been used" by a federal agent, Kavanaugh added, "the Fourth Amendment prohibits such action, and remedies should be available in

federal court."

This comment is particularly rich coming from a Supreme Court justice who has voted with the majority to block civil rights suits against federal police under the landmark 1971 case of *Bivens v. Six Unknown Named Agents*, not to mention virtually all constitutional claims against local police, especially those concerning excessive force, by expanding "qualified immunity" into a virtual bar for recovery.

Lauren Bonds, the executive director of the National Police Accountability Project, told CNN, "What we've seen is, term after term, the court limiting the avenues that people have available to sue the federal government."

"It's bordering on impossible to get any sort of remedy in a federal court when a federal officer violates federal rights," Patrick Jaicomo, a senior attorney at the libertarian Institute for Justice, told CNN.

Kavanaugh began his right-wing legal career as a lawyer for Kenneth Starr's phony investigation of then-President Bill Clinton, who was impeached for denying consensual oral sex in the oval office. At an event held at a Waco, Texas community college on September 11 to honor Starr, who died in 2022, Kavanaugh gaslit the audience with the claim that the Constitution's "framers recognized in a way that I think is brilliant, that preserving liberty requires separating the power. No one person or group of people should have too much power in our system."

He was refuted by demonstrators across the street, who held signs such as "BK—Trump Flunk" and, with reference to last year's notorious ruling giving Trump broad presidential immunity, "Shame on you. No one is above the law."

In the August 2025 Gallup survey, the Supreme Court's approval rating fell to 39 percent, the first time it has ever been below 40 percent, including record lows of 11 percent among Democrats and 34 percent for independents. It is clear that the Supreme Court is committed to using all its tools to dismantle democratic institutions and formalize a dictatorial regime.



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