



## Fox Rothschild Podcast

### The Presumption of Innocence

#### Episode 77: The Shadow Docket: Supreme Court Decisions That Shape America

*Featuring Matt Adams of Fox Rothschild and Carolyn Shapiro*

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**Matt:** Welcome back to "The Presumption of Innocence," a podcast brought to you by the White-Collar Criminal Defense and Regulatory Compliance Practice at Fox Rothschild. I'm your host, Matt Adams.

The spotlight is always on the United States Supreme Court, but perhaps more so now than ever before. Whether it's decades of precedent being overturned in cases like *Dobbs* or the president of the United States being handed presumptive blanket immunity from criminal prosecution in *Trump v. United States*, there can be no dispute that the Roberts Court-- whether you like it or not-- now with a six-three conservative super majority, has left its mark on history.

Our guest today on the program is Professor Carolyn Shapiro. She is one of the leading Supreme Court scholars in our country. Professor Shapiro is a professor of law at Chicago Kent College of Law, where her scholarship focuses on constitutional and administrative law. She is also the Founder and Co-director of Chicago Kent College of Law's Institute on the Supreme Court of the United States, or ISCOTUS, where her work focuses on executive power, separation of powers and the role of the Supreme Court in American democracy.

Professor Shapiro previously served as the Illinois Solicitor General and clerked on the United States Supreme Court. Professor Shapiro, welcome to "The Presumption of Innocence."

**Carolyn:** It's a pleasure to be here. Thanks for having me.

**Matt:** Professor, let's step back to a 30,000-foot view of the current Supreme Court, if we could for a moment. Whether one chooses to agree with the recent decisions that I opened the program with or

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not-- and there are more-- where does this court rank among the most impactful in history, in your view?

**Carolyn:** Well, it's always hard to measure in the middle, because we can't fully see all of the effects, uh, and long-term impacts of what this court is doing. But there's no question that it's going to rank high. It is making major changes in, specifically, the balance of power between the different branches of the federal government. It is also making major changes with respect to the way our democracy functions. Those are just two of the big, big categories that I think are going to lead it to be seen in hindsight as extraordinarily impactful.

But I'll add that being impactful can play out in different ways. One way it could in the long run be impactful is that people are unhappy enough with things that it's doing, that that generates a meaningful movement and perhaps successful movement towards court reform. And there are all kinds of changes that could be made to the way the court functions that don't require a constitutional amendment, and that I think are being discussed with more and more seriousness as this court continues to do things that many people find extremely disturbing.

**Matt:** And I want to build on that for just a second. How does the Supreme Court and the role that it's taking in handling some of these cases that are of high-profile value to the jurisprudence in our country and have impact on the separation of powers, as you mentioned, how does that factor into this broader, deeper political divide that we're experiencing in our country now?

Not, I wouldn't say, unprecedented. We've had political divides in this country--

**Carolyn:** mm-hmm.

**Matt:** --before. As a student of history, I can recognize that. But has the Supreme Court played as, as prominent a role in those polarized times in past, or is it different now?

**Carolyn:** I don't know that I can say it's played as, as significant a role or not in the past.

I mean, if, if you look at the pre-Civil War Supreme Court, when it decided *Dred Scott*, that certainly led right into the, or, you know, it heightened and increased the extreme divide in the country over slavery, uh, and some people would say led to the Civil War. Some people would say the Civil War was inevitable for other reasons.

So I, you know, it's, I don't know if I am willing to make a historical comparison, but I do think that many of the things the court is doing are in fact problematic from the perspective of heightening or making our polarized society less functional.

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**Matt:** Yeah. I could just say that in, in my lifetime, this really is the most difficult time that I've experienced. And on the top of the program, I referenced a few of the court's extremely impactful decisions.

**Carolyn:** Mm-hmm.

**Matt:** In your view, what's the top couple or three most impactful decisions that this court has issued in recent years? And building on that, what are the lasting impacts of those decisions?

**Carolyn:** Well, in, in true lawyer fashion, I'm going to slightly modify your question. And instead of identifying only a handful of cases, I'm going to identify a couple of categories of cases and then talk about some of the cases in those categories. The first category has to do with voting and democracy, and in particular multiracial democracy. Uh, I think the court has done enormous harm in those areas. And I'll, I'll give you a couple of examples: they have, in the case of *Rucho v. Common Cause*, which was a 2019 case, the court announced that federal courts just can't review extreme partisan gerrymandering. There's just not a claim that federal courts have jurisdiction to consider. So what that has meant is that in states where the states themselves don't regulate extreme partisan gerrymandering, there is more and more extreme partisan gerrymandering. And we see that, for example, in the redistricting effort that President Trump kicked off in Texas. They made it even more of a gerrymandered state than it already was in terms of its congressional maps. So we have a situation where in order for Democrats to gain a majority in the house, they have to win a super majority of sorts in the popular vote, because the gerrymandering is, is so extreme.

The court has also cut back significantly on the scope of the Voting Rights Act, both by killing section five of the Voting Rights Act in Shelby County. That was back in 2013. So I'm not sure when you say this court, if that, if you, you, you count that. But section five of the Voting Rights Act was the part of the Voting Rights Act that required certain jurisdictions to get federal approval before they made changes to anything in their voting system. And the reason for that was that they needed to show that they weren't going to have negative consequences for minority voters. That's gone for now. They've cut back on section two, which is the part of the Voting Rights Act in which plaintiffs can say, well, these decisions have a negative effect on minority voters. And they may be poised to actually strike down aspects of section two with respect to redistricting in *Louisiana v. Callais*, which is a case that they, that was argued this, this fall.

At the same time, they've made it harder for minority voters to say, hey, this particular, redistricting plan has had a negative impact on us. Has even had, uh, an intentionally negative impact on us by, for example, insisting on a kind of presumption of good faith on the part of the legislatures that do the redistricting, making it, just ratcheting up higher and higher the bar for being able to show racially discriminatory redistricting that harms minority voters.

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So all of that, is, I think, incredibly problematic. So that's-- oh, and then there's all the campaign finance stuff, which I won't go into in as much detail. But they have, starting with *Citizens United*, but an ongoing basis, including a case that they're hearing this term, they may continue, make it restrict more and more the, the ability of the states and the federal government to regulate the way money flows in when it comes to campaign finance, which has the effect of making the super-duper rich people, of whom we have a lot, giving them an extraordinary amount of influence over our elections. So that's one category.

The other category I would say has to do with executive power and more broadly the balance of power between the different branches of the federal government. So for example, they have made it harder for Congress to say-- or they seem to be about to make it harder for Congress to say-- you know what, we don't want the President to be able to fire certain agency heads for any reason at all. We actually want those agency heads to have some independence because we want them to be implementing policies that we, Congress, have set. The court is cutting way back on that. We're sort of in the middle of seeing exactly what they're going to do and exactly how far they're going to go. But it, it is a, a pretty significant expansion of executive power at the expense of Congress. While at the same time, they're also maintaining something called the Major Questions Doctrine, which gives them the authority, the court itself the authority to say, well, wait a minute, we think actually this particular statute doesn't authorize the president to do particular things.

So when it wants to, it can restrict what the president does, and when it doesn't want to, it could say, oh yeah, president, you know, Congress can't step in. So it's a, it's a real undermining of Congressional power to the benefit of the Supreme Court and the executive.

**Matt:** What I'm hearing, professor, is that some of the guardrails on our democracy are being weakened. Is that perhaps contributing to some of the destabilizing impact that we've, we've been talking about for the last few minutes here with our increasingly polarized society?

**Carolyn:** Absolutely. Uh, and I'd add in, in that mix, *Trump v. United States*, the immunity decision, and *Trump v. Anderson*, the decision preventing states from keeping Donald Trump off the ballot in 2024 due to his insurrection, uh, encouragement in 2021.

This court is transferring power, or encouraging the transfer of power or the amassing of power, in the executive, and in extremely wealthy people who want to influence the election. And they are making it difficult or impossible to reign in what the president does.

I mean, *Trump v. United States*, is, I think, one of the most profoundly problematic, really profoundly wrong, decisions that I can think of. It essentially says the president can behave in more or less as lawlessly as he wants in his role as president, uh, which really just flies in the face of the entire reason why we had a revolution in the first place. We were trying not to have a monarchy. That was the

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point. And so, creating a situation where one person can say, yeah, you know what? I don't care what the law is and oh, and by the way, I can pardon anybody I want, at least under federal law. The president cannot pardon people for committing state law crimes. But it is an astonishing, and in my view, highly anti-democratic, uh, move by this court.

**Matt:** What are the trend lines of the court look like when it comes to the Supreme Court's body of criminal jurisprudence? I know there was a, an announcement of a decision reaffirming some, uh, exceptions to the warrant requirement in the Fourth Amendment, unanimous court ruled that essentially the exigent circumstances standard would stand against a challenge, uh, to, to try to increase the showing required of the exigency. Um, but, but against the broader context of this court, in your opinion, eliminating some of those guardrails on our democracy, how is that impacting this court's view of constitutional criminal jurisprudence?

**Carolyn:** I think we don't really know yet, to be honest. The court is likely to consider a variety of big questions that may emerge from, for example, what's happening in Minnesota. Sometimes it will be considering questions that implicate criminal justice, but they might be considering them through a civil case lens, right? If somebody brings a constitutional claim that their rights were violated-- which is, which is hard to do if the person violating the rights is a federal official-- but there are some possible ways of doing that, that that can implicate criminal justice considerations. The court has been very, unwilling to allow for meaningful accountability by law enforcement in many contexts.

So they have been unwilling, for example, to cut back on qualified immunity, which in fact has ratcheted up to extraordinary degrees. So, I assume you want me to explain qualified immunity a a little bit?

**Matt:** Yeah, of course.

**Carolyn:** So, qualified immunity is a doctrine that applies when a plaintiff sues a state or federal official, or local official, for violating their constitutional rights. So there are lots of cases involving police officers. There are lots of cases involving prison guards. There are cases involving other types of officials. For reasons I won't go into, it's much more difficult to bring those cases against federal officials.

But in any case, in any of those cases, the doctrine of qualified immunity applies. And what qualified immunity says is that these officials can't be found liable and, and can't even, don't even have to go to trial if, if they can be established early enough in the proceedings that the law that they are accused of violating was not clearly established at the time that they acted. And by clearly established, what that has come to mean is that there's another case decided by either the Federal Court of Appeals in that area or the Supreme Court that is factually close to identical to whatever the

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facts of the, of the current lawsuit are. And if there is no such case in which one of those courts has said, yeah, that violated the somebody's rights, then qualified immunity is likely to apply.

So it's, it's really a, a remarkable doctrine that immunizes police officers and other actors from having to even account for what they've done. And in our current situation, I think that's, something that we should be concerned about.

**Matt:** Yeah. And let's keep examining some of these impacts from the Supreme Court and go one step further. We've been talking exclusively right now about big decisional law, you know, pronouncements of decisional law from the Supreme Court. But there's a whole nother role of the Supreme Court out there. And in your work, you refer to it --and others --as the shadow docket. Could you explain to our audience what that means? What is the Supreme Court's shadow docket and why should we be concerned about it?

**Carolyn:** Yes. So the shadow docket can mean different things. So, so let me just lay out a couple of things it can refer to, but then really zero in on the, the part that I think you're most interested in. Um, some people would use that term to refer to anything that the court does that does not involve full briefing and argument. Now there's a lot of that stuff. That includes you know, motions for extensions of time, uh, to, to file briefs, it extends to slightly more substantively, uh, the, the petition for certiorari where people are asking the court to hear their cases. All of those things are decided internally without oral argument, without, without full briefing. Some people include those types of decisions, uh, in when they say the shadow docket.

**Matt:** Are these principally procedural issues?

**Carolyn:** Well, some of them are procedural issues. I mean, the, the decision whether or not to grant certiorari is certainly a, uh, at least has substantive implications. But the court gets thousands of petition for certiorari every year. And while there's certainly sometimes criticism of their decisions certiorari, it doesn't rise to the level of the kind of, uh, substantive critique on some of the other stuff I'm about to talk about.

So more recently, people have been using the shadow docket to refer primarily to decisions that the court makes, uh, on what are generally emergency stay applications. And in an emergency stay application, something is about to happen somewhere in the country. It often traditionally has actually been imminent executions. But, uh, increasingly we see shadow docket requests for stays brought by people and, and increasingly the executive branch of the federal government saying, please stay this lower court injunction. This lower court is saying we have to do X or we can't do Y and we want you, the Supreme Court to stay that.

The capital cases have been around for a long time. When I clerked at the Supreme Court-- which was, uh, 20, 30 years ago, I can't even keep track-- we had those cases, uh, I, so I wouldn't say they

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weren't substantive 'cause obviously they were incredibly significant. People's lives were literally at stake. But they didn't get the kind of public attention that the shadow docket cases we're now talking about generally get.

So the category of shadow docket cases that are currently in the news a lot are these cases where lower courts are issuing some kind of injunction that tells the federal government-- often the federal government, sometimes other parties --that it can or can't or must do particular things. And, the Trump administration has been filing requests for stays at a higher rate than any prior administration. Although I should say that there's been an increase in these types of applications for stays by the executive branch, really since the Obama administration, a sort of a, a steady increase in their variety of, of reasons for that. But Trump Two, uh, has had an extremely high number of these requests and the Supreme Court has been granting almost all of them. Not quite all of them, but has granted almost all of them. So I can pause there to see if you want me to, if you have any questions about what I've said so far.

**Matt:** No, I, I, I, I think it's a, it's a, it's a fascinating expose 'cause it, seldom do we actually think in terms of Supreme Court decisions in these kind of, I, I mean these are the types of things that don't extend into very many pages. These are the one word decisions, right? These are the: denied, granted. This is just done with very little intellectual firepower, right?

**Carolyn:** Some of 'em. Uh, many of these decisions granting these stays to the Trump administration have come with little or no explanation whatsoever, uh, which is one reason why I and others are criticizing this practice.

I would say, in my view, another really, really significant problem with many of these grants of stays is that the court is just not applying the standards that it claims to still be the law in a variety of cases. The standard to grant a stay is supposed to go like this: The, the applicant, whoever it is who's asking for the stay, has to show, first of all, a likelihood of success on the merits. And in the context of the Supreme Court, that means likelihood that at least four justices will vote to grant for cert, and that then there's a reasonable probability that ultimately the lower court will be reversed. That's number one.

Number two, they're supposed to show, uh, that they will suffer irreparable harm-- whoever the applicant is-- it will show irreparable harm in the absence of this stay. And then there are two final criteria, which kind of merge when the government is the applicant. But one is the effect on other parties, uh, so that you know, whoever the other people are in the case, what's going to happen to them? Will they suffer some kind of harm? Um, and then overall, the public interest. The Supreme Court in its decisions regarding this Trump administration's, uh, applications for stays has largely focused on irreparable harm and nothing else. They've basically said-- and, and, uh, justice Barrett said a version of this or hinted at this in her opinion on nationwide injunctions-- that anytime the

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federal government is told that it can't do whatever it is that it wants to do, that's irreparable harm. Now that just, I don't think that can be right, uh, in the sense that it's incomplete. Because in many, many of these cases, what the executive branch is saying it wants to do is something that Congress has said it can't do. Or so, you know, the idea that it's the irreparable harm to the executive branch, but we don't look at the other who else might suffer irreparable harm, or even the other parts of the government, is just to me kind of shocking. They don't always seem to be looking at likelihood of success on the merits, and they certainly aren't balancing the equities in terms of looking at, you know, who else might experience, uh, even beyond, beyond Congress, but also looking at, say the people impacted by whatever decision is being made.

And so that's I think what people are extremely critical of, of the current court's actions. And, and again, they do, they are frequently and largely doing this without explanation. And then some of them have even said to the lower courts, well, you're not, you're not even doing your job because you're not following what we said you should do, when in fact they haven't explained the implications of what they're doing. So it's, it's really, deeply, problematic. And, in many, many, many of these cases, under any other circumstances, we would expect that the court would say, okay, maybe there's, you know, we'll decide this when it gets to us. There, there's no emergency. They seem to be reading this emergency in this irreparable harm that they view the government, the, the executive branch to be experiencing, in a way that I've never seen them consistently do at any other time.

Normally, certainly when I was clerking, the view was let it, let it go through the process. It's not the court's job to be the court of first review. Uh, so we want to have a full record. We want the lower courts to fully figure this out, to, to develop the record, to do the analysis and then the Supreme Court can review that. There may be times when you want to short circuit that process in some way, um, but not in many, or even most of, of these cases.

**Matt:** I was always trained, professor, that the, the irreparable harm was the proverbial wrecking ball about to go wipe out the structure and you need to stop it from swinging because once you hit that wrecking ball against the building, that thing's coming down. And that's what irreparable harm was intended to stop. And what I'm hearing from you is that we are almost redefining the, the contours of what irreparable harm is. Justice Barrett, that's a pretty broad-based pronouncement to say that anytime the federal government comes in on an application such as this, there would be irreparable harm. I mean, I think that's fairly overbroad. And, and she is a deep intellectual thinker. For her to pronounce that is, is kind of astonishing.

But it really begs a broader question that I have for you today, and that is, you know, Constitutional Law 101, first year of law school, you are taught the Doctrine of Stare Decisis. You are taught that the, the purpose of our Supreme Court and its body of law is so that we have something that's predictable and it, and it builds out a common law doctrine that we can continue to rely on as we

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move forward in, in our time, some 250 years into this experiment in human liberty that we're in. Now, against the backdrop, these high-profile reversals that we've seen-- *Dobbs*, we've seen others-- and the procedural expansion of the court's shadow docket to have really reaching impacts, is the Doctrine of Stare Decisis just dead?

**Carolyn:** Well, I don't know that I would say it's dead. It certainly applies in the lower courts, we'll start there. Uh, I think the question is, does, is the Supreme Court itself adhering to Stare Decisis when it's overruling cases that have been on the books for a long time? Or even not a long time. I mean, you know, we saw them do that in *Dobbs* when they overruled *Roe v. Wade*. We saw them do that in the *SFFA v. Harvard* case, the affirmative action case. They are undoubtedly about to do that with respect to a case called *Humphrey's Executor*-- which has been on the books for about a hundred years-- that allows congress to prevent the president from firing, uh, certain types of agency commissioners.

In some of those cases, I would say, they have not done the work that I would expect to see to, uh lay the groundwork for explaining why overruling is appropriate. But I think to some degree that is, at least, debatable, whether or not they've done that. All three of those issues have been extremely controversial for a long time. It shouldn't have come really, it shouldn't come as a surprise to anybody, regardless of whether you think they're right or wrong, um, that the court overruled those cases.

The one that concerns me the most in terms of its sort of broader implications for the stability of law, *Humphrey's Executor*, this removal power. And, and I say that acknowledging that *Dobbs* and *SFFA* are incredibly important, and in my view, incredibly harmful decisions. So I'm not saying I think they were rightly decided. I do not. But I think that in our current moment, the *Humphrey's Executor* likelihood of it being overruled is much more disruptive. Because what it does is it says, well, you know, Congress, you created for, you know, a hundred years you've been creating agencies, you've been instructing these agencies, these independent agencies like the FTC and the FCC, uh, to do certain things. And you've been doing that on the understanding that they were going to be led by experts, by a panel of experts who the president can appoint and the Senate confirms, but who the president can't fire if he just doesn't agree with the policies that they are implementing, which are the policies that Congress has set forth. So if and when they overrule *Humphrey's Executor*, all of a sudden what's likely to be the case is that we'll have all of these agencies-- 'cause they don't think they're going to say, well, all the agencies just go away. I think what they're going to say is the only agencies are still there. It's just that the president can fire the people who run them. So it, it really undermines what the legal backdrop against which Congress has been legislating for a hundred years.

**Matt:** And again, concentrating power in the executive.

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**Carolyn:** And concentrating power in the executive. But it's, it's that kind of, sort of changing the background rules in ways that have far-reaching effect beyond a specific case that I think is really problematic.

And, and I would say *Dobbs* does do that to some extent. If we didn't have 50 years of reproductive rights after *Roe v. Wade*, it is entirely possible that lots of states and the federal government would have repealed laws that in some places are still on the books --that people, some people call them zombie laws-- that outlaw abortion. So Wisconsin, for example, had one of these laws from the 19th century. The Wisconsin Supreme Court said, no, it's not good law because, you know, it, it due to the, the nature of all the things that have happened since it was enacted, including *Roe v. Wade*, et cetera.

But one at the federal level, we have something called the Comstock Act, which has not been enforced, uh, with respect to restricting the use of the mails to distribute, uh, materials and information for birth control and abortion hasn't been enforced for decades, for obvious reasons. And Congress never bothered to repeal it because the background principle that we were all acting against is there was no reason to. Well, we'll see now what, uh, this administration might decide to do with the Comstock Act.

**Matt:** Yeah. And with the risk of oversimplifying a complex morass of, of decisions-- and, um, before we take a bit of a hard pivot into an impending clash of state and federal law-- what in your view has been the most impactful ruling of this Supreme Court on this so-called shadow docket? Or are they, are, are they all just equally of, of equal measure continuing to present a, a situation where we're undermining our, our legal structure?

**Carolyn:** Whatever answer I give you, I'm going to be leaving things out. But I would say, uh, among the most impactful are the cases that have prohibited lower courts from requiring money to be spent and/or, uh, employees to remain in their jobs. In other words, the cases where lower courts have said, hey, wait a minute, Congress created this agency and Congress appropriated these funds. You can't just decide not to do that because you don't want to-- you being the executive branch --and the Supreme Court has, stayed some of those injunctions. So, that's incredibly impactful because even if eventually-- because the litigation does continue, and, and it will eventually probably come back to the Supreme Court in the sort of fully briefing, briefed and argued context-- so even if the Supreme Court later says, oh, well actually we were wrong about that, uh, the agency has now been decimated. The Department of Education is, is one of those agencies where the, where the Supreme Court has stepped in.

It's not, it's not the only agency that, uh, that has been decimated in that way. By the way, I, I represent some USAID workers in some ongoing litigation, and there are other agencies as well. But that's the one where the, the court has, has stepped in.

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In a series of cases, the court has stayed lower court injunctions preventing the president from terminating particular officials, uh, that's sort of along the lines of things I've already talked about. There, we have now had, oral argument in one of those cases. So those are, those are a little different. On the immigration or enforcement front, they have allowed the president to remove what's called temporary protected status from large groups of people-- in particular Venezuelans-- which has had the effect of making those people instantly illegally present in the United States. They haven't done anything wrong. They came here and got this temporary protected status that allowed them to function here. And then with the stroke of a pen, the president said, eh, no. The lower courts tried to stay, or enjoin the president from doing that. And the Supreme Court said, no, go ahead, it's okay. So you can imagine sort of the fear that people in those groups are currently experiencing.

And along those similarly, um, the case of *Noem v. Perdomo Vasquez*, the, that, that's the case involving, ICE tactics in California where the lower court had enjoined federal officials from stopping people solely because of their appearance, whether or not they spoke Spanish or spoke English with an accent, where they were like at a bus stop or a Home Depot parking lot and what kind of work they appeared to be doing. The, the lower court said that's essentially racial profiling. The lower court had pages and pages of factual findings. And then the Ninth Circuit upheld the injunction in like a 50-page opinion. And the Supreme Court --with no explanation whatsoever-- stayed that injunction. Justice Kavanaugh wrote a concurrence that's, that's gotten quite a bit of, uh, criticism, but there was no explanation from the court.

And so what we see happening now in places like Minnesota, where it is very clear that ICE is stopping people solely based on the color of their skin, um, and demanding that they prove that they are citizens or otherwise legally present. And if they're non-citizens, even if they have papers showing they're legally present, that it's not clear that, they don't always accept those documents. Um, and so I think that case is going to turn out to be incredibly, incredibly important.

**Matt:** All green-lighted via the shadow docket.

**Carolyn:** Yes. Now the one case where they've done something, that may have helped to prevent things from escalating further is a case in which they said that-- uh, again, on the shadow docket -- that the president couldn't call out the National Guard under current circumstances in Illinois. I think that same holding would apply in Minnesota right now. But the president started talking about invoking the Insurrection Act, which would allow 'em to call out the military and send them to Minnesota. We don't know whether the Supreme Court would decide that that's even reviewable. But I see that coming to a Supreme Court near you very soon.

**Matt:** We are amidst a fascinating discussion with Professor Carolyn Shapiro of Chicago Kent College of Law, where she is the Founder and Co-director of that institution's ISOTUS, or Institute on the Supreme Court of the United States.

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Let's take a hard pivot out of the Supreme Court's shadow docket for a moment, but still something that is bound, I think, to head to the Supreme Court. And that is the impending clash of, Minnesota State law and federal law in the aftermath of the shooting death of unarmed activist Renee Nicole Goode, who was shot and killed by a ICE officer Jonathan Ross, in broad daylight with seemingly dozens of cameras rolling as Ross fired into her vehicle three times amid some profanity-laced tirade by himself and some of his colleagues.

Say what you want about the arguments on both sides of the issue of justification. That is a, I think, a separate legal issue that we're going to peel off for the time being. Would you agree with me that we're headed now for a showdown of state law versus federal law on this issue?

**Carolyn:** I think it's quite likely. And if it's not in the Renee Goode case, it likely will arise in other cases, in the sense that there are plenty of examples of ICE and CBP agents doing things that are crimes under state law. And some of those, the issues of justification or the, the potential defenses are, not really arguable, at least in my view. Um, although, I'm not a criminal defense lawyer, so, uh, I, I shouldn't speak quite that definitively. So, you know, states do have jurisdiction to prosecute federal officials who violate state law, but who commit crimes under state law. Those federal officials can then claim something called Supremacy Clause Immunity, which allows them to say, hey, I was doing my job as a federal official and because of the Supremacy Clause-- which says the federal law trumps state law-- you, state, can't prosecute me for doing that job.

What then the application of Supremacy Clause Immunity turns on, then, is whether the officer was actually acting within his lawful duties, and acting reasonably within those lawful duties. So, or whether what he did was necessary and proper to fulfill those duties. That's some of the language the courts sometimes use. There's not a ton of case law on this, but there is some. And when I first started to look at this, frankly, I was surprised that states can, do and have brought these prosecutions, sometimes successfully. Sometimes the question of whether the Supremacy Clause Immunity applies really comes down to a question of fact, right? Did this person who was shot -- to refer to a specific case, from, like a hundred years ago-- did the person who was shot actually have his hands in the air? Or, was that person doing something that could have been perceived as a threat, right? That's a fact question. If, if the person had their hands in the air, it wasn't reasonable, it wouldn't have been reasonable for federal agents to shoot him.

So you know, there, there's a lot of overlap, uh, depending on the specific instance, between figuring out whether the supremacy clause immunity applies and sometimes the factual defense that, one of these agents might raise. But, undoubtedly, if a state brings one of these prosecutions-- whether it's against Jonathan Ross, the, the shooter of Renee Goode or somebody else, some, some other person, purportedly enforcing immigration law-- that will be heavily litigated and the government, I would expect, will try to get the Supreme Court to weigh in very early, perhaps take it to the shadow docket. But it's, you know, the specifics of that have yet to be developed.

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**Matt:** So when the Vice President of the United States, JD Vance, said that ICE agent, had, quote, "absolute immunity," it's a bit of an oversimplification.

**Carolyn:** I would say it's a falsehood. I wouldn't say it's an oversimplification: It's not true. They do not have absolute immunity. They don't have absolute immunity from federal prosecution either, by the way. I mean, there's no particular reason to think, you know, this administration is not going to prosecute them, but a subsequent administration might. But they absolutely do not have absolute immunity. And, Kristi Noem said, the reason that the federal government isn't collaborating with the state of Minnesota and the investigation of Renee Good's killing is because the state doesn't have jurisdiction. Also not true. The state has jurisdiction. If you want to read more about this, I have a post that explains all of this in more detail on the LawFare website.

**Matt:** Yeah, we're going to get to that because I, I read it, just prior to, to getting on with you for this podcast.

But before we get there, you recently published a piece for SCOTUS Blog as part of your ongoing Cases in Controversy series entitled, quote, the Worst Supreme Court Case You've Never Heard of, And What it Tells Us About Trump's Immigration Enforcement.

And I think we've alluded to this already, but what has this Supreme Court action, past Supreme Court action, I should say, done to pave the way for what is ongoing right now with ICE and this heavily armed conflict that's happening in American cities and towns?

Just this past week, less than a mile from where I'm sitting right this moment, a 17-year-old was taken into ICE custody and secreted off to a detention facility without due process, at a laundromat. A child. I know you have strong views about how Supreme Court precedent has brought us to this point. What in particular? What decisions by the court have brought us to this point?

**Carolyn:** Well. I would say this Noem v. Perdomo case might be-- the one that I mentioned before where they stayed the, the lower court injunction from California. I--

**Matt:** Again, on the shadow docket, it's just--

**Carolyn:** On the shadow docket. I think that case has given the green light for these really remarkably outrageous tactics that I think are wildly unconstitutional on numerous fronts, in terms of excessive force being used, in terms of the lack of due process. I mean, repeatedly, we see protestors being arrested, taken into custody and then released without ever being charged, in some instances without ever being told why they were being arrested. These are pretty fundamental violations of the Fourth Amendment.

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The case that I was talking about in my SCOTUS blog piece is called *Prigg v. Pennsylvania*, and it, it predates the Civil War. And in that case, it, it involved the state of Pennsylvania's effort to protect its black residents from being abducted by slave catchers. Before the Civil War, that was a thing that happened a lot. Slave catchers would come from the states that had slavery, and they would abduct Black people who they said --sometimes accurately, sometimes inaccurately-- were escaped enslaved people. Pennsylvania said, well, we don't like this. And under the fugitive slave clause of the Constitution, we might not be able to prevent people who are escaped slaves from being returned to slavery. But at least we want to protect other people, who are free, legally free. And so they imposed a requirement that, before taking Black folks outta state, the slave catchers had to go before a state magistrate. In the particular case, that didn't happen. And the woman --named Margaret Morgan -- and her children... Margaret Morgan had lived as a free woman her whole life. Her husband was a free Black man. Uh, she and her children were abducted and taken to Maryland, and we really don't know what happened to them after that. And neither did her husband. He tried really hard to find them, and couldn't. So it's a horrible story.

There's a lot of the inhumanity of that story that I see playing out in the actions of the federal government today in its complete lack of concern and consideration for people's lives, their families, their loved ones. You know, you could decide to deport more people who are deportable, but give them time to, for example, say goodbye to their loved ones, put their affairs in order, sell their property. You know, nothing that is happening right now vices any suggestion that the federal government thinks that the non-citizens its abducting, are entitled to the slightest bit of consideration as humans.

But the other thing about that case that I talked about is that it and other things that were happening in this pre-Civil War era, really prompted a pretty strong response among regular people, particularly in free states. They would set up slave catcher watches. They would surround homes where escaped slaves might be sheltering. They would sometimes surround jails where a, an escaped slave might be imprisoned, before they were returned to where they came from, and sometimes they were successful in getting those people released. These were ordinary people. Um, and I see enormous parallels between those actions and the actions of the protestors, and the ICE watch people in Minnesota today.

And I think it's really, really important to see that those actions not simply as policy disagreements, but as kind of acting on your belief and what the Constitution means. Does the Constitution mean that the federal government can just like, show up or slave catchers can just show up and abduct anybody they accuse of being, you know, an enslaved person or somehow deportable? And in many cases, right, these are people who, today, folks who are here legally, but maybe, you know, ran a stoplight or something like that a number of years ago. Or does our constitution have a commitment to due process and equality and liberty? And, if, when, that commitment is being severely tested, if you believe in those constitutional commitments, that's what you're doing when you're protesting.

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You're not just, I mean, you are standing up for your neighbors. You are taking a, a policy position. But you're also taking a position on a constitutional vision.

**Matt:** You, you alluded to it earlier, your piece on the LawFare website. It's entitled, Minnesota Can Prosecute Jonathan Ross, But It May Not Be Easy. And it's a wonderfully thoughtful, expose of this particular moment and event in our history. In our waning, minutes together, I have a couple more questions for you. Professor. At least six federal prosecutors in that Minnesota case have resigned, reportedly in protest of the Department of Justice's handling of the case and it's focus on investigating the victim, Ms. Goode's, widow rather than the ICE officer who actually fired those fatal shots through her windshield. Do you have any faith that the shooting will be given a full and impartial investigation? And what role do you believe that the courts will have in making sure or not that that takes place?

**Carolyn:** I think that there are undoubtedly people who still work at the FBI and other investigatory arms of the federal government who have an interest in doing the appropriate investigation. I don't know if they'll be allowed to do that. I believe that Todd Blanche, Deputy Attorney General, said that they had concluded there was no basis for a criminal investigation into the shooting. And not only were the resignations you described announced, also several career prosecutors in the criminal section of the Civil Rights Division in Washington also resigned because they were told they could not investigate this shooting, which is something they would ordinarily do.

So this government does not appear to have the slightest bit of interest in determining whether or not there could conceivably be criminal liability by Jonathan Ross. And, they've made a predetermination and, and we can see that because in other ways as well. Kristi Noem, Secretary of Homeland Security, said literally minutes after the shooting, she called Renee Goode, a domestic terrorist. I mean, to say there hadn't been an investigation is an understatement. It had just happened. It was outrageous.

So I'm pretty skeptical that the federal government is going to do, much of an investigation here. Although, again, there may be some people, you know, career people who are still there, who will, try to do little bits and pieces. The state of Minnesota prosecutors determined that they can charge Ross. Which is a complicated question. I mean, I, I don't actually at this point have a prediction about that. But if they decide that they can charge him and they do, then I think the, you know, we'll see the, the Minnesota State Courts initially, but the case will be removed to federal court. Hopefully they will demand that we see as much of an evidentiary record as is available. But, I don't know that they can require, even under those circumstances, the federal government to share information with the state.

**Matt:** And then that Supremacy Clause Immunity will be litigated. Is that, is that what happen?

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**Carolyn:** That's, that's right. That's what will happen. Uh, if he's charged in, in state court, Jonathan Ross has the right to have the case removed to federal court. It still will be prosecuted by the state prosecutors, that's important to note. It, it just will be prosecuted in federal court in front of a federal--

**Matt:** Before a federal judge and subject to federal appellate appeal that includes, but is not limited, to the United States Supreme Court.

**Carolyn:** Correct.

**Matt:** Both substantively and on its shadow docket.

**Carolyn:** Correct. All of that's right. So, it could be a long haul. I mean, that's one of the things I, I said in the piece is that I, I, don't expect a quick resolution. I don't even expect a quick determination by the state prosecutors as to whether or not they're going to charge him.

I think there's a lot of things they have to think about really hard and, and they don't have all of the evidence that they would want to have. Now, the Hennepin County Prosecutor, Mary Moriarty, has said, " I often don't have all of the evidence I wish I had when I have to make a charging decision."

So I don't think she's shying away from the possibility of charging him, but we just don't know yet.

**Matt:** And that is even on top of the legal issues that will surround what will be inevitably a, a self-defense.

**Carolyn:** He's likely to raise a self-defense claim or he's likely to raise a claim that, as a peace officer, he had the right to use force under those circumstances, under Minnesota law. And you know, there's a lot of sort of factual and even some legal overlap between that and the Supremacy Clause Immunity question. I honestly think one of the places in which he is maybe most vulnerable, is with respect to the Minnesota law that requires somebody who, who shoots another person to investigate and, and go to their aide, which did not happen.

**Matt:** In fact, the videos demonstrate that they denied, apparently, medical personnel that, doctors and or nurses, who themselves have an obligation under their respective professional oaths to--

**Carolyn:** mm-hmm.

**Matt:** To render aid. That they secured the scene in such a way that precluded them from getting to it.

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**Carolyn:** Yes. So I am sure there are arguments I haven't thought of, but it's hard for me to see how, especially their own failure to investigate. I, I could, I could see an argument that maybe keeping other people, uh, away from the scene might be within their duties, but they are under Minnesota law and also under federal guidelines that govern their use of force, they were supposed to come to her aid.

**Matt:** Yeah. Professor, I have one last question for you and, uh, it's a question I frequently ask my guests. And forgive me for the, I guess maybe tacky, uh, way of saying this, but take out your proverbial crystal ball and, look into the future against a fairly disturbing last 60 minutes or so of dialogue that we've had about some of the way that the guardrails are really coming off, because of both the court's substantive decisions, but perhaps more impactfully these shadow docket decisions that are being made with very little explanation. Looking into that crystal ball, will the courts have a role in quelling the tumultuous time we're living through right now? Will the courts ultimately see that this lessening, this reduction of guardrails may very well be contributing to the destabilization that we're experiencing and right the ship? Will the pendulum swing back or is something else going to have to happen? Is it going to have to take legislative action? Is it going to have to take political will in the form of ballots? Will the courts have a role or have they already taken aside?

**Carolyn:** Okay, so I, I think I have three-part answer to that question. So, the first thing I'll say is that the courts-- plural-- I actually think have done already a fair amount of work in holding up the guardrails. The lower federal courts have been very active and have issued lots of injunctions, many of which-- in fact the majority of which-- uh, the Trump administration have, has not taken to the Supreme Court. So the courts plural are doing some work to protect the guardrails, and I expect they will continue to do so.

Will the Supreme Court shift at all in what it's doing? I think it's possible that it will. Justice Kavanaugh, for example, who wrote a concurrence in the *Noem v. Perdomo* case has in, in the subsequently this very, there's a concurrence, was heavily criticized. And one of the reasons it was heavily criticized is that he said, well, you know, of course it's no big deal if you're a citizen, uh, it's just a brief stop you show, you know, you establish you're a citizen and they let you go. And, that has been widely criticized, and I would say even ridiculed, as just being an inaccurate statement of fact in terms of what's actually happening.

And in the National Guard case, the *Trump v. Illinois* case, uh, he also wrote a concurrence and he dropped a footnote where he said, essentially, yeah, racial profiling is not permissible, which is kind of the opposite of what he said in *Noem v. Perdomo*. So, you know, there's a good reason to believe that he was responding to the criticism of that opinion and also-- and/or also-- the, what's actually happening on the ground.

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So I, I think, uh, that it's possible that some of the justices who have been voting to allow the Trump administration on the shadow docket to do a lot of its activity will pull back. And, and they did to some degree, uh, I think it is worth noting also, in the case involving the Alien Enemies Act, which was a, a few months ago. The, the court did insist on due process for people who the, the, administration was trying to deport without any process at all.

So I, you know, there, there may be, uh, there, there, there may be some movement there. But the last thing I'll say, uh-- and this goes back to what I was saying about *Prig* and, and protestors-- the Constitution belongs to all of us, uh, and we are all entitled to our vision of what it means. And peaceful protest and documenting what's happening is a crucial part of that. It's, it's not just up to the courts. I also hope there will be some legislative action, but, and, we'll be interesting to see what happens in the midterms. But, more immediately, I think it's important to recognize that the people can be constitutional actors as well.

**Matt:** Professor Carolyn Shapiro, I can't thank you enough for joining us. That's all the time that we have on this episode of "The Presumption Innocence." Until next time, I'm Matt Adams. We'll see you then. Take care.

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