

The NYT and the 'Shadow Papers'

Thoughts on the reporting



JACK GOLDSMITH

APR 20, 2026



Please [click here](#) to opt in to receive via email our [Roundup](#)—brief daily summaries of new developments and commentary related to executive power.



The U.S. Supreme Court, Washington DC, May 2023. (Matt Blaze, CC BY-NC-ND 2.0, cropped, <https://flic.kr/p/2oEeQBC>)

This essay is cross-posted at [SCOTUSblog](#).

Over the weekend Jodi Kantor and Adam Liptak [published several stories](#) in the New York Times based on the internal Supreme Court memoranda that led to the famous [interim order](#) staying President Obama's Clean Power Plan in 2016.

The CPP order was unusual, but not because the Court temporarily decided a very important issue via an interim order with no explanation. That had happened quite a lot, even outside the death penalty and election contexts. See for example [these two](#) interim orders from 2014 on abortion and same-sex marriage.

Consider becoming a free or paid subscriber to
Executive Functions.

<input type="text" value="Type your email..."/>	<input type="button" value="Subscribe"/>
---	--

The CPP order was novel at the time, I believe, because it temporarily shut down a presidential program even before the court below had a chance to rule on the issue. (The Court did something similar last year in [enjoining](#) President Trump's Alien Enemies Act deportations.) Viewed from the perspective of 2026, this order fairly marks the beginning of the Court's modern active engagement with presidential initiatives via interim orders, as Kantor and Liptak suggest.

The CPP memoranda implicate lots of meaty legal and institutional issues which I will analyze in due course. But for now I simply want to flag what I view as unfortunately tendentious reporting about the memoranda, especially but not exclusively about the Chief Justice.

Without any support in the documents, Kantor and Liptak say the Chief Justice seemed "[angry](#)" and "[irritated](#)" in the memos and they portray him as an almost back-faith actor.

I also do not think “the papers show” that the Chief Justice “[acted as a bulldozer](#) in pushing to stop Mr. Obama’s plan to address the global climate crisis.” It was the Chief Justice’s responsibility to write the initial memo with his views and his prerogative to note disagreements with others. But he had no power to “bulldoze” anyone into voting any particular way—especially Justice Kennedy, “the court’s [ideological fulcrum](#),” who cast the deciding fifth vote for a reason not offered by the Chief Justice.

Kantor and Liptak frame the order as part of a larger personal battle between the Chief Justice and President Obama, even though the Chief Justice [wrote](#) two [opinions](#) that saved Obamacare and also [voted to uphold](#) a different Obama EPA initiative. (Kantor and Liptak note that the Chief Justice voted to uphold one of the Obamacare cases but say “that was approved by Congress.” But of course the Chief Justice thought the CPP was *not* authorized by Congress.)

Kantor and Liptak say the Chief Justice “and the other conservative justices have repeatedly empowered the president through their shadow docket rulings” without mentioning the very consequential rulings against Trump on the shadow docket (such as [this](#), [this](#), and [this](#)), or the fact that every interim order Trump has won came to the Court preselected by the solicitor general based on likelihood of success.

They mention that the Chief Justice’s legal analysis for the order rested in part on the major questions doctrine that “in the years since . . . has played an increasingly important role in the court’s work.” Since their central message is that the conservative majority led by the Chief Justice is unprincipled and outcome-driven, they might have mentioned that two months ago he wrote an opinion for three conservative justices that [invoked major questions](#) to strike down President Trump’s signature tariff policy. (Three liberal justices joined the tariff invalidation but did not rely on the major questions doctrine.)

I also have a hard time understanding why Kantor and Liptak called out and went into biographical detail about the law clerks who worked on and initialed the memos for

the Chief Justice and Justice Alito but failed to mention or say anything about the law clerk who apparently initialed the Breyer memo.

They also say that the Chief Justice took the “unusual step of quoting” a BBC interview in which the EPA administrator effectively said (in Kantor and Liptak’s [words](#)) that “the agency was baking the Clean Power Plan into the system in ways that later presidents and Congress would not be able to undo.” I’m not sure how unusual this is, especially since (as they failed to mention) this interview was cited in and relied on in the [application for the interim order](#).

There are other small things in the stories that seemed unfair or misleading. I see no value in listing more, and I am sure others will see things differently. Kantor and Liptak have [provided the documents](#) that form the basis of their story and so you can study them and decide for yourself.

I thank Tia Sewell for editorial assistance.



Printable version

333KB · PDF file

Download

Download

Subscribe to Executive Functions

Hundreds of paid subscribers

Bob Bauer and Jack Goldsmith, two former senior government lawyers from different political backgrounds and administrations, decode the presidential power issues and controversies of the day.

Subscribe

By subscribing, you agree Substack's [Terms of Use](#), and acknowledge its [Information Collection Notice](#) and [Privacy Policy](#).

© 2026 Bob Bauer and Jack Goldsmith · [Privacy](#) · [Terms](#) · [Collection notice](#)
[Substack](#) is the home for great culture