

IT'S NOT THE SHAMELESS EXECUTIVE POWER GRAB IN PLAIN SIGHT, IT'S THE ATTEMPT TO RETCON IT AFTERWARDS

This, from Steve Vladeck, is a helpful piece on the plight of Mamoud Khalil, the Columbia student detained by ICE the other day whom Trump is trying to deport. As he describes, the case is clearly an attempt to police speech, but (as many things are in a counterterrorism frame) the Trump administration might well offer up some plausible legal justifications to defend their actions.

[A]lthough what the government has done to this point is profoundly disturbing, and is, in my view, unconstitutional retaliation for First Amendment-protected speech, I'm not sure it is as clearly unlawful as a lot of folks online have suggested. And that's a pretty big problem all by itself.

[snip]

Third, what is the legal basis pursuant to which the government is seeking to remove Khalil?

This brings us to the central "merits" question. What is the exact basis on which Khalil, in the government's view, is subject to removal from the United States? Suffice it to say, President Trump's social media post is not exactly specific here, nor has Secretary of State Rubio provided much additional clarity.

For what it's worth, my best guess (and it is only a guess) is that the

government is going to rely upon one or both of two very specific provision of immigration law.

The first, 8 U.S.C. § 1227(a)(4)(C), provides that “An alien whose presence or activities in the United States the Secretary of State has reasonable ground to believe would have potentially serious adverse foreign policy consequences for the United States is deportable.” There’s a caveat protecting such a non-citizen from removal “because of the alien’s past, current, or expected beliefs, statements, or associations, if such beliefs, statements, or associations would be lawful within the United States,” but only “unless the Secretary of State personally determines that the alien’s [continued presence] would compromise a compelling United States foreign policy interest.” Thus, if Secretary Rubio makes (or has made) such a personal determination, that would provide at least an outwardly lawful basis for pursuing Khalil’s removal—so long as **Rubio has also made timely notifications of his determinations to the chairs of the House Foreign Affairs, Senate Foreign Relations, and House and Senate Judiciary Committees required by 8 U.S.C. § 1182(a)(3)(C)(iv).** (I’ve seen no evidence that he’s done so, but that doesn’t mean he hasn’t.)

The second provision is 8 U.S.C. § 1182(a)(3)(B)(i)(VII), which renders both inadmissible and removable any non-citizen who “endorses or espouses terrorist activity or persuades others to endorse or espouse terrorist activity or support a terrorist organization.” Perhaps the argument is going to be that, insofar as Khalil was involved in organizing pro-Palestinian protests on Columbia’s campus, he was “endors[ing]

or espous[ing]" terrorist activity (to wit, by Hamas).

I know there's a lot of technical language here. The key point is that it's at least possible that the government has a non-frivolous case for seeking Khalil's removal under one or both of these provisions—especially if Secretary Rubio invoked § 1227(a)(4)(C). And insofar as the government is relying upon those provisions to pursue Khalil's removal, that might bring with it a sufficient statutory basis for his arrest and detention pending his removal proceeding. We'll see what the government actually says when it files a defense of its behavior before Judge Furman; for present purposes, it seems worth stressing that there may well be a legal basis for its deeply troubling conduct. [my emphasis]

I of course don't question Vladeck's legal analysis (some immigration experts were pointing to the same immigration law provisions as well).

I instead want to suggest that with this case, as with several others, it appears that the Trump Administration made a shameless power grab *without doing their investigative work first*. So what we see going forward may be nothing more than an attempt to retcon it, to change their story after the fact to adjust for new facts.

Here are some ways Trump has been retconning (or attempting to) in the 50 days of this short term already.

- After Elon Musk made exaggerated claims about NYC's use of hotels to house migrants paid for by a FEMA grant, Kristi Noem loudly bragged that she had fired

the people involved and had clawed back the money involved. In its lawsuit suing to get the money back, NYC disputes the underlying claim that the government had pointed to (that Roosevelt Hotel was being used to support crime and NYC knew it). One of the fired workers, Mary Comans, disputed Noem's claim about her own firing in one declaration. And now she's suing not just for her termination, but for the false claims made about her publicly. As that suit was being filed, a top FEMA lawyer was fired, and those involved suspect it had to do with a request that the lawyer make claims about the clawback to give it legal justification.

- After Elon and others repeatedly claims made in a Project Veritas video about efforts to fund the Greenhouse Gas Reduction Fund at the end of the Biden Administration, Lee Zeldin bragged that he would claw back that funding, in such a way that may expose him to legal claims. In an attempt to do that, Emil Bove and Ed

Martin pressured a senior DC USAO prosecutor, Denise Cheung, to not just freeze the funds, but do so with a claim of probable cause based on the PV video. That led her to quit and release her resignation statement. Only after that, the FBI interviewed the guy in the PV video; according to his attorney, Mark Zaid, he had nothing to do with the disbursements in question. And since then, Ed Martin has been jurisdiction shopping attempting to pursue this case. Zeldin is trying to get the Acting Inspector General to invent justification for this after the fact. One of the entities involved, Climate Fund, has sued the EPA, Zeldin, and Citibank (there will be a hearing on its request for a TRO tomorrow).

- With a great many DOGE activities (but most obviously with the USAID closure), the government initially claimed that it had stopped funding pursuant to Trump's first-day Executive Orders, but after providers got Temporary Restraining Orders, the

government (as laid out in a series of court declarations by Pete Marocco, in the USAID case) claimed, instead, that everything was shut down pursuant to a contract review involving Marco Rubio. The shutdown of contracts by itself may be totally legal (or at least defensible), but the way they did so raises real questions about whether the government was lying about Rubio's personal involvement in the review process, and therefore its legality. (I'll return to this example, and Rubio's agency – double entendre intended – more generally, in a follow-up.)

With all of these things, like the Khalil detention, there might be some legal argument that it was legal.

But along the way, *because* the government didn't have their story straight when they took action, they subsequently took actions that may cause, at the very least, legal friction going forward, if not legal liability themselves. Noem made allegedly false claims about Comans. A FEMA lawyer resigned, potentially available to offer conflicting testimony about what happened. Cheung resigned, loudly, exposing her opinion that Martin didn't have criminal probable cause to pursue the clawback. Martin jurisdiction shopped. Marocco has made claims in declarations that defy credulity (and even conflict with a tweet Rubio posted yesterday).

More judges have gotten dragged in, with the kinds of fact sets that tend to piss off judges.

In Khalil's case, there are several details that suggest the Trump Administration may be trying to retcon their basis for detaining him.

First, there were several right wing groups who first doxed and then targeted him. As with the PV video, right wingers are running with allegations regardless of the evidence. Last year after Columbia booted Khalil, they reversed the decision for lack of evidence. A right wing dossier on Khalil doesn't actually include examples of antisemitism – but it does invoke Hamas relentlessly. More recently, State has been doing AI searches to target people; thus far, anything this government has done with AI has had ridiculous problem. So there's good reason to believe there was shitty information that went in the front end of this effort.

Further, it appears that ICE *didn't know* that Khalil was a Green Card holder when they came to arrest him. The habeas petition claims that the agents "looked confused" when he provided proof of status.

15. On the evening of March 8, 2025, at approximately 8:30 p.m., [redacted] and his wife were returning to their Columbia University-owned apartment from a friend's home. When they arrived at their apartment building, [redacted] and his wife were approached by approximately four people who were dressed in plain clothes. All of them entered the lobby of the apartment building.

16. When the people approached and his wife, they asked, "Are you [redacted]?" When [redacted] answered in the affirmative, the men identified themselves as being with the Department of Homeland Security ("DHS") and that they have to take into custody. The agents told [redacted]'s wife to go up

to her apartment, and that if she would not leave they threatened to arrest her, too.

17. [redacted]'s wife retrieved s immigration documents to show the agent that is a lawful permanent resident. She handed the documents to the agent, who was talking to someone on the phone. The agent **looked confused** when he saw the documents and said, "He has a green card."
[redacted]'s wife heard the agent repeat that they were being ordered to bring in anyways.

[snip]

Attorney Greer identified herself as s attorney and asked who she was speaking with. The agent identified himself as Special Agent Elvin Hernandez of Homeland Security. Attorney Greer asked if Agent Hernandez had a warrant, and he answered in the affirmative, stating that [redacted]'s student visa had been revoked by the U.S. Department of State and therefore they were detaining him. Attorney Greer advised Agent Hernandez that is a lawful permanent resident and has the right to due process. Agent Hernandez responded that the Department of State had revoked [redacted]'s green card, too, and that he would be brought in front of an immigration judge. The agent stated that he would be taking to 26 Federal Plaza.

19. The agents then handcuffed and brought him outside where there were multiple vehicles waiting. [redacted]'s wife asked for the names of the agents, their contact information, and how to reach them to follow up on her husband's detention, but they only advised her that would be

taken to 26 Federal Plaza, and otherwise refused to speak with her. They left her no business card or any information at all as to how to find out where her husband will be taken, on what grounds, or who she can contact. [my emphasis]

If the backup to the warrant to detain Khalil was premised on him being a student visa holder (this Tweet targeting Khalil directly asks Rubio to strip his visa), then it's almost impossible that Marco Rubio would have done the concerted review that stripping him of his Green Card would require (much less the notice to Congress, which Vladeck laid out above), just as it's "implausible" that Rubio really reviewed the USAID contracts that got shut down.

That is, the ICE agent's representation that State *had* stripped Khalil's visa when they detained him may not yet have been true, whatever else State tries going forward.

Finally, while it is normal for ICE to whisk people off to Louisiana like they did Khalil and normal for it to take a day or so to show up in the system (meaning, he wasn't specifically disappeared, but rather, America's detention systems work in this Kafkaesque way normally), the current record suggests that ICE moved Khalil *after* his attorneys had submitted the habeas petition. As Vladeck notes, that should help Khalil to retain the jurisdiction in SDNY, before Jesse Fruman and in the Second rather than Fifth Circuits.

Kahlil is currently being held in Jena, Louisiana—which is in the Alexandria Division of the U.S. District Court for the Western District of Louisiana (and, as importantly, the Fifth Circuit). It wouldn't surprise me at all if the government tried to argue that the New York federal courts lack jurisdiction over Kahlil's petition—because they lack jurisdiction over his "immediate

custodian," *i.e.*, the head of the ICE detention facility in Jena. Indeed, this is the *exact* argument on which the Bush administration prevailed in the Supreme Court in the Jose Padilla case in 2004—when a U.S. citizen detained in South Carolina as an “enemy combatant” sought to challenge his detention in Manhattan, which is where he had last been before he was transferred to military custody.

But there are two potential grounds on which *Padilla* can be distinguished. First, in *Padilla*, the habeas petition wasn’t filed until *after* Padilla had been physically removed from the Southern District of New York. Here, Khalil’s lawyers have represented that they filed *before* he was transferred to Louisiana (at 4:40 a.m., no less!). If that’s true (and there’s no reason to believe that it isn’t), that would make this a very different case. After all, a *different* line of Supreme Court precedent provides that the federal government can’t defeat jurisdiction in a habeas case by transferring the petitioner *after* the petition is filed.

But it also raised questions about whether ICE was trying to whisk him away to defeat the legal proceeding that was pending as soon as that petition was filed.

There’s that old adage, which seems inoperative since Nixon, that it’s not the crime, it’s the cover-up. With Trump and under expansive authorities of Article II, it often looks like it’s not the initial power grab that might create legal problems. It’s the attempt to retcon that power grab after it becomes clear the facts were not what Trump or others believed when the Administration took action.

Over and over, Trump 2.0 has taken aggressive steps based off bullshit, much of it coming from

Elon or other far right propagandists. And over and over, Trump's top people keep creating problems for themselves as they try to adjust the (legal) narrative to match their evolving understanding of the facts.

So as we go forward with discussions about Khalil, don't necessarily assume that legal justifications that the government *could* have used were yet the legal justifications they may argue going forward.