# SUPREME COURT STARTS CLEANING UP KRISTI NOEM'S SLOPPY MESSES

The Supreme Court intervened in two cases pertaining to Kristi Noem's March 15 botched deportation effort yesterday.

First, John Roberts paused review of Kilmar Abrego Garcia's case. And, shortly thereafter, the entire court ended James Boasberg's Temporary Restraining Order on deportations under the Alien Enemies Act (captioned as JGG v. Trump), while holding that detainees must have access to habeas review before being deported.

Contrary to what you're seeing from the Administration (and, frankly, many Trump critics), neither of these rulings settles Trump's deportation regime, though the JGG opinion extends SCOTUS' real corruption of rule of law in very ominous fashion (see Steve Vladeck on that, including his observation that just weeks after Trump called to impeach Boasberg, "Roberts has overruled Boasberg, in a move that Trump will view as sweet vindication").

I'd like to consider them instead as means to help Kristi Noem clean up after her own incompetence. From a legal standpoint, there's nothing (yet) unusual about the pause in Abrego Garcia's case. Indeed, the timing of it may undermine the newly confirmed John Sauer's efforts to win the case, as I'll lay out below. As such it may interact in interesting way with the JGG opinion.

The JGG opinion intervenes in a TRO (which shouldn't be reviewable at all) to take the case out of Judge James Boasberg's hands the day before he was set to hear arguments on a preliminary injunction. That's what Ketanji Brown Jackson laid out in her dissent: this was

a naked intervention to prevent Boasberg from looking more closely.

> I write separately to question the majority's choice to intervene on the eve of the District Court's preliminary-injunction hearing without scheduling argument or receiving merits briefing. This fly-by-night approach to the work of the Supreme Court is not only misguided. It is also dangerous.
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> The President of the United States has invoked a centuries-old wartime statute to whisk people away to a notoriously brutal, foreign-run prison. For lovers of liberty, this should be quite concerning. Surely, the question whether such Government action is consistent with our Constitution and laws warrants considerable thought and attention from the Judiciary. That was why the District Court issued a temporary restraining order to prevent immediate harm to the targeted individuals while the court considered the lawfulness of the Government's conduct. But this Court now sees fit to intervene, hastily dashing off a four-paragraph per curiam opinion discarding the District Court's order based solely on a new legal pronouncement that, one might have thought, would require significant deliberation.

Jackson notes that, as a result, key parts of this legal dispute will not be fully briefed, as Korematsu was.

> At least when the Court went off base in the past, it left a record so posterity could see how it went wrong. See, e.g., Korematsu v. United States, 323 U. S. 214 (1944). With more and more of our most significant rulings taking place in the shadows of our emergency docket, today's Court leaves less and less of a

> trace. But make no mistake: We are just as wrong now as we have been in the past, with similarly devastating consequences. It just seems we are now less willing to face it.

The JGG opinion is silent about what happens to Boasberg's contempt inquiry. While there are people, such as gay hair stylist Andry José Hernández Romero, whose deportation to El Salvador may have violated Judge Boasberg's TRO and who — since he's no longer in US custody — may not be stuck challenging their deportation in South Texas, it's not clear whether any of the men who've been deported will be able to sustain the inquiry.

As for everyone else, the per curium opinion rebukes Trump's original legal stance, which argued that Trump could declare a war and Marco Rubio could declare a bunch of people to be terrorists based on little more than tattoos and via that process deport them to slavery in El Salvador (though you wouldn't know that from the Xitter posts of virtually everyone involved).

> AEA detainees must receive notice after the date of this order that they are subject to removal under the Act. The notice must be afforded within a reasonable time and in such a manner as will allow them to actually seek habeas relief in the proper venue before such removal occurs.
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> For all the rhetoric of the dissents, today's order and per curiam confirm that the detainees subject to removal orders under the AEA are entitled to notice and an opportunity to challenge their removal. The only question is which court will resolve that challenge. For the reasons set forth, we hold that venue lies in the district of confinement.

So courts, including SCOTUS, might yet find that Trump was totally unjustified in declaring his own little war. Courts, including SCOTUS, might yet rule Trump's use of the AEA beyond the pale. But the legal review of that decision will take place in the Fifth Circuit, where such an outcome is *far* less likely than in DC.

Indeed, this decision might will be an effort to outsource the really awful work of sanctioning egregious constitutional violations to the circuit most likely to do so.

This was an entirely tactical decision, in my opinion. A gimmick. An unprecedented intervention in a TRO to prevent Boasberg from issuing a really damaging ruling in DC, yet one that affirmed thin due process along the way.

Meanwhile, consider how Abrego Garcia's fate might complicate all this. As noted above, Roberts' intervention, *thus far*, is not unusual. Indeed, by pausing the decision, Roberts made way for Abrego Garcia to submit a response, which corrected some of the false claims that John Sauer made in his filing, his first after being sworn in as Solicitor General. (Erwin Chemerinsky also submitted an amicus.)

Having held that detainees should have access to habeas before deportation, one would think that would extend to Abrego Garcia, who was not given time to challenge his deportation *to El Salvador*.

The government's concession that the AEA detainees should get habeas review provided a place for SCOTUS to backtrack to without directly confronting Trump's power grab. But consider how AUSA Erez Reuveni's concessions, his admission that DHS knew there was an order prohibiting Abrego Garcia's deportation to El Salvador, limit SCOTUS' ability to do the same. That's one of two key points the Fourth Circuit — a panel of Obama appointee Stephanie Thacker, Clinton appointee Robert King, and Reagan appointee Harvie Wilkinson — made in its opinion, issued at about the same time as

Roberts halted the order. Just as the government ultimately conceded that the AEA detainees were entitled to due process, the government conceded that Abrego Garcia should not have been deported to El Salvador.

> As the Government readily admits, Abrego Garcia was granted withholding of removal – "It is true that an immigration judge concluded six years ago that Abrego Garcia should not be returned to El Salvador." Mot. for Stay at 16; see also Cerna Declaration at 53 ("ICE was aware of this grant of withholding of removal at the time [of] AbregoGarcia's removal from the United States.").3 And "the Government had available a procedural mechanism under governing regulations to reopen the immigration judge's prior order, and terminate its withholding protection." Mot. for Stay at 16–17. But, "the Government did not avail itself of that procedure in this case." Id.; see Dist. Ct. Op. at 4 (Mr. Reuveni: "There's no dispute that the order [of removal] could not be used to send Mr. Abrego Garcia to El Salvador." (quoting Hr'g Tr., Apr. 4, 2025, at 25:6–7)); see also Guzman Chavez, 594 U.S. at 531 (explaining that a non-citizen who has been granted withholding of removal may not be removed "to the country designated in the removal order unless the order of withholding is terminated"). Based on those facts, the Government conceded during the district court hearing, "The facts – we concede the facts. **This person should – the plaintiff, Abrego Garcia, should not have been removed**. That is not in dispute." S.A. 98 (emphasis supplied).4
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> 3 Consistent with this reality, the Government attorney appearing before the district court at the April 4 hearing candidly admitted that no order of

> removal is part of the record in this case. Dist. Ct. Op. at 14 (citing Hr'g Tr. Apr. 4, 2025, at 20 (counsel admitting no order of removal is part of the record), and id. at 22 (counsel confirming that "the removal order" from 2019 "cannot be executed" and is not part of the record)).
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> 4 Of note, in response to the candid responses by the Government attorney to the district court's inquiry, that attorney has been put on administrative leave, ostensibly for lack of "zealous[] advocacy." Evan Perez, Paula Reid and Katie Bo Lillis, DOJ attorney placed on leave after expressing frustration in court with government over mistakenly deported man, CNN (Apr. 5, 2025, 10:40 PM), https://www.cnn.com/2025/04/05/politics/doj-attorney-leave-maryland-father-deportation/index.html; see also Glenn Thrush, Justice Dept. Lawyer Who Criticized Administration in Court Is Put on Leave, New York Times (Apr. 5, 2025, 5:41 PM), https://www.nytimes.com/2025/04/05/us/politics/justice-dept-immigration-lawyer-leave.html. But, the duty of zealous representation is tempered by the duty of candor to the court, among other ethical obligations, and the duty to uphold the rule of law, particularly on the part of a Government attorney. United States Department of Justice, Home Page, https://www.justice.gov/ (last visited Apr. 6, 2025) ("Our employees adhere to the highest standards of ethical behavior, mindful that, as public servants, we must work to earn the trust of, and inspire confidence in, the public we serve."). [links added]

With footnote 4, the Fourth Circuit established

that DOJ was attempting to retaliate against Erez Reuveni and his supervisor, August Flentje, because Reuvani told the truth. (See also Reuters, which was the first outlet I saw with the story, and ABC, the first to report that Flentje was placed on leave along with Reuveni.)

I was struck by the retaliation in real time, because in fact Reuveni did what a slew of other attorneys have had to do, confess he didn't know the answers to obvious questions. But something — perhaps Sauer's review that earlier fuckups may limit his ability to get relief at SCOTUS — led DOJ to overreact in this case.

That is, by retaliating against Reuveni so egregiously, Pam Bondi's DOJ (Todd Blanche is reportedly the one who made the order, but it also happened after Sauer may have started reviewing the case), DOJ may have made it more difficult for SCOTUS to engage in similar gimmicks down the road.

The Fourth Circuit also anticipated that DOJ would lie about Abrego Garcia's request to be returned.

> 5 To the extent the Government argues that the scope of the district court's order was improper because Abrego Garcia never asked for an order facilitating his return to the United States, that is incorrect. See S.A. 88 (arguing that the district court has "jurisdiction to order [the Government] to facilitate his return, and what we would like is for the Court to enter that order"); see also S.A. 74–75; 85–87.

Indeed, Sauer did just that.

> In opposing a stay of the injunction in the court of appeals, respondents insisted that they did "request[]" the injunction that the district court entered. Resp. C.A. Stay Opp. 9. But contrary to respondents' characterization, the court did not

> merely order the United States to "facilitate" Abrego's return, ibid.; it ordered the United States actually to "effectuate" it, App., infra, 79a. If there were any doubt on that score, the court's memorandum opinion eliminated it, by reiterating that its injunction "order[s]" that "Defendants return Abrego Garcia to the United States." Id. at 82a (emphasis added). Again, respondents clearly disclaimed such a request in repeatedly telling the court that it "has no jurisdiction over the Government of El Salvador and cannot force that sovereign nation to release Plaintiff Abrego Garcia from its prison." Id. at 42a, 44

Ultimately, Sauer may get his proposed solution — that Abrego Garcia gets moved from El Salvador to someplace else. But before that happens, he'll have to account for the Fourth Circuit ruling that there's no convincing evidence that Abrego Garcia is the terrorist Kristi Noem claims he is and that DOJ itself laid out cause to return him to the US.

The Supreme Court exhibited a willingness to engage in a gimmick decision to bail Trump out of one fuckup Kristi Noem made the weekend of March 15, to ignore Judge Boasberg's order and deport a bunch of men with tattoos into slavery. It has not yet bailed Trump out of the other fuckup, including Abrego Garcia on one of those planes. Thus far, Trump has made things worse by retaliating against Reuveni for refusing to lie.

Which just makes SCOTUS' challenge — to invent a gimmick to bail Trump out — all the more challenging.

Update: Predictably, in his reply, Sauer blames Reuveni for not being told some unspecified sensitive information that might excuse the defiance of a judge's order.

> Respondents (Opp. 10-11) cite statements

> by the attorney who was formerly representing the government in this case, who told the district court that he "ask[ed] my clients" why they could not return Abrego Garcia and felt that he had not "received * * * an answer that I find satisfactory." They likewise cite his statements that "the government made a choice here to produce no evidence" and that agencies "understand that the absence of evidence speaks for itself." Opp. 12 (citing SA120, SA128). Those inappropriate statements did not and do not reflect the position of the United States. Whether a particular line attorney is privy to sensitive information or feels that whoever he spoke with at client agencies gave him sufficient answers to satisfy whatever personal standard he was applying cannot possibly be the yardstick for measuring the propriety of this extraordinary injunction.

Real judges would haul Sauer before them and insist he deliver that sensitive information withheld from the AUSA. Sadly, the Roberts court is well beyond that.