CASE SELECTION AND REVIEW AT THE SUPREME COURT

Hearing Before the Presidential Commission on the Supreme Court of the United States
Wednesday, June 30, 2021

Testimony of Stephen I. Vladeck
Charles Alan Wright Chair in Federal Courts
University of Texas School of Law

Co-Chair Bauer, Co-Chair Rodriguez, and distinguished members of the Commission:

Thank you for the invitation to testify today. As you know, I hold the Charles Alan Wright Chair in Federal Courts at the University of Texas School of Law, where my research and writing focus on the intersection of constitutional law, national security law, and the federal courts. In addition to writing and teaching about the Supreme Court, I also practice before it (I've argued three cases over the last four Terms), and help CNN cover it (as its Supreme Court analyst). It's therefore not only my distinct honor, but also a real treat, to have the opportunity to participate in the broader conversation that the Commission is having today (and throughout this process).

For all of the public attention devoted to hot-button Supreme Court reform topics like term limits for the Justices or expanding the number of seats on the Court, I'm heartened that the Commission is devoting an entire panel to the more technical — but, in many respects, no less important — issue of "case selection and review." And at least in the last few years, one of the most significant shifts in the Court's case selection and review has been the growing prominence of what one member of this Commission has dubbed the Court's "shadow docket." Although, as I note at the end of my statement, this body of decisions ought to be understood as part of a far broader shift in the composition and structure of the Court's workload, I'd like to focus my testimony today on this particular subset — and why it is a worthy topic of both the Commission's attention and any potential Court reform.

To that end, my testimony has five objectives: (1) to introduce the shadow docket and describe what it comprises; (2) to document the rise in several specific *types* of significant shadow docket rulings in the last few years; (3) to identify some of the possible explanations for this uptick; (4) to outline at least some of the serious concerns that these developments raise; and (5) to sketch out some potential reforms that both the Court and Congress might consider — and that this Commission therefore ought to discuss.

I. WHAT *IS* THE "SHADOW DOCKET"?

The term "shadow docket" was coined by Commissioner (and University of Chicago law professor) Will Baude in 2015 as a catch-all

for a body of the Supreme Court's work that was, to that point, receiving virtually no academic or public attention.[1] Unlike the Court's "merits" docket, which includes the approximately 60–70 cases each Term in which the Justices hear oral argument and resolve the dispute in a signed "opinion of the Court," the "shadow" docket, as Professor Baude described it, comprises the thousands of *other* decisions the Justices hand down each Term — almost always as "orders" from either a single Justice (in their capacity as "Circuit Justice" for a particular U.S. Court of Appeals) or the entire Court. So understood, although the terminology itself dates only to 2015, the shadow docket has been around for as long as the Supreme Court.

Although it's only of recent vintage, the "shadow" metaphor is entirely appropriate given the contrast between such orders and merits decisions. The latter receive at least two full rounds of briefing; are argued in public at a date and time fixed months in advance; and are resolved through lengthy written opinions handed down as part of a carefully orchestrated tradition beginning at 10:00 a.m. Eastern time on pre-announced "decision days." It is impossible to miss these 60–70 cases, which, on top of the attention they receive from the Court, also tend to be the subject of numerous professional and academic Term "preview" events (before they're argued) and "recap" events (after they're decided). Indeed, both academic and popular efforts to identify broader trends in the Court's work tend to focus almost exclusively — and, in my view, to their significant detriment — on this understandably prominent but numerically small slice of the Court's caseload.

In contrast, rulings on the "shadow docket" typically come after no more than one round of briefing (and sometimes less); are usually accompanied by no reasoning (let alone a majority opinion); invariably provide no identification of how (or how many of) the Justices voted; and can be handed down at all times of day — or, in some exceptional cases, in the middle of the night. Owing to their unpredictable timing,

1. *See* William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J.L. & LIBERTY 1, 3–5 (2015).

their lack of transparency, and their usual inscrutability, these rulings come both literally and figuratively in the shadows.[2]

That does not mean that the shadow docket is inherently pernicious. Every court needs a docket to handle applications and other emergency requests that come up outside the normal flow of merits litigation. The Supreme Court is no exception. Indeed, scholars and court-watchers have long *known* about the Court's shadow docket; they've just ignored it — because nearly all of the Justices' decisions on the shadow docket were perceived to be anodyne: denying petitions for certiorari in un-controversial cases; denying applications for emergency relief in cases presenting no true emergency; granting parties additional time to file briefs; dividing up oral arguments; and so on.

That's not to say that there were *never* controversial rulings on the shadow docket; from the execution of the Rosenbergs[3] to Justice Douglas halting President Nixon's bombing of Cambodia[4] to the initial stay of the Florida recount in what became *Bush* v. *Gore*,[5] there certainly have been significant rulings on the shadow docket across the Court's modern history. But the shadow docket rulings that provoked public and scholarly attention were sufficiently few and far between that scholarly focus tended to focus on their substance — rather than their procedure. And even as the number of significant shadow docket orders crept upwards in the 1980s, a large majority of those rulings came in capital cases — as various doctrinal shifts provoked a surge in emergency litigation seeking to halt executions (or lift lower-court orders halting executions).[6]

---

2. Unlike merits decisions, shadow docket rulings can appear in any of four different places on the Supreme Court's website — as an "opinion of the Court"; an "opinion relating to orders"; a published order of the Court; or an unpublished order by an individual Justice that is reflected only on the Court's docket. This is a minor point, to be sure, but it's even harder to *find* these orders relative to merits decisions.

3. *See Rosenberg* v. *United States*, 346 U.S. 313 (Douglas, Circuit Justice 1953).

4. *See Holtzman* v. *Schlesinger*, 414 U.S. 1316 (Douglas, Circuit Justice 1973).

5. *See Bush* v. *Gore*, 531 U.S. 1046 (2000) (mem.).

6. *See generally* CAROL S. STEIKER & JORDAN M. STEIKER, COURTING DEATH: THE SUPREME COURT AND CAPITAL PUNISHMENT (2016) (documenting the doctrinal shifts in post-conviction capital litigation and their implications for emergency appeals).

Because the Court so rarely settled divisive disputes through the shadow docket (outside of the election and death penalty contexts, anyway), the most frequent litigants before the Court did not tend to rely upon it. To take just one example, from 2001–17, across two very different two-term presidencies, the Justice Department (by far, the most common litigant before the Supreme Court) only sought emergency relief from the Justices eight times — once every other Term.[7] Although the Court granted four of those requests and denied four,[8] only *one* of the eight orders in those cases provoked any of the Justices to publicly dissent.[9] Compared to what we have seen over the past four-plus years, the contrast is striking.

II. THE RISE OF THE SHADOW DOCKET SINCE 2017

There's no perfect way to measure the rise of the shadow docket. It's a large dataset to begin with, and it's hard to separate out the significant rulings (which are *always* a relatively small percentage of the total number of orders the Court hands down) from the insignificant ones. My focus, at least thus far, has been on orders that, through whatever mechanism, change the status quo. Although there may be other examples,[10] the four most common examples are orders: (1) staying a lower-court decision and/or mandate pending appeal; (2) vacating a stay (*e.g.*, of an impending execution) imposed by a lower court; (3) granting an emergency writ of injunction pending appeal; and (4) vacating a lower-court's grant of an emergency injunction. Here is a

---

7. Stephen I. Vladeck, *The Supreme Court, 2018 Term — Essay: The Solicitor General and the Shadow Docket*, 133 HARV. L. REV. 123, 162 tbl.3 (2019).

8. *See Veasey* v. *Perry*, 135 S. Ct. 9 (2015) (mem.); *United States* v. *Comstock*, No. 08A863 (Roberts, Circuit Justice Apr. 3, 2009) (mem.); *Dep't of Health & Human Servs.* v. *Alley*, 556 U.S. 1149 (2009) (mem.); *Gates* v. *Bismullah*, 554 U.S. 913 (2008) (mem.); *Rumsfeld* v. *Rell*, No. 05A231 (Ginsburg, Circuit Justice Sept. 8, 2005); *Ashcroft* v. O Centro Espirita Beneficente Uniao do Vegetal, 543 U.S. 1032 (2004) (mem.); *Bush* v. *Gherebi*, 540 U.S. 1171 (2004) (mem.); *Ashcroft* v. *N. Jersey Media Grp.*, 536 U.S. 954 (2002) (mem.).

9. *Veasey*, 135 S. Ct. at 10 (Ginsburg, J., dissenting).

10. Prior to the Bail Reform Act of 1984, for instance, it was far more commonplace for Circuit Justices to receive applications for bail and/or release pending appeal (or applications to vacate lower court orders granting such interim relief) — and to grant them. *See* STEPHEN M. SHAPIRO ET AL., SUPREME COURT PRACTICE §§ 17.15–17.21 (11th ed. 2019).

rough table documenting the frequency of each of these types of relief since Chief Justice Roberts's first Term on the Court (October Term 2005):

Table 1. Total Status-Quo Altering Orders By Term (October 2005–Present)[11]

Term	Grant Stay	Vacate Stay	Grant Injunction	Vacate Injunction	Total
OT2020[12]	6	4	6	1	**17**
OT2019	15	4	0	1	**19**
OT2018	12	3	0	0	**15**
OT2017	9	0	0	0	**9**
OT2016	10	1	0	0	**11**
OT2015	11	1	1	0	**13**
OT2014	7	2	1	0	**10**
OT2013	4	2	2	0	**8**
OT2012	1	0	0	0	**1**
OT2011	6	0	0	0	**6**
OT2010	6	0	0	0	**6**
OT2009	3	1	0	0	**4**
OT2008	8	0	0	0	**8**
OT2007	7	0	0	0	**7**
OT2006	1	0	0	0	**1**
OT2005	6	0	0	0	**6**

These numbers show that, especially in the last few years, the Court is doing a lot more to alter the status quo through the shadow docket. But the uptick in status-quo-altering shadow docket rulings is far more than quantitative; there have also been at least six distinct respects in which the past four years have seen *qualitative* changes in the scope and size of the shadow docket, as well.

---

11. The data were collected by running a series of different searches through Westlaw's Supreme Court database. Given the different terminology that the Court (and individual Justices) use in describing emergency relief in some of these contexts, there may be slight variations compared to any official data source (if one exists).

12. As of 4:00 p.m. EDT on Friday, June 25, 2021.

a. DESCRIBING THE RISE OF THE SHADOW DOCKET

First, excepting ordinary grants of certiorari, as the chart on the previous page shows, there are a lot more cases in which the Justices are using the shadow docket to change the status quo — where the Court's summary action disrupts what was previously true under rulings by lower courts. Consider, in this respect, one of the Court's most recent high-profile shadow docket rulings — the order handed down at 11:34 p.m. EDT on Friday, April 9 in *Tandon* v. *Newsom*, in which the Court issued an emergency "writ of injunction" to block California's COVID-based limits on in-home gatherings to members of no more than three households on the ground that it violated the Free Exercise Clause.[13] Neither the district court nor the Ninth Circuit had blocked California's limits, so it was the Justices, in the first instance, who put them on hold. Indeed, *Tandon* was the *sixth* emergency writ of injunction issued by the Court since November 2020 — after it hadn't issued *one* since 2015, and had only issued *four* since Chief Justice Roberts's 2005 confirmation.[14]

In both absolute and relative terms, there have been far more of these kinds of rulings in cases seeking emergency relief — granting injunctive relief; granting stays of lower-court rulings; or, as in a surprising number of capital cases, *lifting* stays of lower-court rulings — than at any prior point in the Court's history. In that respect, part of the significance of the shadow docket of late has been in how often the Justices are using it to disrupt the state of affairs until a case reaches the Court on the merits (which, increasingly, may be never).

Second, perhaps most dramatically, the shadow docket has seen a remarkable increase in action from the Solicitor General. In contrast to the eight applications for emergency relief filed by the Justice Department between January 2001 and January 2017 that I described above, the Trump administration filed *41* applications for such relief

---

13. 141 S. Ct. 1294 (2021) (per curiam).

14. The other five were in *Gateway City Church* v. *Newsom*, 141 S. Ct. 1460 (2021) (mem.); *South Bay Pentecostal Church* v. *Newsom* ("*South Bay II*"), 141 S. Ct. 716 (2021) (mem.); *Harvest Rock Church* v. *Newsom*, 141 S. Ct. 1289 (2021) (mem.); *Roman Catholic Diocese of Brooklyn* v. *Cuomo*, 141 S. Ct. 63 (2020) (per curiam); and *Agudath Israel* v. *Cuomo*, 141 S. Ct. 889 (2020) (mem.). For the 2015 example, see *Akina* v. *Hawaii*, 577 U.S. 1024 (2015) (mem.).

over four years — asking the Justices to intervene at a preliminary stage of litigation more than 20 times as often as either of its immediate predecessors.[15] Emergency applications became such a central feature of the Office of the Solicitor General during the Trump administration that it even led to a restructuring of the Office's staff.[16]

What's more, the dramatic increase in applications paid dividends. Not counting one application that was held in abeyance and four that were withdrawn, the Justices granted 24 of the 36 remaining applications in full, and another four in part. Even among the eight applications that were denied in full, only a few were denied with prejudice. Thus, not only was there a dramatic increase in the *demand* for shadow docket rulings from the party often referred to as the Court's "Tenth Justice," but the Justices — or at least a majority of them — have been willing to go along with it.

Third, both in cases in which the Solicitor General sought emergency relief and otherwise, the shadow docket has become far more publicly divisive in recent years. I already noted that only one of the eight applications filed by the Bush 43 or Obama Justice Departments provoked *any* public dissent. In contrast, 27 of the 36 applications from the Trump administration on which the Justices ruled provoked at least one Justice to publicly dissent.

And expanding the focus beyond applications from the federal government, there has been a sharp increase in the number of shadow docket rulings that have provoked four public[17] dissents. During the October 2017 Term, for instance (Justice Kennedy's last on the Court), there were exactly *two* such rulings. In the next two Terms, there were 20. Indeed, during the October 2019 Term, there were almost as many

---

15. For the most recent data, see Steve Vladeck (@steve_vladeck), TWITTER (Jan. 20, 2021, 11:21 AM), https://twitter.com/steve_vladeck/status/1351927798882066436.

16. *See* Steve Vladeck, *Symposium: The Solicitor General, the Shadow Docket, and the Kennedy Effect*, SCOTUSBLOG, Oct. 22, 2020, https://www.scotusblog.com/2020/10/symposium-the-solicitor-general-the-shadow-docket-and-the-kennedy-effect/.

17. As noted below, this qualifier is important because, except when four Justices dissent (or three from an order denying certiorari), we usually cannot do anything other than guess how the Justices voted on unsigned orders — or even unsigned opinions.

public 5-4 rulings on the shadow docket (11) as there were on the merits docket (12).[18]

Even so far *this* Term (the Court's first without Justice Ginsburg), there have already been three shadow docket rulings that were publicly 5-4,[19] and at least one that was a 6-3 summary reversal (where it's often thought that six votes, rather than five, are the relevant threshold).[20] What's more, virtually all of the divisions in these cases are occurring along conventional ideological lines — with the progressives on one side, one bloc of conservatives consistently on the other, and exactly one of the conservative Justices (Chief Justice Roberts) occasionally voting with the progressives. None of the "strange bedfellows" that we sometimes see on the merits docket have shown up on the shadow docket in recent years; instead, the divisiveness of the shadow docket has been even more homogenously ideological than the divisiveness of the merits docket.

Fourth, although it has long been a criticism of the shadow docket, especially denials of certiorari, that the public usually has no idea how many Justices voted for a specific outcome (let alone *which* Justices), that concern has become that much more pronounced as the *public* tally has increasingly reflected multiple dissents. Consider, in this respect, the Court's February order refusing Alabama's request to vacate a lower-court injunction in order to allow a scheduled execution to proceed.[21] Four Justices concurred in the order — and joined an opinion explaining the basis for their concurrence.[22] Only three Justices noted dissents.[23] So we know that either (or both) of Justices Alito and Gorsuch joined the majority to block the execution. But we have no idea

---

18. *See* Steve Vladeck, *The Supreme Court's Most Partisan Decisions Are Flying Under the Radar*, SLATE, Aug. 11, 2020, https://slate.com/news-and-politics/2020/08/supreme-court-shadow-docket.html.

19. *See Tandon*, 141 S. Ct. 1294; *Roman Catholic Diocese of Brooklyn* v. *Cuomo*, 141 S. Ct. 63 (2020) (per curiam); *Agudath Israel* v. *Cuomo*, 141 S. Ct. 889 (2020) (mem.).

20. *See Shinn* v. *Kayer*, 141 S. Ct. 517 (2020) (per curiam);

21. *Dunn* v. *Smith*, 141 S. Ct. 725 (2021) (mem.).

22. *Id.* at 725 (Kagan, J., concurring).

23. *Id.* at 726 (Kavanaugh, J., dissenting).

which of them, or if they both did, or why. Stealth votes aren't new,[24] but as the shadow docket grows in both absolute terms and divisiveness, the stealth votes are increasingly the *dispositive* ones — which, among other things, complicates efforts to decipher the potential impact of the Court's ruling beyond the instant case.

Fifth, accompanying the rise of the shadow docket has been the rise of new (and unusual) forms of relief. Consider the "*South Bay II*" decision handed down on February 5,[25] in which the Court, in an unsigned order, issued an emergency writ of injunction barring California from enforcing at least some of its COVID-related restrictions on indoor worship services. The following Monday, the Court issued an order in another California case in which a plaintiff had also sought an emergency injunction — treating the application for an injunction as a petition for a writ of certiorari *before judgment* (itself an unusual procedural vehicle)[26] and issuing a "GVR," *i.e.*, granting the petition; vacating the district court's order; and remanding "for further consideration in light of" *South Bay II* — itself an unsigned order that was not accompanied by an opinion of the Court.[27] What about the Court's summary ruling in *South Bay II* was the district court supposed to consider? To similar effect, on January 15, the Court granted another petition for certiorari before judgment in a federal death penalty case — and, unlike the "GVR" order in *Gish*, summarily *reversed* the district court on the merits,[28] something else that, at least according to my research, it has never before done in that posture (*i.e.*, cert. before judgment).

Finally, as the *Gish* order suggests, the dramatic increase in significant shadow docket rulings has brought with it novel questions

---

24. For an example of why we can't infer from the fact that *some* Justices publicly noted their dissents that there weren't other dissenters, see *Arthur* v. *Dunn*, 137 S. Ct. 14, 15 (2016) (statement of Roberts, C.J.) (noting that he was providing a courtesy fifth vote to grant a stay in an order from which only two Justices publicly dissented — and none recused).

25. *Gish* v. *Newsom*, 141 S. Ct. 1290 (2021) (mem.).

26. *S. Bay United Pentecostal Church* v. *Newsom*, 141 S. Ct. 716 (2021) (mem.).

27. *Gish* v. *Newsom*, 141 S. Ct. 1290 (2021) (mem.).

28. *United States* v. *Higgs*, 141 S. Ct. 645 (2021) (mem.).

about how lower courts are supposed to give precedential effect to rulings that the Supreme Court has *itself* previously suggested are of little precedential value.[29] For instance, a panel of the Fourth Circuit split sharply in August 2020 over what to make of how the Supreme Court had handled emergency applications in different cases brought by different parties challenging the same underlying governmental policy.[30] And D.C. district judge Trevor McFadden has even published a paper, together with one of his former clerks, attempting to taxonomize the different kinds of shadow docket rulings and what their value as precedent should — and should not — be.[31] In the unsigned majority opinion in *Tandon*, the Court made this problem explicit, chastising the Ninth Circuit for refusing to give effect to four prior rulings involving California COVID restrictions — *none* of which had been accompanied by a majority rationale.[32]

Simply put, it is no longer possible for any reasonable observer to dispute that there has been a dramatic uptick in significant, high-profile, status-quo-altering rulings on the shadow docket in the past few years; that these rulings have been unusually divisive; that they are leading to novel forms of procedural relief from the Court; and that their substantive effects are causing significant uncertainty both in lower courts and among those government officers, lawyers, and court-watchers left to parse what, exactly, these rulings portend.

---

29. *See, e.g.*, *Lunding* v. *N.Y. Tax Appeals Tribunal*, 522 U.S. 287, 307 (1998) ("Although we have noted that '[o]ur summary dismissals are ... to be taken as rulings on the merits in the sense that they rejected the specific challenges presented ... and left undisturbed the judgment appealed from,' we have also explained that they do not 'have the same precedential value ... as does an opinion of this Court after briefing and oral argument on the merits.'" (quoting *Washington* v. *Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 477 n.20 (1979)) (alterations in original)).

30. *Compare Casa de Maryland, Inc.* v. *Trump*, 971 F.3d 220, 229–30 (4th Cir. 2020), *with id.* at 281 n.16 (King, J., dissenting). The Fourth Circuit has agreed to rehear *Casa de Maryland* en banc. *See Casa de Maryland, Inc.* v. *Trump*, 981 F.3d 311 (4th Cir. 2020).

31. *See* Trevor N. McFadden & Vetan Kapoor, *The Precedential Effects of the Supreme Court's Emergency Stays*, 44 HARV. J.L. & PUB. POL'Y 827 (2021).

32. *See Tandon* v. *Newsom*, 141 S. Ct. 1294, 1297–98 (2021) (per curiam).

b. EXPLAINING THE RISE OF THE SHADOW DOCKET

There is no single explanation for the source of this uptick. The most common effort to downplay the uptick as a source of concern is to suggest that it's the result of a unique confluence of one-off factual circumstances — the increase in "nationwide" injunctions during the Trump administration; the unique legal issues arising out of government reactions to the COVID-19 pandemic; the flurry of litigation relating to the 2020 elections; etc. On this view, the Justices are merely reacting to circumstances beyond their control, and so the roots of (and any solutions to) the shifts documented above lay elsewhere.

With respect to those advancing these arguments, I fear that they rest on an incomplete assessment of the Court's "shadow docket" jurisprudence. My own view is that the surge in high-profile shadow docket rulings can best be traced to a confluence of four factors: (1) subtle procedural changes that have made it easier for the Court to act collectively even when the Justices are physically dispersed; (2) a subtle but significant shift in how a majority of the Justices *apply* the traditional four-part standard for emergency relief pending appeal; (3) the effects of the changing composition of the Court on both the substance and procedure of these disputes; and (4) repetition — where what used to be extraordinary has increasingly become routine.

Before briefly outlining these shifts, let me first debunk one of the most common claims about the rise of the shadow docket in recent years — that it has largely been in response to the rise of so-called "nationwide" injunctions. Practically and empirically, that's just not true. First, that only describes cases in which the federal government is the party invoking the shadow docket — which, as the myriad election and COVID cases of the past year drive home, is only one modest slice of the shadow docket. Without considering any of those cases, we've still seen a dramatic uptick.

Second, even *within* the DOJ slice, less than half of the Trump administration's applications for emergency relief involved nationwide injunctions. Rather, the theory on which the Trump administration routinely (and usually successfully) litigated most of its applications was that *any* injunction of a government policy created the kind of irreparable harm that justified emergency relief. That's why, after

staying a "nationwide" injunction against the "public charge" rule,[33] the Court *separately* (and later) voted to stay an Illinois-only injunction against the same rule;[34] the geographic scope of the injunction just wasn't the central consideration.

Nor can the uptick be traced only (or even largely) to COVID-19 or 2020 election disputes. As Table 1 on page 5 demonstrates, the uptick really began to emerge during the October 2014 Term — years before either of those topics were remotely on our radar. Indeed, there have been any number of momentary justifications for at least some of the uptick in emergency orders. The larger point is that none of these provocations explains either the overall trend or the *substance* of the Court's reactions thereto.

To take one case in point, consider the *Mifeprex* dispute. There, a district judge had blocked the FDA's requirement that Mifeprex, an FDA-approved medication used to terminate early pregnancies, be dispensed in person only by licensed pharmacies — relying on the difficulties that the in-person dispensation requirement imposed at the height of the COVID-19 pandemic. After the Court of Appeals refused to stay the ruling, the Trump Administration sought an emergency stay pending appeal — filing its application on August 26, 2020.[35] This was not a nationwide injunction; it was not an election case; it was not a religious liberty dispute. And a lower-court ruling that provided pregnant women with easier access to an FDA-approved medication was, whatever its merits, hardly an "emergency."

The Court sat on the application for months. Finally, over three public dissents, the Court granted the government's application on January 12, 2021[36] — four-and-a-half months after it was filed. During that same time period, the Court: (1) added to its merits docket a challenge to President Trump's proposal to exclude undocumented immigrants from the post-Census reapportionment; (2) received full

---

33. *See Dep't of Homeland Sec.* v. *New York*, 140 S. Ct. 599 (2020) (mem.).

34. *See Wolf* v. *Cook County, Ill.*, 140 S. Ct. 681 (2020) (mem.).

35. *See Food & Drug Admin.* v. *Am. Coll. of Obstetricians & Gynecologists*, No. 20A34 (U.S. filed Aug. 26, 2020).

36. *See Food & Drug Admin.* v. *Am. Coll. of Obstetricians & Gynecologists*, 141 S. Ct. 578 (2021) (mem.).

merits and *amicus* briefings; (3) heard oral argument; and (4) handed down a lengthy merits opinion.[37] In other words, the Court clearly had time to elevate the dispute to its merits docket if it wanted to; it just didn't want to.

Indeed, my own view is that the uptick reflects a more nuanced confluence of developments. For instance, it used to be standard practice for the Justices to resolve most contentious shadow docket disputes by themselves — "in chambers," acting as the Circuit Justice for the Court of Appeals from which the dispute arose. Into the 1970s, Justices would often even hear oral argument in such contexts, and routinely published opinions *as* Circuit Justices setting forth their rationale.

But two shifts starting in the 1980s moved away from this practice. First, the Court stopped formally adjourning for its summer recess — so that the Court was technically *always* "in session," even when the Justices were scattered across the globe.[38] This made it easier for the full Court to act on especially contentious cases — and took significant authority away from the individual Circuit Justices. Second, and related, although individual Justices often heard argument in chambers in shadow docket disputes (especially on matters they perceived to be of public importance[39]), the full Court, as a matter of practice (but no formal rule) did not.[40] Thus, the Court slowly normalized the practice of issuing orders, even in contentious cases, by the full Court, without meeting in person, and without any opportunity for oral argument.[41]

---

37. *See Trump* v. *New York*, 141 S. Ct. 530 (2020) (per curiam). The jurisdictional statement in *New York* was filed on September 22, 2020; and argument was held on November 30.

38. *See* SHAPIRO, *supra* note 10, § 1.2(F).

39. *See, e.g.*, *Cousins* v. *Wigoda*, 409 U.S. 1201, 1201 (Rehnquist, Circuit Justice 1972) ("Because applicants' application raised what seemed to me to be significant legal issues of importance not only to them but to the public as a whole, I heard oral argument of counsel on the application.").

40. SHAPIRO ET AL., *supra* note 10, § 17.2.

41. In the 1973 Cambodia bombing case, one of Justice Douglas's central objections to the denouement — where Justice Marshall obtained the telephone acquiescence of the other six Justices in his effective overruling of Douglas — was that it short-circuited

As the Court's procedures shifted subtly, its composition shifted dramatically. It's not just that the two most recent appointments have moved the Court rightward; it's that they also appear to have provided a fifth (and sixth) vote for a particular (and idiosyncratic) view of *when* the Court should issue emergency relief. As I've explained in detail elsewhere, there now appears to be a majority of Justices who believe that, when *any* government action is enjoined by a lower court, the government is irreparably harmed, and the equities weigh in favor of emergency relief *no matter* the consequences to those who might be injured by allowing the policy to remain in effect.[42] Not only did Justice Kennedy never expressly endorse this view (which may help to explain why the uptick has dramatically accelerated since his retirement), but the underlying justification for this approach does not actually hold up to meaningful scrutiny; it just gets repeated as if its logic is beyond dispute.[43]

The upshot is that emergency relief now appears to rise and fall entirely on the merits — with virtually no regard for whether the *other* factors that are usually required (whether by custom, rule, or even statute) for such extraordinary relief are in fact satisfied. Once again, *South Bay II* stands out. Although there were four statements from the six Justices in the majority,[44] *none* of them purported to apply the four-factor test the Court traditionally follows when considering whether to grant an injunction. Instead, all of the discussion, and all of the

---

both formal rules and informal norms concerning what had to happen before the full Court reached a decision. *See Holtzman* v. *Schlesinger*, 404 U.S. 1321, 1323–26 (Douglas, J., dissenting from grant of stay).

42. Vladeck, *supra* note 7, at 131–32.

43. This view appears to originate with then-Justice Rehnquist, who traced the idea to the "presumption of constitutionality" that accompanies (most) government action. *See New Motor Vehicle Bd. of Cal.* v. *Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (Rehnquist, Circuit Justice 1977); *see also Maryland* v. *King*, 567 U.S. 1301, 1303 (Roberts, Circuit Justice 2012) (endorsing Rehnquist's formulation). But the presumption of constitutionality (1) is principally about *statutes*, not executive action; (2) is supposed to yield when constitutional rights are implicated; and (3) is, in any event, not a justification for declining to take into account the harm caused by *allowing* the policy to remain in effect pending appeal. *See* Vladeck, *supra* note 7, at 132 n.60.

44. *See South Bay II*, 141 S. Ct. at 716 (notation of Alito, J.); *id.* (Roberts, C.J., concurring); *id.* at 717 (Barrett, J., concurring); *id.* (statement of Gorsuch, J.).

Justices' analysis, was focused on the merits of the First Amendment dispute. Worse still, the grant of an emergency injunction in *Tandon* — which, unlike *South Bay II*, came with a four-page per curiam opinion for the Court adopting a *new* understanding of the Free Exercise Clause — necessarily exceeded the Court's *statutory* authority to issue such relief. As the Justices have long explained, because the Court's authority to issue emergency injunctions derives from the All Writs Act, and not 28 U.S.C. § 2101, such relief is supposed to be available only "where the legal rights at issue are 'indisputably clear.'"[45]

It ought to follow that newly minted rights, such as the one *Tandon* articulated, cannot justify an emergency injunction pending appeal. And yet, using what are supposed to be emergency *procedural* rulings to effect *substantive* changes in the law is increasingly the norm in these contexts — which may also help to explain why it's happening so much more often. The more that the Justices issue emergency relief on the shadow docket, especially in cases in which it might not previously have been available, the more the standard for such relief is necessarily diluted — making it easier for the next applicant to make out a case for such relief, and so on. What's more, issuing such relief through either unsigned orders or cryptic unsigned opinions may be *easier* for the Justices than doing so through lengthy merits opinions more likely to divide even those who agree as to the bottom line.[46]

As the merits have become the all-but exclusive consideration in shadow docket cases, it is hardly surprising that positions likely to resonate with the Court's conservative majority are faring better. But the shift in the Court's composition has also had *procedural* consequences. For instance, in *Tandon*, just as he had in *Roman*

---

45. *Ohio Citizens for Responsible Energy, Inc.* v. *Nuclear Regulatory Comm'n*, 479 U.S. 1312, 1313 (Scalia, Circuit Justice 1986) (quoting *Communist Party of Ind.* v. *Whitcomb*, 409 U.S. 1235, 1235 (Rehnquist, Circuit Justice 1972).

46. In that respect, compare *Tandon* with *Fulton* v. *City of Philadelphia*, No. 19-123, 2021 WL 2459253 (U.S. June 17, 2021), in which the Justices divided over whether to overrule *Employment Division* v. *Smith*, 494 U.S. 872 (1990). *Tandon*, which takes a pretty healthy bite out of *Smith*, reached the Court a full year after *Fulton* had been granted, and months after it had been briefed, argued, and voted upon — and yet it was decided before *Fulton* with the Justices *knowing* how *Fulton* was going to come down. Only two Justices in the *Tandon* majority — Justices Kavanaugh and Barrett — joined Chief Justice Roberts's narrower opinion in *Fulton*.

Catholic Diocese and its companion case in November, Chief Justice Roberts joined the three Democratic appointees in dissenting from the majority's decision to grant an emergency injunction pending appeal. Here as much as in any other context this Term, Justice Barrett's confirmation in place of Justice Ginsburg had a direct and immediate impact on the *results* of the Court's decisions.[47]

But the shift in composition is relevant not only with respect to emergency relief such as stays or injunctions, but also with respect to summary reversals of lower courts — for which there is at least a norm (if not a rule) that *six* votes, not five, are required (on the theory that any four Justices could grant plenary review, and so it takes six to prevent that from happening). Thus, the Court's novel January 15 ruling in *Higgs*[48] — a summary reversal on a petition for a writ of certiorari before judgment — seems possible only *because* there are no longer four Justices who would dissent from such a procedural move.

Simply put, if a majority of the Justices are now of the view that the merits are the predominant consideration in considering emergency applications, and if six Justices are willing to summarily dispose of the merits even in novel procedural contexts, then that not only explains why we've seen such a dramatic uptick on the shadow docket in the last few years, but it also suggests that this shift is here to stay even as COVID cases wane and even if the Biden administration is less aggressive in pursuing (or the Justices are less solicitous in providing) such relief going forward. Instead, the focus will likely shift to cases in which *states* are parties, or cases in which those *challenging* federal policies are asking the Justices to intervene to freeze a lower-court ruling in favor of the federal government — as with the Clean Power Plan late in the Obama administration.[49]

---

47. With five argued cases left to be decided when this testimony was submitted, there have been only two merits decisions so far this Term in which Justice Barrett was part of a 5-4 majority — where it is at least possible that the result, and not just the rationale, would have been different were Justice Ginsburg still on the Court: *TransUnion LLC* v. *Ramirez*, No. 20-297, 2021 WL 2599472 (U.S. June 25, 2021), and *United States* v. *Arthrex, Inc.*, No. 19-1434, 2021 WL 2519433 (U.S. June 21, 2021).

48. *United States* v. *Higgs*, 141 S. Ct. 645 (2021) (mem.).

49. *See West Virginia* v. *EPA*, 136 S. Ct. 1000 (2016) (mem.). At the time this testimony was submitted, the Justices were already considering one such application —

Finally, it's worth noting that, whatever the cause of this uptick, it has almost nothing to do with Congress — which hasn't touched the Court's jurisdiction or procedures in any meaningful way since 1988. Even the change in the Court's Term — from one that formally ended with the summer recess to a "continuous" Term — was accomplished via a 1990 amendment of Rule 3 of the Court's rules.[50] Everything else has come, by all appearances, through unexplained behind-the-scenes shifts in how the Court applies its own standards for emergency relief under statutes that Congress has not disturbed.

III. WHY THE RISE OF THE SHADOW DOCKET IS A PROBLEM

The uptick identified above is not simply an assessment of volume. Rather, the Supreme Court's significant shadow docket rulings in recent years have had dramatic real-world impacts — from allowing controversial immigration policies affecting millions to go into effect[51] to clearing the way for the first federal executions in 17 years;[52] from blocking state-wide COVID restrictions[53] and rulings by lower federal courts extending access to the polls in the 2020 election[54] to staying out of cases after the election seeking to overturn the result.[55] Reasonable minds will surely disagree about the merits of each (and all) of these rulings. But it seems important to me to highlight some of the many ways in which handing down significant rulings via the shadow docket is problematic *even* to those who think the Court is generally getting the merits of most (or even all) of these disputes "right."

---

asking the Court to lift a lower-court stay of a ruling blocking the CDC's COVID-related eviction moratorium. *See Ala. Ass'n of Realtors* v. *Dep't of Health & Human Servs.*, No. 20A169 (U.S. filed June 3, 2021).

50. Prior to the rule change, if the Court needed to decide a case en banc during the summer recess, it had to return for a "Special Term," of which there were five during the twentieth century: one in 1942; two in 1953; one in 1958; and one in 1972.

51. *See, e.g.*, *Trump* v. *Int'l Refugee Assistance Proj.*, 137 S. Ct. 2080 (2017) (mem.).

52. *See Barr* v. *Lee*, 140 S. Ct. 2590 (2020) (per curiam).

53. *See, e.g.*, *S. Bay United Pentecostal Church* v. *Newsom* ("*South Bay II*"), 141 S. Ct. 716 (2021) (mem.).

54. *See Merrill* v. *People First of Ala.*, 141 S. Ct. 25 (2020) (mem.).

55. *See, e.g.*, *Gohmert* v. *Pence*, 141 S. Ct. 972 (2021) (mem.); *Texas* v. *Pennsylvania*, 141 S. Ct. 1230 (2020) (mem.); *Kelly* v. *Pennsylvania*, 141 S. Ct. 950 (2020) (mem.).

1. The absence of reasoning. Most significantly, these rulings are generally coming down without any explanation from a majority of the Justices as to their reasoning, leaving not only the parties and lower courts but other actors who might be affected by the decision (e.g., state executive officials) to speculate as to *why* the Court ruled the way it did. At the very least, if, as I've suggested above, the Justices truly are focusing on the merits to the exclusion of all other considerations in applications for emergency relief, it might behoove them to say so — so that lower courts stop applying what may increasingly be the *wrong* standard. Either way, the lack of reasoning makes it impossible to scrutinize the merits of the Court's action in far too many of these cases.

2. The anonymity of the vote. The uncertainty over which Justices voted which way, especially on contentious issues, also perpetuates uncertainty among parties and lower courts — who have been instructed by the Supreme Court to generally give weight to the "narrowest" view that commands the support of a majority of the Justices.[56] When, as in the *Dunn* v. *Smith* ruling in February, we don't even know *who* the fifth (and perhaps sixth) votes were in support of a shadow docket ruling, that only further complicates efforts to figure out exactly what the Court has commanded.

3. The unpredictable timing of decisions. Another issue that has arisen with the rise of the shadow docket has been the proliferation of what Bloomberg Supreme Court reporter Greg Stohr has called the "night Court" — with decisions often coming down late in the evening (or very early in the morning), especially on Friday nights.[57] In July 2020, for example, the Court handed down a pair of *major* rulings clearing the way for the first federal executions in 17 years in a pair of 5-4 decisions that were handed down the first night at 2:10 a.m. EST, and two nights later at 2:46 a.m. EST. Executions raise unique timing concerns with respect to last-minute stay applications (or applications to lift stays), but even cases with no comparable urgency have led to late-night rulings — such as the decision in *South Bay II*, which came

---

56. *See Ramos* v. *Louisiana*, 140 S. Ct. 1390, 1403 (2020) (citing *Marks* v. *United States*, 430 U.S. 188, 193 (1977)).

57. Greg Stohr (@gregstohr), TWITTER (Feb. 6, 2021, 1:02 PM), https://twitter.com/GregStohr/status/1358113817696288769?s=20.

at 10:44 p.m. EST on a Friday night *six days* after briefing had been completed, or the ruling in *Tandon* at 11:34 p.m. EDT on a Friday night two months later. Likewise, the Court's significant ruling blocking New York's COVID-based restrictions on certain religious services in *Roman Catholic Diocese of Brooklyn* v. *Cuomo* was handed down at 11:56 p.m. EST on Wednesday, November 25 — the night before Thanksgiving. There's a reason why the Court follows a longstanding protocol for when it hands down rulings in argued cases. Among other things, it increases public access to and awareness of the decisions. Indeed, the hand-down announcements are even recorded and eventually published. Here, in contrast, the rulings are handed down in a manner that makes them that much more *in*accessible.

4. The lack of merits briefing, *amicus* participation, and/or oral argument. Deciding significant questions through the shadow docket also deprives any number of affected parties of the opportunity to participate, including through the filing of friend-of-the-Court briefs. Although the Supreme Court's rules do not preclude the filing of such *amicus* briefs in conjunction with shadow docket applications, the timing makes them all-but impossible in most cases (and, anecdotally, the Clerk's Office has been known to describe *amicus* filings with respect to applications as being "disfavored"). And effectively handing down merits decisions on the shadow docket also deprives the parties of a chance to fully brief the merits (as opposed to briefing whether emergency relief is warranted) *and* oral argument — notwithstanding the settled view that both of those are key features of the Court's plenary consideration.

5. The problems with predictions. The above concerns all go to the transparency of the Court's decisions and the opportunities of interested parties to help shape them. But even on their merits, shadow docket rulings suffer from multiple flaws, including the difficulties of making predictive judgments about the merits of a dispute so early in the progress of litigation. Consider, in this respect, the Court's shadow docket ruling issuing a partial stay of two district court injunctions against the second iteration of President Trump's travel ban.[58] Presumably (although we'll never know), that decision reflected a

58. *Trump* v. *Int'l Refugee Assistance Proj.*, 137 S. Ct. 2080 (2017) (mem.).

judgment by a majority of the Justices that they would uphold that policy if and when it reached them for plenary review. But right before the Court was set to hear argument, the Trump administration withdrew the second iteration, and replaced it with the more legally nuanced third version — mooting the appeal and leading the Court to dump the cases from its calendar *without* reaching those merits. (The Court would eventually uphold the third iteration by a 5-4 vote.[59]) As these cases show, the Justices are sometimes making predictions about what they're going to do in cases on which they never actually have a chance to rule. Indeed, the Court was supposed to hear arguments this Term on challenges to President Trump's border wall and his "remain in Mexico" asylum policy — which no lower court ever sustained. But because the Biden administration has changed those policies, the Court has removed those cases from its argument calendar, and will likely never reach the merits of those disputes notwithstanding its earlier rulings that allowed the policies to go into effect pending appeals of adverse lower-court rulings.

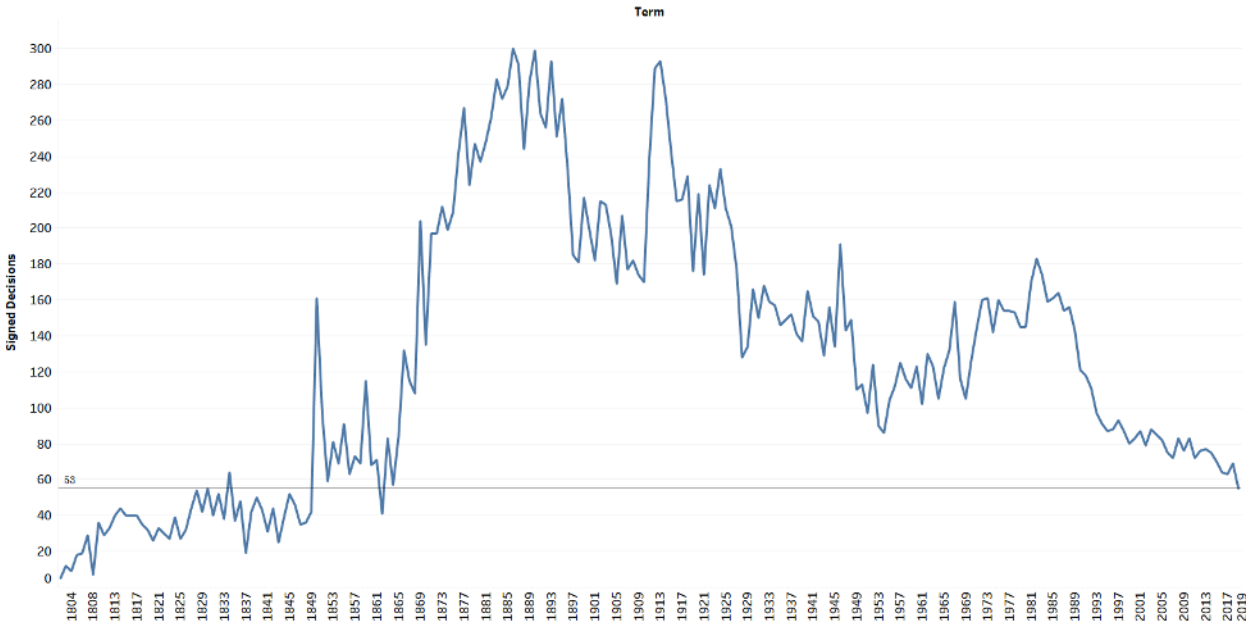
6. Prematurely (and unnecessarily) resolving constitutional questions. The increasing prominence of the shadow docket also means that the Justices are more frequently deciding significant questions of constitutional law at an incredibly early stage of litigation — including in contexts in which such constitutional analyses turn out to be premature and/or entirely unnecessary. Consider, in this respect, the decision in *Roman Catholic Diocese of Brooklyn*, in which a 5-4 majority enjoined New York COVID restrictions that were *no longer in effect* on the ground that they likely violated the First Amendment. Although the dispute certainly appeared to be moot, the majority (in a rare — but unsigned — opinion for the Court) justified such an intervention because "*if*" the state were to re-apply the challenged restrictions on religious worship, such a hypothetical move would "*almost certainly* bar individuals in the affected area from attending services before judicial relief can be obtained."[60] In other words, the Court used a shadow docket ruling to resolve major First Amendment questions about a policy that wasn't even in effect — and did so before the litigation had a

59. *Trump* v. *Hawaii*, 138 S. Ct. 2392 (2018).

60. *Roman Catholic Diocese of Brooklyn* v. *Cuomo*, 141 S. Ct. 63, 68 (2020) (per curiam) (emphases added).

chance to make its way through the courts on the merits. The Court is fond of saying that it is "a court of final review and not first view,"[61] trumpeting the virtues of percolation, of developments of factual records, and of the benefit of having several rounds of lower-court briefing (and rulings) in the record before deciding weighty constitutional cases. Except on the shadow docket.

7. Distorting the Supreme Court's workload. In addition to these procedural and substantive concerns, the shadow docket also appears to be increasingly competing with merits cases for the Justices' attention. During its October 2019 Term, the Court handed down signed opinions in only 53 merits cases — the fewest since the Civil War. Some of that can be blamed on COVID, which led the Justices to postpone arguments in 10 cases from the March 2020 and April 2020 sessions to October 2020. But as this Term draws to a close, the Court looks likely to hand down signed opinions in only 56 merits cases — which would be the *second*-lowest total since the Civil War:



[Graphic Credit: Dr. Adam Feldman]

61. *Zivotofsky ex rel. Zivotofsky* v. *Clinton*, 566 U.S. 189, 201 (2012) (quoting *Adarand Constructors, Inc.* v. *Mineta*, 534 U.S. 103, 110 (2001) (per curiam)). During the October 2018 Term alone, this sentiment was referenced in 11 different opinions. *See* Vladeck, *supra* note 6, at 126–27 n.20.

Simply put, as the shadow docket has grown, the merits docket has shrunk. Correlation is not causation, but it's not hard to imagine how the increasing volume of (and attention paid to) these emergency rulings has consumed resources that the Justices, their staffs, and the Court could otherwise have devoted to the merits docket.

8. Undermining the Court's legitimacy. All of the above concerns tie together in respect to the final, and most significant objection: That the rise of the shadow docket, especially at the expense of the merits docket, has negative effects on public perception of the Court — and of the perceived legitimacy of the Justices' work. If the Court is handing down a higher number of decisions affecting Americans in unsigned, unreasoned orders, both in absolute terms and relative to merits rulings, that necessarily exacerbates charges — fair or not — that the Justices are increasingly beholden to the politics of the moment rather than broader jurisprudential principles. As Justice Sotomayor has warned, all of these developments in the aggregate "erode[] the fair and balanced decisionmaking process that this Court must strive to protect."[62]

IV. POTENTIAL AVENUES FOR REFORM

Of course, just as the rise of the shadow docket has largely been the result of judge-made shifts in judge-made norms and procedures, the first place where reforms to address these concerns should be pursued is at the Supreme Court itself. Hopefully, the mere fact that the Commission is considering this topic as part of a broader reform conversation will bring additional light to the concerns I and others have raised — and perhaps the Justices will take those into account as they approach shadow docket rulings going forward. Among other reforms that the Court could adopt, whether formally or informally, *without* an Act of Congress, it might include:

- Reviving the practice of having individual Circuit Justices (rather than the full Court) resolve even contentious emergency applications whenever and wherever possible (including, where appropriate, holding in-chambers oral argument).

62. *Wolf* v. *Cook County, Ill.*, 140 S. Ct. 681, 684 (2020) (Sotomayor, J., dissenting).

- Formally publishing any order by an individual Circuit Justice granting or denying an application, whether or not it is accompanied by an opinion.[63]
- Amending the Court's formal rules and informal norms to provide far clearer guidelines for the procedures and timing of emergency applications (at least in non-capital cases), including the rules governing *amicus* participation and the possibility of oral argument before either the full Court or the Circuit Justice.
- Committing, at least informally, to publishing a rationale (and publicly identifying the concurring and dissenting Justices) for (1) any order that disrupts the status quo in the lower courts; (2) any order (other than a denial of certiorari) from which a Justice publicly dissents; or (3) any other order that the Justices intend to have precedential effect in the lower courts.
- Tying any order disrupting the status quo in the lower courts to a specific statutory authority — and, where possible, articulating why the relevant standard for such relief has been satisfied.
- Committing to scheduled releases of orders on emergency applications except where circumstances prohibit it (as in last-minute execution-related litigation), and to provide advance public notice of order issuance wherever possible.

I should also note that I'm one of those who is generally opposed to undue congressional interference in the workings of the federal courts in general, and the Supreme Court in particular. To that end, I don't think that the concerns that I and others have identified can or should be addressed through reforms designed to *prohibit* the Court from doing what it's doing — or, for example, to mandate that the Justices publicly disclose their votes on all (or even some) orders, etc. For starters, the

63. Although in-chambers *opinions* are published today as a matter of course, that wasn't always so. *See* Cynthia Rapp, *Introduction*, *in* 1 RAPP v (2001). Still today, in-chambers *orders* are *not* usually reported in either the *Supreme Court Reporter* or the *U.S. Reports*; they can be found online only by searching the docket listing for the specific case (so that one cannot search for cases they don't already know about). *See, e.g.*, *Rumsfeld* v. *Rell*, No. 05A231 (Ginsburg, Circuit Justice Sept. 8, 2005) (mem.).

problem is not the shadow docket *itself*; for as long as we have a Court the jurisdiction of which extends to emergency applications, *some* action on the shadow docket is inevitable. What's more, even if such legislation doesn't raise constitutional concerns (and some of it might), I fear that it could open up a can of worms that could lead to intrusions on norms of judicial independence going forward.

That's not to say, however, that Congress would be entirely powerless to address the rise of the shadow docket. Rather, I think that there's a meaningful conversation to be had about shadow-docket inspired legislative reforms, which I see as falling into two basic camps:

First, Congress can and should consider mechanisms for taking pressure *off* of the shadow docket. If the rise of the shadow docket is in part a reflection of the Justices being unwilling to wait for plenary merits consideration of some of these issues, Congress can, of course, address that. Among other things, such reforms might include:

- Allowing the federal government to transfer all civil suits seeking "nationwide" injunctive relief to the D.C. district court — to avoid the concern of overlapping (or diverging) "nationwide" injunctions.
- In cases in which *any* (state or federal) government action is enjoined by a lower federal court, speed up the appellate timelines so that appeals of lower-court rulings receive plenary appellate review much faster — by shortening the time for filing an appeal; by mandating aggressive briefing schedules; and by strongly encouraging courts to give such cases all due priority.
- In capital cases (where Justices from across the spectrum have bemoaned the difficulty of confronting novel legal questions on the literal eve of a scheduled execution), give the Court *mandatory* appellate jurisdiction at least over direct appeals — and perhaps also make it easier for death-row prisoners to bring timely method-of-execution challenges *before* an execution date has been set.

Second, Congress might consider codifying certain features of the shadow docket that were only norms historically. These could include:

- Codifying the traditional four-factor test that the Court applies in considering applications for emergency relief.[64]
- Encouraging the Justices to provide at least a brief explanation of any order with respect to a stay or injunction that alters the status quo vis-à-vis the lower courts.
- Encouraging the Court to hold oral arguments on applications where there is at least a reasonable likelihood that the Justices will alter the status quo.[65]
- Requiring (or, at least, encouraging) applications to be resolved in the first instance by the relevant Circuit Justice without referral to the full Court.

V. CONCLUSION

I harbor no illusion that these reform ideas are either unique or exhaustive. But they do circle around a broader proposition of more general applicability to this panel: The overwhelming majority of orders that the Supreme Court hands down through the shadow docket are exercises of the Court's constitutional *appellate* jurisdiction — not its original jurisdiction. As such, it is subject to "such exceptions[] and . . . such regulations as the Congress shall make."[66] Even for those, like me, who believe that Congress's power under the Exceptions Clause is not plenary,[67] Congress still has significant and substantial leeway and latitude to regulate the Court's appellate docket.

---

64. Congress has, in at least some prior cases, prescribed standards of review even for injunctions against unconstitutional governmental action. *See, e.g.*, *Miller* v. *French*, 530 U.S. 327 (2000) (upholding provision of the Prison Litigation Reform Act that prescribes a standard of review for injunctions against unconstitutional prison conditions); *cf. Nken* v. *Holder*, 556 U.S. 418 (2009) (where the majority opinion and dissent disagreed as to *which* statutory standard should govern stays of removal, including from the Supreme Court itself — but no Justice disputed Congress's power to impose a standard in the first place).

65. Indeed, the Court's shift to conducting remote oral arguments via telephone in merits cases starting in May 2020 and continuing through the current Term reinforces the possibility that similar remote arguments could be staged in the future for suitable emergency applications, as well.

66. U.S. CONST. art. III, § 2, cl. 2.

67. *See Felker* v. *Turpin*, 518 U.S. 651, 667 (1996) (Souter, J., concurring).

And that is the broader point on which I'd like to close my testimony today: It has been over 33 years since the last time that Congress passed legislation generally regulating the Supreme Court's docket. That legislation, as the Commission well knows, eliminated almost all of the Court's remaining "mandatory" appellate jurisdiction — so that, except for the handful of original cases and appeals from three-judge district courts, the Court would have complete control over its docket.[68]

If nothing else, the rise of the shadow docket and the decline of the merits docket should at the very least provoke this Commission to ask whether Congress went too far in 1988 — and whether, across an array of topics, it's time for Congress to re-assert some modicum of control over the *entire* docket of the highest court in the land, both procedurally and substantively. I just hope that any conversation along those lines *includes* the shadow docket, because regardless of any reforms that the Commission considers, bringing this increasingly important source of significant Supreme Court rulings out of the shadows is an important step unto itself. In that respect, this afternoon's panel strikes me as a salutary development.

Thank you again for the invitation to testify today. I look forward to your questions.

* * *

68. *See* Act of June 27, 1988, Pub. L. No. 100-352, 102 Stat. 662 (codified in scattered sections of 2, 7, 22, 25, 28, 33, 43, and 45 U.S.C.).