*IMPORTANT NOTE ON THESE DISCUSSION MATERIALS*

*The following are discussion materials assembled solely for deliberation by the President's Commission on the Supreme Court of the United States. Each set of discussion materials was prepared by a working group for the Commission's use in studying and deliberating on the issues identified in Executive Order 14023 and is informed by the Commission's public deliberations on October 15, 2021.*

*These materials attempt to set forth the broad range of arguments that have been made in the course of the public debate over reform of the Supreme Court. They were designed to be inclusive in their discussion of these arguments to assist the Commission in robust, wide-ranging deliberations.*

*The inclusion of particular arguments in these draft materials does not constitute a Commission endorsement or rejection of any of them, and specific points of analysis or particular perspectives appearing in the drafts should not be understood to reflect the Commission's views or those of any particular Commissioner. Consistent with Executive Order 14023, the Commission includes members with diverse perspectives on these issues. Commissioners therefore can be expected to hold various and even strongly opposing views, which will be the subject of deliberation at the public meeting scheduled for November 19, 2021.*

*Prior to its next public meeting, the Commission will post a draft final Report for deliberation and a vote on its submission to the President.*

# CHAPTER 5: THE SUPREME COURT'S PROCEDURES AND PRACTICES

In recent years, Supreme Court observers have engaged in vigorous debates about how the Court conducts its work and explains its decisions. The Commission recognizes that the discourse about reform, in addition to focusing on the structural proposals discussed in prior chapters, has also addressed the transparency of the Court's operations and its procedures for reviewing cases. As observers, including members of Congress, have emphasized, internal procedures and practices at the Court can have a significant external impact: They affect perceptions of the Court's impartiality, the credibility of its rulings, and the clarity of its guidance for lawyers and for other courts. And they have real consequences for the parties in each case, as well as for the many people and institutions affected by the federal laws or constitutional rights at issue.

The Commission received testimony on a broad range of the Court's internal procedures and practices. The testimony included criticisms and counterarguments, as well as proposals aimed at increasing transparency, improving procedure, and generating more visible adherence to standards of judicial ethics. A number of Justices have also expressed their views on some of these issues in written opinions and public discussions. Although it is not the Commission's charge to present suggestions to the Court, we are tasked with examining prominent debates about the work of the Court; and this task entails addressing a range of proposals from witnesses and commentators, including policies the Court would be able to implement on its own.

This chapter focuses on three sets of issues. While some of these issues have become more salient under the pressure of recent events, others have been the subject of longstanding public discussion, debate, and analysis. The first issue is the Court's use of emergency orders, issued without the usual rounds of briefing or oral argument and often without a written explanatory opinion. The second is judicial ethics. The third is public access to the Court's proceedings. In addition, an Appendix to this Report details analyses offered by witnesses before the Commission about the sources of advocacy and information provided to the Court.

## I. Emergency Orders

Many people associate the work of the Supreme Court with its "merits cases." These are cases in which the Court grants review and the parties then conduct established rounds of briefing and participate in oral argument. The Court may also receive briefs from interested non-parties called amici curiae. In these cases, the Court eventually issues a decision with a reasoned, written opinion and discloses the votes of all Justices. These robust procedures are intended to ensure that the Court's decisions are well informed, fair to the parties, and attentive to implications for the broader legal system. The opinions in these merits cases generally carry the full weight of precedent and thus are written in a manner that not only binds lower courts but also aspires to guide them, all while limiting the likelihood that the Court will dramatically change its own positions in the near future.

Yet the Court's business goes beyond its merits cases. As the Court explains on its website, the "vast majority of cases filed in the Supreme Court are disposed of summarily by unsigned orders."[1] The most common orders—there are thousands of these each year—are those in which the Court declines to review cases by denying the parties' petitions for certiorari.[2]

In another category of unsigned orders, the Court responds to parties' emergency requests by issuing an injunction, vacating a lower court's injunction, granting or lifting a stay of a lower-court ruling, or denying such emergency relief. Because these emergency orders often concern legal challenges to governmental decisions and practices, they can have substantial effects on the rights and obligations of governments, private institutions, and broad segments of the American public.

In contrast to its merits cases, however, the Court issues emergency orders without the same regularized rounds of full briefing, amicus participation, and oral argument; without much time for deliberation; often without a written opinion speaking for the Court and explaining its reasoning; and often without disclosing how each of the Justices voted. Many of these orders respond to requests from parties in the early stages of litigation and thus are issued before the lower courts have completed their adjudication and appellate review of the case.

The Court's use of various truncated procedures has at times attracted public scrutiny. Beginning in the 1950s, some commentators criticized its use of summary decisions on grounds of procedural inadequacy and lack of guidance for the lower courts.[3] Others argued that these practices were necessary to manage a large caseload, deal with emergency matters, and supervise the lower courts.[4] Subsequent scholarship has continued to address certain forms of summary or unsigned decisions,[5] and recently the phrase "shadow docket" has come into use as a catch-all term for the Court's "orders and summary decisions that defy its normal procedural regularity."[6]

In the past few years, many commentators have focused their attention on the Court's increasing use of emergency orders,[7] especially in cases of public importance or controversy.[8] Several Justices have addressed the issue in recent statements, offering both critiques and defenses of this practice.[9] The Commission also received testimony and comments about the Court's use of emergency orders. It should be emphasized that the concerns raised are not about the existence of emergency procedures—no one disputes that they are needed for true emergencies—but about specific aspects of their current use by the Court.

This section first examines three sets of concerns about emergency orders: limited process in high-impact cases; limited information about the Justices' votes and the Court's reasoning; and uncertain signals about a ruling's precedential effect. This section then examines proposals from witnesses and commentators for changing current practices, including proposals addressed to concerns about emergency orders generally, as well as those specifically addressed to cases involving the death penalty.[10]

### *A. Limited Procedure for Important Cases*

The Court's recent emergency orders have involved issues of national importance and public debate, including abortion,[11] immigration policy,[12] environmental regulations,[13] and evictions during a surge in COVID-19.[14] Yet the Court's practice in issuing such orders has

involved relatively limited briefing, no oral argument, no norm that the Court's reasoning must be publicly explained in a written opinion, and no expectation that the Justices' votes will be revealed. Thus, a prominent line of critique has focused on the dissonance between the significance of many of the Court's orders and the limited procedures that apply to them. Commentators initially focused criticism on orders that granted emergency applications seeking results contrary to those reached by the lower courts. More recently, following the Court's first ruling in *Whole Woman's Health v. Jackson*, which denied an emergency application that would have prevented a Texas abortion law known as S.B. 8 from going into effect,[15] critical attention has also turned to orders that deny such relief.

Although emergency orders technically are temporary and used in service of further adjudication, they often have the practical effect of being the final word on the issue. Since 2016, for example, the Court has issued orders that have effectively determined the end of the period for responding to the 2020 Census;[16] limitations on absentee and curbside voting, including for voters with disabilities and other vulnerable populations, at the height of the pandemic;[17] the degree of exposure to COVID-19 infection for inmates in prisons and jails;[18] and the extent of the right to congregate for religious services during the pandemic.[19] Even where such orders eventually expire, moreover, and even where they directly involve only one person as a party, they can have profound implications for affected individuals and influence larger societal debates.[20]

As these examples suggest, the issues resolved through emergency rulings often are controversial as well as consequential. Emergency orders breaking down 6-3 or 5-4 along ideological lines have multiplied in recent years, indicating that the Court increasingly is deciding contested legal questions through cursory and relatively non-transparent emergency procedures.[21] During the 2017 Term, there were five orders from which at least three Justices publicly dissented; during the 2020 Term, there were 29 such orders.[22] This increase has occurred even while the merits docket has remained at historically low levels,[23] and during the 2019 Term there were nearly as many 5-4 decisions among emergency rulings as on the merits docket.[24]

Various explanations have been offered for the Court's increasing use of expedited procedures in important and controversial cases: the lower courts' issuance of so-called "nationwide" or "universal" injunctions that "control the behavior of the federal government toward everyone, not just the plaintiffs," and which often prompt the government to seek relief;[25] federal executions during the Trump Administration; emergency requests during the COVID-19 pandemic;[26] a growing divide between the views of the Supreme Court and the lower federal courts; and possible changes in how the Justices apply the traditional legal standard for emergency relief pending appeal.[27] Critics and defenders of the Court's practices draw competing conclusions from such explanations, some of which point to passing rather than persistent causes.

Those who defend the Court's recent use of emergency rulings argue that the problem—if there is one—is not of the Court's own making. As in the lower courts, emergency applications come to the Court from parties seeking urgent relief.[28] The consequential nature of the interests at stake is precisely why the Court must act quickly, lest significant rights be left unprotected or harm imposed on the parties and the public while the full judicial process unfolds.[29] Deciding

important issues using a truncated process, on this view, is not illegitimate; it is the nature of emergency adjudication. And the de facto final resolution of important matters through temporary relief is an unavoidable part of the tradeoff that can happen at any judicial level.

Indeed, virtually everyone agrees that nothing is inherently suspect about emergency orders. Every court must have procedures for accelerated determination of urgent matters, even at the expense of a more deliberative process or more fully reasoned decisions. Disagreement, then, tends to center not on the fact of emergency procedures, but on which matters warrant the Court's immediate intervention. Critics have argued that the Court is too often using relatively impoverished procedures and deliberation to intervene on important issues, including by overturning reasoned decisions of the lower courts.[30] Relatedly, some commentators contend that the Court too often acts to disrupt the appropriate "status quo" rather than to preserve it—in some cases, at least, without clear explanation of when or why intervention is warranted.[31]

In some respects, these debates may reflect disagreement about the underlying merits of the disputes or about how to weigh the threatened interests or risk of harm.[32] An additional source of disagreement is the question of how to characterize the baseline condition or "status quo" that emergency relief is meant to preserve and the "disruptive force" that is to be held at bay pending full judicial consideration.[33] Witnesses before the Commission differed on the proper conception of the status quo for purposes of evaluating the Court's emergency orders,[34] and as one witness acknowledged, the choice will often be contested and "normatively tinge[d]."[35] One possible understanding of the status quo is the state of affairs that exists based on the last ruling in the courts below.[36] That is the baseline some critics claim the Court too often disrupts, as it did in a number of pandemic-related voting, prison safety, and religious gathering cases, among others.[37] A different conception of the status quo is the state of affairs created by the law, policy, or practice being challenged.[38] A third understanding was captured by Chief Justice Roberts's dissent in *Whole Woman's Health*, in which he explained: "I would grant preliminary relief to preserve the status quo ante—*before* the law went into effect—so that the courts may consider whether a state can avoid responsibility for its laws in such a manner."[39] This question becomes more complicated still when policymakers are responding (or not) to a sudden change in the state of the world, such as during a pandemic.

### *B. Transparency*

The Court often issues emergency orders without accompanying explanation, or with very little of it. A standard defense of such a norm is that emergency decisionmaking may not allow time for a thorough expression of the Court's reasoning in every case, and that anything less (such as a rote citation to a legal standard without elaboration on its application to a given case) would rarely provide much useful information.

Yet the question is not whether all emergency orders require detailed explanation; there has been no serious suggestion that routine denials of obviously unwarranted relief need to be accompanied by a written opinion.[40] Rather, the question is whether some emergency orders are important enough (as all merits cases are presumed to be) that the public—and the public record—should receive an express statement of the Court's reasoning and of how the Justices voted.

Critics and defenders alike recognize that the Court sometimes does issue opinions explaining its emergency orders, and individual Justices even more frequently write opinions concurring in or dissenting from the Court's orders. For critics of the Court's orders practices, such opinions demonstrate that reasoned explanation is possible; the problem, in their view, is that it is not provided more regularly in cases of national importance.

Critics argue that the lack of a stated rationale on behalf of the Court—and the lack of full disclosure of the Justices' votes on emergency orders—deprive the public of valuable information about how the Court and each of its members understands and applies the substantive legal principles at issue in important cases.[41] Similar arguments extend to the procedural rules that govern emergency orders: Critics contend that it is sometimes unclear whether or how the Court is applying the traditional multipart standard used to determine issuance of emergency relief.[42]

Another line of critique focuses on the disciplining function of reasoned opinions. For example, some critics argue that the Court has not followed a straight line on the question of when to grant emergency relief, and that it has been willing to break new legal ground in certain cases while disclaiming that power in others, without explaining the difference.[43] In the critics' view, the lack of explanation enables such variation by removing the rigor and consistency that the writing of carefully reasoned opinions is said to impose on judicial decisions.

Critics more broadly charge that the issuance of high-profile orders without adequate explanation damages the perceived impartiality and legitimacy of those rulings, or even of the Court, in the public eye: When the Court does not routinely explain its reasoning in cases of great public concern, people may speculate that the Justices are making decisions based on politics.

Defenders of the Court's rulings respond that detailed opinion writing is infeasible in many emergency settings.[44] On this view, the relative lack of transparency in emergency orders is simply part of the process of faster decisionmaking. Moreover, in certain cases, the chances of the Justices reaching rapid agreement on the outcome might be improved by dispensing with an expectation that a majority of Justices will agree on legal reasoning set out in an opinion speaking for the Court.[45]

Relatedly, it may be practically useful for the Justices to reveal less rather than more in their emergency orders, to avoid locking themselves into positions or reasoning that is based on limited process, reflection, and information.[46] A similar argument supports the view that Justices ought not be required to reveal their votes in emergency orders.

### *C. Precedential Effect*

A third set of concerns centers on the uncertain precedential effect of the Court's emergency rulings. Even to expert legal observers, including judges, it remains unclear which orders and related opinions operate as precedents binding on lower courts.[47] In the context of emergency orders, one might think that, at most, only opinions designated as "Opinions of the Court" should function as binding precedents; indeed, Justice Alito recently noted in a public address that a ruling on an emergency application is not a precedent with respect to the

underlying issue in the case.[48] Yet at times the Court has appeared to expect its emergency orders to be treated as precedential, at least if statements of individual Justices or concurring opinions accompany the order, even though none of them is designated as the opinion of the Court.

An example from the Court's pandemic cases about religious gatherings illustrates this issue.[49] In *Gateway City Church v. Newsom,* the Court ruled that the Ninth Circuit's "failure to grant relief was erroneous," and explained that "[t]his outcome is clearly dictated by this Court's decision in *South Bay United Pentecostal Church v. Newsom.*"[50] But the *South Bay* case was an emergency ruling that presented no majority rationale. As one Commission witness noted, the Court seemed to require lower courts to discern binding legal principles from an order with a concurring opinion by Justice Barrett (joined by Justice Kavanaugh), a statement of Justice Gorsuch (joined by Justices Thomas and Alito), and a concurrence by Chief Justice Roberts.[51]

Critics as well as many defenders of the Court's emergency orders appear to agree that orders like the one in *South Bay* should not carry precedential weight for lower courts. More broadly, even when emergency orders do include an opinion for "the Court," the nature of such orders and the quality of the processes that precede them generally counsel against giving dispositive weight to decisions reached on an emergency footing.[52] Without clarification, uncertainty about the precedential effect of emergency orders can breed confusion about the content of the law for the lower courts, for relevant parties, and for the public.

### *D. General Proposals*

Commentators have made various proposals aimed at addressing the concerns described above while acknowledging the reality that emergency orders are, and will remain, a necessary component of the Court's work.

#### *1. Transparency*

Specific reforms proposed in response to concerns about non-transparency—and the accompanying risk of an appearance of inconsistency, arbitrariness, or bias—urge the Court to explain the majority's reasoning in emergency orders involving matters of great public debate. A different approach would place a premium on providing an explanation whenever the Court is undoing reasoned rulings in the lower courts.[53] Another proposal would urge the Justices to disclose their votes in emergency orders.[54]

The aim of such explanations and disclosures would be to provide guidance to parties, lawyers, and lower-court judges; to allow the public to know the role of each Justice in granting or denying an emergency order; and to ensure that especially consequential decisions benefit from the rigor and discipline associated with reasoned opinions.[55] The explanations need not be lengthy, nor does anyone suggest that opinions need to be written in every case. Instead, the goal is to enable observers to understand the bases for the Court's most significant rulings—to follow the legal trail through each decision and from one decision to the next. Proponents of reform argue that, at a minimum, the Court should clearly articulate the test it is using to assess the application for emergency relief and indicate how (or whether) it applied each prong of the test.[56]

The category of "important" cases in which explanation may be most valuable is not self-defining; reasonable minds will differ about that threshold. Even short opinions take time to write, moreover, and the suggestion that the Court indicate how it applied each prong of a four-part test may be in tension with the suggestion that the writing need not be lengthy. Indeed, there may be an unavoidable tradeoff between the explanatory benefits of any given opinion and the costs of producing it—including not only the time and effort spent preparing the opinion, but also the possibility of committing the Justices to positions they have not yet had time to consider fully. On the one hand, an opinion in which the Court merely articulates the relevant legal test and states its conclusions on the application of each prong may not pose undue risks of delay or lock-in. On the other hand, such an opinion—lacking the detailed explanation of the underlying reasoning typically found in merits opinions—may not provide much illumination.[57]

The Court has demonstrated, however, that it can issue informative opinions in an expedited way. In a high-profile case concerning the second federal eviction moratorium, the Court released an eight-page per curiam opinion providing a concise analysis of the majority's view of the likelihood of success on the merits, weighing of the equities, and consideration of the public interest.[58] Given that public perceptions of the legitimacy of its rulings may be at stake, the Court may well benefit from continuing to adjust its explanatory practices in important cases, with an eye toward enabling greater transparency, reinforcing procedural consistency, and avoiding the possible appearance of arbitrariness or bias.

Relatedly, the Court might also avoid most of the procedural and transparency concerns about emergency rulings by more frequently exercising its discretion to transfer emergency applications to the merits docket on an expedited basis, as it recently did in the ongoing litigation concerning the Texas abortion law,[59] as well as in *Ramirez v. Collier*, a capital case.[60]

*2. Precedential Effect*

Many observers seem to agree that emergency orders should not, as a general matter, carry precedential weight. In some of its orders, the Court is careful to say that the grant or denial of emergency relief should not be construed as resolving the merits of the case. The opinions accompanying the first emergency order denying relief in *Whole Woman's Health* present an illustration: The Court stated that "we stress that we do not purport to resolve definitively any jurisdictional or substantive claim in the applicants' lawsuit."[61] And, as the dissent by Chief Justice Roberts elaborates, "[a]lthough the Court denies the applicants' request for emergency relief today, the Court's order is emphatic in making clear that it cannot be understood as sustaining the constitutionality of the law at issue."[62]

By contrast, when the Court earlier implied that lower courts are bound even by an emergency order issued with no opinion on behalf of the Court, in *Gateway City Church v. Newsom,* it risked confusing lower courts, relevant parties, and the public. Such an implied expectation would also be hard to square with a central justification for using truncated and relatively non-transparent procedures for emergency orders.[63] To the extent the Court has been taking steps since that case to clarify whether emergency rulings should have any precedential effect on lower courts,[64] or to specify which aspects of individual rulings should or should not be construed as precedent, these are welcome developments.

### *3. Existing Norms of Deference*

A committee of regular advocates before the Court, including several former Solicitors General and Deputy Solicitors General, provided testimony highlighting established principles that the Court has endorsed and yet may not be regularly applying.[65] These principles, if applied more consistently, might relieve pressure on the Court to intervene early in at least some lower-court proceedings. For example, their testimony pointed to "the Supreme Court's traditional 'two-court rule,'" which places an especially heavy thumb on the scale against reversing findings of fact that have been made by the trial court and affirmed by a court of appeals.[66] Also, "when the Court of Appeals sets an expedited schedule to address an important constitutional issue, the interest in ordinary process weighs against Supreme Court intervention."[67] One potential cost of more regular adherence to such principles might arise from privileging lower-court rulings that turn out to be erroneous. An additional limitation is that these principles are relevant only to a subset of cases. The reach of both principles may be expanded, however, by the greater use of expedited scheduling in the federal appeals courts for cases likely qualifying as emergencies.[68]

### *4. Nationwide Injunctions*

Another approach would aim to eliminate or reduce the number of "nationwide" or other defendant-oriented injunctions in the lower courts, some of which give rise to emergency applications to the Court.[69] Recommendations along these lines, including proposed legislation, have been primarily motivated not by concerns about the Court's emergency orders but by considerations about the power of the lower courts; such proposals have inspired extensive debate among commentators and policymakers, which we do not rehearse or evaluate here.[70] A witness before the Commission proposed the alternative of legislation allowing the 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."[71] Funneling litigation involving the federal government into a single court, however, would only affect the subset of cases in which federal law or policy is at issue—and perhaps only the still-smaller subset in which there is a realistic risk of conflicting injunctions.

## *E. Proposals for Capital Cases*

The Supreme Court's emergency orders draw the most attention in high-profile cases where controversies directly impacting large numbers of people are at stake. Another component of the Court's emergency rulings, however, arises in the context of capital punishment, where the Court often has the final word on whether a state or federal execution will go forward. These cases come to the Court in an emergency posture as the date of execution approaches, when there are unresolved legal challenges to the execution pending in the lower courts.[72] If the lower courts do not stay the execution, the condemned person will ask the Court to do so. If the lower courts do halt the execution, the state will typically ask the Court to vacate that stay so the execution can proceed.[73] These decisions form a substantial and well-known component of the Court's emergency orders.[74]

In recent years, the Court's handling of emergency applications in capital cases has drawn criticism from commentators as well as from members of the Court itself. Several Commission witnesses presented arguments and proposals specific to the death penalty context,

based on the premise that "death is different" because there is no opportunity to correct a legal error if an execution goes through, and because ending human life is a uniquely serious form of state action.[75] At the extreme, the risk of legal error may compound a risk of factual error, thus raising the worry that the state may kill an innocent person;[76] one Commission witness testified that to date "185 people have been exonerated after being wrongfully convicted of a capital offense and condemned to death."[77] In other cases, the concern is not that the state might execute someone who is innocent, but rather that it will violate constitutional or other legal rights and protections in the course of administering a death sentence.[78] These cases include challenges concerning the risk of severe and needless pain and suffering due to the method of execution,[79] the individual's competency to be executed,[80] or the presence of a religious advisor at the time of death.[81] Commentators have argued that the Court should err on the side of pausing an execution if such legal challenges remain unresolved.[82]

Yet there are those who argue, to quote Justice Thomas, that injustice can also come "in the form of justice delayed."[83] Executions typically are authorized pursuant to warrants that expire on a given date; if a judicial stay prevents the execution from going forward, the state often needs to obtain a fresh warrant, a process that can delay an execution by a month or more, meanwhile frustrating the state's interest in carrying out the sentence.[84] And a stay that remains in effect during the pendency of lower court or Supreme Court review can remain in place for considerably longer.[85]

Until very recently, such debates centered on death penalty cases in the states, with little attention paid to federal executions, for the simple reason that federal executions are far less common. Between 1963 and 2001, the federal government did not execute anyone, and it executed only three people between 2001 and 2019.[86] By contrast, the states have executed more than 1,500 people since 1973.[87] In the months before the Commission's formation, however, a spike in federal executions gave rise to multiple emergency applications to the Court. Commission witnesses and commentators cited these rulings, in addition to state cases, as salient examples of problems with the Court's handling of its emergency orders.[88]

The federal executions at issue occurred during the last six months of the Trump administration, when the Department of Justice sought the execution of thirteen individuals.[89] Legal challenges were filed in all thirteen cases, including claims that the Department's proposed execution plan violated federal statutes and constituted cruel and unusual punishment under the Eighth Amendment.[90] In multiple instances, the lower federal courts noted that the challenges raised significant and complex issues, and in some cases they concluded that the challengers were likely enough to succeed on the merits to warrant a stay of execution to permit time for the courts to resolve the issues.[91] At the Supreme Court, one or more requests for emergency relief were filed in each case, sometimes from the government seeking to vacate a lower-court stay and sometimes from the person seeking the stay. The combined effect of the Court's orders in these cases was to permit all thirteen executions to go forward.[92] In most cases, it did so in brief orders that gave no rationale for its decision,[93] though multiple dissents were filed.[94] A Commission witness defended these rulings on the ground that the challengers did not convince the Court that they were likely to succeed on the underlying merits.[95] Other Commission witnesses criticized the Court's handling of the cases.[96] So did Justices Breyer and Sotomayor.[97] In Justice Sotomayor's view, the way the Court made these decisions, "with little opportunity for proper

briefing and consideration, often in just a few short days or even hours," and often without a public explanation of their rationale, "is not justice."[98]

In their testimony before the Commission, several witnesses argued that because in capital cases the stakes of error are asymmetrical, the Court's approach to stays of execution should be asymmetrical as well. "[T]here is no symmetry between an erroneous execution and an erroneous non-execution," one witness reasoned. "If proper attention is given to irreparability [of harm] and the need to preserve the judiciary's ability to decide a case, then the Justices should be much more willing to give shadow-docket orders that *delay* an execution than shadow-docket orders that *accelerate* an execution."[99] Below, we address two sets of reforms proposed by witnesses taking this view of asymmetrical stakes.

*1. Asymmetric or Automatic Stays of Execution*

Several witnesses endorsed the view that the Court should apply an explicitly asymmetrical approach to staying executions,[100] for example, with a presumption in favor of staying an execution when there is genuine doubt as to its legality, or with a heightened standard of review for vacating stays when lower courts have issued them.[101] One witness testified that such an asymmetric approach could be imposed by congressional legislation, either in the form of a statute prescribing asymmetric standards of review or one removing the Court's jurisdiction to review stays of execution entered by lower courts.[102] We address jurisdiction stripping generally in Chapter 4 of this Report. But absent any action from Congress, the Court can alter its own threshold for staying an execution.

Commission witnesses also proposed variations of an automatic stay of execution during certain stages of litigation: Under one proposal, previously endorsed by Justice Stevens and by a commission led by Justice Powell, "the Supreme Court should be required to automatically grant a stay of execution to any defendant who has not yet completed a first federal habeas review."[103] In another proposal, every person with a pending execution date would have at least one full opportunity to litigate any challenges to the state's proposed method or administration of execution.[104] Arguing against these proposals, a Commission witness contended that the availability of automatic stays might induce litigation based on weak claims; that the existing legal standard could account for the irreversibility of an execution; and that any additional delay could undermine the government's interests in cases where the legal challenge has little chance of success, even if lower-court judges view the underlying question as unsettled or unresolved.[105]

*2. Four Votes to Stay an Execution*

Another approach would be for the Court itself to reduce the number of votes required to grant a stay of execution, from five votes to four—a reform embraced by a number of Commission witnesses,[106] as well as certain Justices in the past.[107] Such a reduction would address a related but distinct set of concerns called to the Commission's attention regarding what one commentator has called "a lethal gap" in the Court's internal processes: "It takes four votes to put a case on the court's docket" via a writ of certiorari, "but it takes five to stop an execution."[108] Thus, it is possible that the Court could grant a petition for certiorari and set a case for full briefing and argument to resolve a significant legal question, and yet also allow the petitioner to be put to death while the case is pending. Given this concern, some Justices have at

times employed a practice known as the "courtesy fifth," whereby a Justice who does not believe that either certiorari or a stay is warranted will nonetheless vote to issue a stay if four other Justices have voted to grant certiorari, thus preserving the Court's jurisdiction.[109] The contours and the continuing viability of this norm are unclear, however.[110]

In recent years, the Court has declined to halt executions when four Justices requested more time for consideration—before a vote on certiorari. In one instance, four Justices voted to call for the views of the Solicitor General, a step typically taken only in cases in which the Court is seriously considering granting certiorari. But as Justice Breyer noted in dissent: "[N]o Member of the majority . . . proved willing to provide a courtesy vote for a stay so that we can consider the Solicitor General's view once received. As it is, the request will be mooted by petitioner's execution."[111] More recently, in *Dunn v. Price*,[112] after the state sought to vacate a lower-court stay on the evening of the execution, four Justices requested that the application be held until the following morning when all the Justices could discuss the issue at their regularly scheduled conference; the Court refused and entered a brief order vacating the stay.[113]

In such situations, a case that four Justices are seriously considering placing on the merits docket for full consideration can be denied a path forward by a decision disposing of the case through an emergency order. The proposal of a rule that four votes are sufficient to grant a stay of execution would resolve this concern. So would an extension of the "courtesy fifth" norm to include circumstances in which four Justices need more time to determine whether to vote to grant certiorari, an approach taken by Chief Justice Roberts in a capital case several years ago.[114]

Arguing against such a proposal, a Commission witness argued that if the Court is to prevent the government from carrying out a death sentence as scheduled, it should only do so if a majority of the Justices endorse that action.[115] A related concern is the one raised by then-Justice Rehnquist, who argued to his colleagues that "four Justices out of a total number of nine could frustrate the effectuation of the will of the majority" by banding together to issue a stay "in every death penalty case."[116] Other commentators are skeptical of this concern, however, asserting for instance that "there are many reasons—including collegiality, the likelihood of an adverse outcome on the merits, and the probability of negative public and congressional comment—why the minority would be unlikely to behave in this fashion."[117] A Commission witness observed, moreover, that the Court for many years had four Justices who were generally sympathetic to legal issues raised by capital defendants, but who did not use "their existing authority to disrupt the operation of the court" by granting certiorari in every capital case and pressing for a courtesy fifth.[118]

## II. Judicial Ethics

The Justices of the U.S. Supreme Court are the only members of the federal judiciary who are not covered by a code of conduct. Since 1973, the United States Judicial Conference has composed and updated an advisory code of conduct directed to all other federal judges. That Code, by its own terms, is not addressed to the Justices of the Supreme Court.

In a 2011 year-end report, Chief Justice Roberts addressed concerns over the Justices' exclusion from the Code. He emphasized that "All Members of the Court do in fact consult the

Code of Conduct in assessing their ethical obligations. In this way, the Code plays the same role for the Justices as it does for other federal judges since . . . the Code 'is designed to provide guidance to judges.'"[119] In 2019, during an appropriations hearing in Congress, Justice Kagan similarly stated that the Justices follow the Code to the very best of their ability.[120]

There is some debate over whether the Justices always follow the Code even if they do consult it.[121] The Commission has not undertaken a study of the Justices' adherence to the standards in the existing Code and makes no finding in this respect. Regardless of whether the Justices do consult and follow the existing Code, not having a formally adopted code might not be best practice for the Court. On this view, even if there were no apparent issue with ethical practices on the Court, the explicit adoption of a code could promote important institutional values. Most significant public and private entities have adopted codes of conduct for their organizations and employees.[122] It is not obvious why the Court is best served by an exemption from what so many consider best practice. To bring the Court into alignment with other courts and entities, some observers argue that the Supreme Court should adopt a code of conduct—either the existing Code applicable to other judges or its own version of a code—or that Congress should impose one.

The discussion of whether the Court should adopt a code of conduct has included a further discussion about whether the Justices should be subject to a disciplinary framework as well. The Justices are not subject to the complaint and discipline framework that applies to other federal judges. The Judicial Conduct and Disability Act of 1980 allows for any person to file a complaint against a federal judge alleging that the judge "engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts" or "is unable to discharge all the duties of office by reason of mental or physical disability."[123] The Code of Conduct can be relevant to determining whether a judge has engaged in prejudicial conduct. However, the Judicial Conduct and Disability Act excludes the Justices from its reach.[124]

Relatedly, though the Justices are subject to statutory standards that require recusal in specified situations, unlike recusal decisions by lower-court judges, the Justices' recusal decisions are not subject to further review.

This section discusses potential benefits and drawbacks of reforms that would impose a code of conduct, a disciplinary framework, or recusal review.

### *A. Code of Conduct*

A code of conduct for the Court would bring the Court into line with the lower federal courts and demonstrate its dedication to an ethical culture, beyond existing statements that the Justices voluntarily consult the Code. In other contexts, such a demonstration of commitment has affected conduct over time, in part by encouraging periodic training and other similar techniques that enhance attention to ethical concerns.[125]

There are two paths to a code of conduct for the Supreme Court: The Court could *internally* adopt a code, or Congress could *externally* impose a code upon the Court. In either case, the code could mirror the one that applies to other federal judges or could be specific to the Supreme Court.

### *1. Internal Adoption of a Code*

The Court could formally adopt the Code of Conduct that already applies to other Article III federal judges. It has adopted similar non-binding regulations in the past: In 1991, the Court formally adopted ethical regulations enacted by the Judicial Conference under the Ethics Reform Act of 1989.[126] Those regulations now govern the Justices' ability to receive gifts, honoraria, and outside income, and they require the Justices to make periodic financial disclosures. Adopting the current Code could be done quickly. Furthermore, the Justices' ethical obligations would then parallel those of the rest of the federal judiciary. The Code comprises, for the most part, broadly stated aspirational principles. Were the current Code to apply to the Justices, it might not be necessary to amend the actual language of the Code,[127] although the opinion letters interpreting the Code in the context of particular situations involving lower-court judges might not be directly applicable to the Justices.

As an alternative to adopting the current Code, the Court could create its own code. In a 2019 appropriations hearing, Justice Kagan stated that the Chief Justice was "studying" the question of whether to adopt a code applicable only to the Supreme Court.[128] In that same hearing, Justice Alito was asked why the current Code of Conduct does not apply to the Supreme Court; among other things, he commented that the working life of the Court is a "little different" from that of the rest of the federal judiciary.[129]

An advantage of creating a new code drafted by the Justices is that the language of the code could be geared to the unique institutional setting of the Court. For example, the considerations involved in the recusal context might be different for the Justices, even though the statutory standards are the same as for other judges.[130] This is because a Justice, unlike a lower-court judge, cannot simply be replaced by another judge. As another example, a new code for the Justices might also provide guidance on public and private appearances, as the considerations could be different for a Justice than for other judges who are not the object of so much public attention. The Justices themselves might be well positioned to consider the tensions and issues that can arise from their public and private activities, and to set standards for themselves. While the Justices' participation in a broad range of educational and professional activities undoubtedly benefits the profession and the country, the Justices must be mindful of appearances if they choose to attend meetings of organizations that have a political or other valence that could cause the Justices' attendance to become controversial or cast doubt on their neutrality.[131] A code drafted by the Justices, amplified over time through its application, might help the Justices navigate these waters.

In either case, the Supreme Court clearly has sufficient authority to adopt a code—doing so raises no constitutional problems. The Court has the power to affect its own internal governance, so long as it continues to meet its constitutional responsibilities.

### *2. External Imposition of a Code*

In the absence of Court action, Congress could enact a code for the Supreme Court. Several bills have been proposed to this effect, although none has been enacted.[132] Typically, the proposed bills direct the Judicial Conference to craft a code for the Court (or simply make the existing code applicable to the Justices). In his 2011 year-end report, Chief Justice Roberts

pointed out that the Judicial Conference currently lacks the statutory authority to do so. The Chief Justice put it bluntly: "Because the Judicial Conference is an instrument for the management of the lower federal courts, its committees have no mandate to prescribe rules or standards for any other body."[133] The proposed bills would address this precise issue of Judicial Conference authority.

Alternatively, Congress could write a code itself. One observer points out that Congress already imposes requirements on the Court that are analogous to a code of conduct.[134] For example, Congress requires that Justices take an oath of office, requiring them to swear to "administer justice without respect to persons, and do equal right to the poor and to the rich . . . ."[135] The oath resembles provisions that might be included in a code of conduct.

External proposals would give Congress more control over the composition of a code of conduct. If Congress were to write a code, it would need to be careful to ensure that the code's demands did not encroach on the Court's constitutionally exclusive judicial decisionmaking function.[136] Further, Congress has largely delegated procedural matters to the courts.[137]

### *B. Judicial Discipline*

In addition to the adoption of a code, there is a similar question of whether the Court should adopt a complaint and discipline framework. Under the Judicial Conduct and Disability Act, other federal judges can be subject to sanctions for conduct that is prejudicial to the "effective and expeditious" business of the courts; the code is highly relevant to an appraisal of judicial conduct under this misconduct formulation.

This section will discuss first the benefits and costs of applying the Judicial Conduct and Disability Act to the Justices. It will then discuss the benefits and consequences of an internal disciplinary framework.

#### *1. Judicial Conduct and Disability Act*

The Judicial Conduct and Disability Act is a framework for disciplining misconduct that does not rise to the level of impeachment. The Judicial Conference provides nationally uniform guidelines governing the substantive and procedural aspects of misconduct proceedings. The following is a simplified description of the procedures currently in place for the lower federal courts:

(1) "any person" may file a complaint alleging misconduct or disability,

(2) the chief judge of the relevant circuit (or the most senior active circuit judge in the event that the chief judge is disqualified) reviews the complaint and decides whether to dismiss the complaint for lack of conformity with the statute or because voluntary corrective action has been taken,

(3) if the complaint is not dismissed, a special committee appointed by and including the chief judge investigates the complaint and reports to the circuit judicial council,[138]

(4) upon receiving the special committee's report, the judicial council may conduct additional investigation, dismiss the complaint, impose sanctions, or refer the complaint to the United States Judicial Conference,

(5) if a complainant is dissatisfied with the disposition of the circuit council, the complainant may petition for review by the judicial conduct and disability committee of the Judicial Conference (review is discretionary).

Applying the Act to the Justices without modification would place inferior court judges in the position of evaluating members of a body that is hierarchically superior. This could possibly lead to undue deference. Applying the Act to the Court might be constitutionally infirm as well if the disciplinary process encroached on the judicial decisionmaking function of the Court.[139]

Additionally, the Act's lack of a standing or jurisdictional requirement for filing a complaint may be open to abuse. The Act allows "any person" to file a complaint against a federal judge. In 2013, chief circuit judges resolved 1167 filed complaints, dismissing all but 20 as "merits-related, lacking sufficient evidence, frivolous, or otherwise improper."[140] These numbers would likely be even higher if the statute applied to the Supreme Court due to the visibility of the Court and the individual Justices.[141]

Furthermore, the stakes of the procedure would be much higher if applied to the Court. Sanctions under the Act "may include . . . ordering that, on a temporary basis for a time certain, no further cases be assigned to the judge whose conduct is the subject of a complaint."[142] Although Justices do not have their own dockets, temporarily restricting a Justice from the work of the Court would be a highly consequential event that would deprive litigants and the American people of whatever number constitutes a full complement of Justices.[143] Unlike in the lower courts, there is currently no mechanism for replacing an absent Justice. The availability of such a sanction could cause groups to file more complaints in the hope of removing those Justices with whom they tend to disagree. Further, and more broadly, it is possible that interest groups seeking to mobilize support, raise money, and pursue their own agendas would see in this process an avenue for seeking their own ends to the detriment of the Court, individual Justices, and the public.

*2. Internal Disciplinary Procedures*

An internal disciplinary procedure for the Court would avoid the issue of having inferior court judges sit in judgment of the Justices or the more serious risks that could arise if the disciplinary process were run by persons outside the judiciary.[144] Some of the mechanisms of the Judicial Conduct and Disability Act, detailed above, could serve as a model for procedures tailored to the Justices. If these procedures called for internal enforcement, the Chief Justice (or next most senior Justice, in the event of conflict) could review complaints against individual Justices. The complaint could be referred to the entire Court or a subset of Justices. How such a procedure might affect the overall role of the Chief Justice and the working relationships of the Justices is not clear, although the development of deep personal rifts seems at least possible as a result. And again, the sanction of removal from a case could have broad repercussions for the Court, litigants, and the public.

Some might conclude that the adoption of a code of conduct would not be beneficial without an additional mechanism for receiving and reviewing complaints. However, experience in other contexts suggests that the adoption of an advisory code would be a positive step on its own, even absent binding sanctions.[145]

*C. Recusal*

All federal judges, including the Justices, are subject to statutory standards that require recusal in specified situations. The statute, 28 U.S.C. § 455, requires a judge or Justice to recuse "in any proceeding in which his impartiality might reasonably be questioned."[146] The statute also requires recusal in more specific circumstances, such as when the judge has a financial interest in the proceedings or personal knowledge of disputed facts.[147] Recusal decisions by lower-court judges are orders in a case and, like other rulings, are subject to review on appeal. By contrast, a recusal decision by a Justice is not subject to further review. Perhaps in part for this reason, the Justices rarely offer any explanation either for refusing to recuse or for recusing. Justices Rehnquist and Scalia famously wrote memoranda explaining their decisions not to recuse in two high-profile cases.[148] But those memoranda were quite unusual.

Moreover, when a lower-court judge recuses, another judge is selected to hear the case. While it can be disruptive to a case when a judge recuses after participating in the proceedings for a substantial period of time, most recusals come at the first assignment of a case and do not affect the handling of the case. In contrast, when a Justice recuses there is no current possibility of adding another Justice. For this reason, the mere fact of the recusal may be case dispositive. The Justices may therefore be justified in being more hesitant than lower-court judges to recuse, and correspondingly should be more careful to avoid circumstances that might trigger recusal.

The Justices' recusal decisions are subject to significant public attention, and Justices are often criticized for failing to recuse.[149] Even so, the Justices recuse somewhat frequently, at least at the certiorari stage. There was an average of 193 recusals at the certiorari stage over the last six Terms, and an average of four recusals at the merits stage.[150]

| U.S. Supreme Court October Term | Recusals at the Certiorari Stage | Recusals at the Merits Stage |
|---|---|---|
| 2020 | 201 | 1 |
| 2019 | 141 | 4 |
| 2018 | 198 | 3 |
| 2017 | 228 | 6 |
| 2016 | 206 | 4 |
| 2015 | 181 | 4 |

The Justices do not offer reasons for their recusals, but reasons sometimes can be inferred based on context. For example, a Justice's financial disclosure forms may reveal whether a

recusal was due to an interest such as owning shares of stock in a publicly traded company. Based on context, it appears that the most common reason for recusal in the past six Terms is that the Justice was involved with a case during previous employment as a circuit judge or as Solicitor General. Following that, recusals due to stock ownership were the next most common.

After stock ownership, there is a significant dip. A few recusals were likely because a Justice (or Justices) were named in the suit, or because of a family relationship (Justice Breyer, for example, will routinely recuse in cases that were handled by his brother, a U.S. district judge). A negligible number of recusals involve other reasons. In 2020, for example, Chief Justice Roberts recused from a case involving the Smithsonian Institute apparently because the Chief Justice serves as the chancellor of that institution.

Proposals for recusal reform largely focus on making the process more transparent and accountable. There are three common proposals for reform: (1) require the Justices to state their reasons for recusal or for refusing to recuse; (2) establish a formal procedure by which recusal decisions may be reviewed by another Justice or by the entire Court; and (3) reform recusal laws to make it easier for Justices to avoid financial conflicts.

*1. Stating Reasons for Recusal*

Statements from the Justices explaining their reasons for recusal could enhance the transparency of the recusal process and help build a "common law" of recusal on the Court. Recusal decisions could serve as guidance to Justices and might also clarify whether the Justices use the same standards for recusal on recurring issues, particularly a Justice's prior contact with a case when a circuit judge. While the Justices may provide such statements on their own, Congress or the Court itself might also require such statements from the Justices.[151] However, requiring full discussion on every decision to recuse could be time consuming and burdensome. A reasoning requirement could also force Justices in some situations to divulge private matters—for example the medical condition of a family member—and this could discourage recusal where otherwise appropriate. A recusal opinion might also have the appearance or effect of lobbying the other Justices.[152] One answer to these concerns might be to require only a short statement without specific details; for example, the Justice might state that the recusal is based on the Justice's involvement with the case when a circuit judge and identify the nature of the involvement (e.g., served on the panel, reviewed a motion to hear the case en banc).

In tandem with requiring explanations for recusal, there may be benefits to requiring Justices to state reasons for *not* recusing when a motion for recusal has been filed. Requiring reasoned explanations could ensure that the Justices have thoroughly considered whether to recuse. And, like explanations for recusal, explanations for not recusing could help build a body of guidance to future Justices that is also accessible to the public. Even more so than with explanations for recusal, however, requiring explanations for not recusing could become burdensome and time-consuming if motions to recuse became more common and interested groups see such motions as an opportunity to harry or embarrass Justices with whom they disagree.

*2. Establish a Review Procedure*

A Justice's decision whether to recuse is totally independent, and recusal decisions are not subject to any kind of review. The Justices may well consult with one another over difficult recusal decisions, but the decision is still that of the individual Justice and not subject to further review. This places the Justice in the position of being the final arbiter of a recusal motion that challenges the Justice's own impartiality.[153]

Other individual decisions made by the Justices are subject to a form of review by another Justice or the full Court. Parties regularly make applications to individual Justices. These applications include, for example, requests for filing deadline extensions and requests for a temporary stay of an injunction. If a Justice denies one of these requests, Supreme Court Rule 22 provides that a party may renew its request to another Justice on the Court.[154] Sometimes Justices refer emergency motions to the entire court.

It is not clear how the Court's operations or relations among the Justices would be affected by an internal process for review of recusal decisions. There has been at least one occasion in the Court's history where disagreement over recusal has led to a significant feud.[155] Because recusal can be case dispositive, were the ultimate decision on recusal to rest with the entire Court, a decision by the Court to force a Justice to recuse may lead to accusations of improper purpose. These issues may not be insuperable; some state supreme courts have a referral process for recusal decisions and the process appears to work without undue friction or burden in that setting.[156] The practice of comparable high courts in other countries, such as those in Canada and the UK, also may be instructive. It appears that neither Canada nor the UK has a referral practice for recusal on its highest court and that high court justices decide recusal on their own without further review, as in the U.S. Supreme Court. The views of the Justices would be particularly helpful in any further analysis.

*3. Reform Financial Recusal Laws*

Context suggests that a significant number of Supreme Court recusals are due to a Justice's financial conflict. Indeed, a study of recusals at the certiorari stage in Terms 2003-2013 revealed that there was at least one recusal in 10% of certiorari petitions involving a Forbes 100 company.[157] What makes these numbers surprising is that the Justices (along with their spouses and dependent children) are legally enabled to divest themselves of any stock that is causing a conflict without incurring capital gains tax.[158] It may be that there is something about the wording or operation of the relevant statute, 26 U.S.C. § 1043, that limits its reach or effectiveness.[159] If so, the Court might speak to this issue so that the statute might be improved.

Given the significant number of financial recusals, some have suggested reforms that may reduce the number of recusals due to financial conflicts. For example, Congress could act to prohibit Justices, their spouses, and any dependent children from owning individual shares in publicly traded companies, or Congress could require divestment when a conflict arises.[160] Both reforms would reduce financial conflicts significantly (and eliminate conflicts arising from stock ownership).

The Commission notes a building consensus among observers that no Justices or their spouses and dependent children should own or continue to own individual publicly traded securities.[161]

## III. Courtroom Transparency

Due to the COVID-19 pandemic, the Supreme Court conducted oral arguments over teleconference beginning in the 2020 Term. For the first time, oral arguments routinely were livestreamed, so the public could listen in from anywhere an internet connection was available. The Court has decided to continue livestreaming oral arguments for the first few months of the current Term (through December 2021), although it has not yet announced whether this practice would continue beyond that period. The present experiment in simultaneous audio has added additional fuel to a long-standing debate over whether there ought to be cameras in the Supreme Court's courtroom, which is usually capable of seating only around 50 members of the general public at a time.

In many respects, the work of the Court has become more accessible over the past few decades. The Court's opinions are available online for anyone to read or download, as are its orders, including decisions on petitions for certiorari. Even before arguments were livestreamed, recordings could be accessed after the fact in most modern cases. Still, the Court has never made the leap to allowing video streaming or video recording of its proceedings.

Proponents of cameras in the courtroom emphasize the importance of transparency and the potential educational, historical, and civic benefits of being able to see the Justices at work. Congress has introduced numerous bills calling for cameras. Numerous members of the media and interested members of the public also urge video coverage. Moreover, lower federal courts and state courts have experimented with cameras, and scholars and judges have documented the results of those experiments.[162] However, several Justices have made clear that they disfavor video recording and streaming of the Court's proceedings. They and other opponents of cameras raise concerns that cameras will lead to grandstanding by attorneys or even by the Justices, and that video clips of the Court will be taken out of context and used to mislead the public.

As an alternative to cameras in the courtroom, the Court could continue its current practice of livestreaming audio of oral arguments. Prior to the pandemic, attendance at the courtroom was determined on a first-come, first-served basis, and important cases often attracted long lines and large crowds.[163] Critics have documented the unfortunate practice of paid line-standers, a problem the Court itself partially addressed in advance of one especially high-profile case.[164] Livestreamed audio is far more accessible; one does not need to be in Washington, D.C., to listen to arguments, and attendance is not limited by seats available. Livestreamed audio also gives the American public real-time access to important events in the Supreme Court's courtroom. This may be practically important in those few cases where the oral argument itself may have significant immediate effects, for example on public markets. In addition to hearing arguments, it could also be meaningful for members of the public to hear opinion announcements from the Justices themselves in real time.

Although livestreaming of the arguments prevents the Court from fixing minor mistakes that may occur during oral argument, the past two Terms indicate that this problem is minor. Livestreamed audio has led to few, if any, hiccups; any such technical problems were related to the telephonic format of the arguments during the pandemic. There is also some concern that

observers in the courtroom might attempt to use the fact of livestreaming to disrupt the proceedings. A short delay in transmission to allow livestreaming to be halted during any outburst could prevent any such disruption.

Given the Court's longstanding opposition to cameras, a continuation of near-simultaneous audio would be a step forward and would better enable the media to cover the Court's work, while enabling interested members of the Bar and the public to better follow the work of the Court. Perhaps further experience with simultaneous audio will encourage the Court to try cameras as well.

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[1] *Orders of the Court - Term Year 2020*, SUPREME COURT OF THE UNITED STATES, https://www.supremecourt.gov/orders/ordersofthecourt/20 (last accessed Sept. 18, 2021). The Court releases a list of orders each Monday that it sits and issues "miscellaneous" orders in individual cases "at any time." *Id.* These orders are catalogued by date of issuance on the Court's website and later consolidated into a set of Orders Lists published in the bound volumes of the *United States Reports*, in a section following the Opinions of the Court. The *United States Reports* are generally printed multiple years after a case is resolved. *See* Richard J. Lazarus, *The (Non)finality of Supreme Court Opinions,* 128 HARV. L. REV. 540, 543 (2014) (noting a five-year delay). In the interim, the Court's orders and its opinions related to orders can be found in various places on the Court's website, including: on a page entitled "Opinions Relating to Orders;" at the end of the regular or miscellaneous "Orders List" catalogued online; and in the preliminary (and eventually final) version of the *United States Reports*, digital images of which the Court makes available for free online. Finally, the Court's orders (but not the opinions relating to those orders) are separately printed in the Journal of the Supreme Court, a bound volume printed at the conclusion of each Term that contains "the official minutes of the Court," digital images of which are also made available online. *Journal*, SUPREME COURT OF THE UNITED STATES, https://www.supremecourt.gov/orders/journal.aspx (last accessed Sept. 18, 2021).

[2] The Court also sometimes issues per curiam decisions finally resolving a given case. These per curiam opinions appear on the Court's web page and in the *United States Reports* alongside other "Opinions of the Court" issued via the merits docket, even though they are often decided summarily without the robust procedures normally associated with merits cases. In addition, the Court sometimes resolves a pending case by granting a petition for certiorari, vacating the opinion below, and remanding for further proceedings (typically with brief instructions, such as to consider a recently issued opinion of the Court). These summary dispositions, known colloquially as "GVRs," for grant, vacate, and remand, appear on the Orders List. Individual Justices also occasionally issue "in chambers" opinions in their capacities as Circuit Justice; these opinions are posted on the Court's web page and eventually published in the *United States Reports*.

[3] *See, e.g.*, Albert M. Sacks, *The Supreme Court, 1953 Term - Foreword*, 68 HARV. L. REV. 96, 103 (1954); Ernest J. Brown, *The Supreme Court, 1957 Term - Foreword: Process of Law*, 72 HARV. L. REV. 77 (1957); Henry M. Hart, Jr., *The Supreme Court, 1958 Term - Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84, 89 & n.13 (1959); Alexander M. Bickel & Harry H. Wellington, *Legislative Purpose and the Judicial Process: The* Lincoln Mills *Case*, 71 HARV. L. REV. 1, 3-4 (1957); ROBERT L. STERN & EUGENE GRESSMAN, SUPREME COURT PRACTICE 222-24 (4th ed. 1969). Many of these criticisms focused on summary reversals occurring at a time when the Court's docket was more crowded with mandatory appeals (which, which have largely been eliminated from its present docket, which is almost entirely discretionary). *See, e.g.*, *Presidential Commission on the Supreme Court of the United States* 20 (June 30, 2021) (written testimony of Judith Resnik, Yale Law School) (noting that between 2018 and 2021, while certiorari was granted in 217 cases, only 4 cases arose from the Court's mandatory appellate jurisdiction), https://www.whitehouse.gov/wp-content/uploads/2021/06/Resnik-PDF-Presidential-Commission.pdf.

[4] *See, e.g.*, William O. Douglas, *The Supreme Court and its Caseload*, 45 CORNELL L.Q. 40 (1960); Eugene Gressman, *Much Ado About Certiorari*, 52 GEO. L.J. 742 (1964); Anthony Lewis, *The Supreme Court and Its Critics*, 45 MINN. L. REV. 305, 319-31 (1961).

[5] *See, e.g.*, Aaron-Andrew P. Bruhl, *The Supreme Court's Controversial GVRs—and an Alternative*, 107 MICH. L. REV. 711 (2009); Ira P. Robbins, *Hiding Behind the Cloak of Invisibility: The Supreme Court and Per Curiam Opinions*, 86 TUL. L. REV. 1197 (2012).

[6] *See* William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J.L. & LIBERTY 1, 1 (2015); *see also Presidential Commission on the Supreme Court of the United States* 1 n.1 (June 30, 2021) (written testimony of Samuel L. Bray, Notre Dame Law School) [hereinafter Bray Testimony], https://www.whitehouse.gov/wp-content/uploads/2021/06/Bray-Statement-for-Presidential-Commission-on-the-Supreme-Court-2021.pdf (defining the shadow docket as "the portion of the orders list that is substantive, not including the mere grant or denial of a petition for a writ of certiorari").

[7] *See Presidential Commission on the Supreme Court of the United States* 4-5 (June 30, 2021) (testimony of Stephen I. Vladeck, University of Texas School of Law) [hereinafter Vladeck Testimony], https://www.whitehouse.gov/wp-content/uploads/2021/06/Vladeck-SCOTUS-Commission-Testimony-06-30-2021.pdf (presenting evidence of an increase in emergency orders in important cases, while also acknowledging that "[t]here's no perfect way to measure the rise of the shadow docket" and that "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"). Professor Vladeck documents a general upward trend, from 2005 through 2020, in the number of orders that either grant or vacate a stay or injunction—"orders that, through whatever mechanism, change the status quo" set by the lower courts. *Id.* Although this measure omits rulings in which the Court *denied* an application to grant or vacate a stay or injunction, such orders can also be of great consequence. Professor Vladeck also presents indicators of shifts in the qualitative importance of the Court's emergency orders in recent years. *Id*. at 6-10.

[8] The leading critic on these issues is Professor Stephen Vladeck. *See, e.g.*, *The Supreme Court's Shadow Docket: Hearing Before the Subcomm. on the Courts, Intellectual Prop. & the Internet of the H. Comm. on the Judiciary,* 117th Cong. (2021) (statement of Stephen I. Vladeck, University of Texas School of Law), https://docs.house.gov/meetings/JU/JU03/20210218/111204/HHRG-117-JU03-Wstate-VladeckS-20210218-U1.pdf; Stephen I. Vladeck, *The Solicitor General and the Shadow Docket*, 133 HARV. L. REV. 123 (2019) [hereinafter Vladeck, *The Solicitor General and the Shadow Docket*]; Vladeck Testimony, *supra* note 7. For other critics of the Court's use of emergency rulings, see, for example, *The Supreme Court's Shadow Docket: Hearing Before the Subcomm. on the Courts, Intellectual Prop. & the Internet of the H. Comm. on the Judiciary,* 117th Cong. (2021) (statement of Loren L. AliKhan, Solicitor General, District of Columbia), https://docs.house.gov/meetings/JU/JU03/20210218/111204/HHRG-117-JU03-Wstate-AliKhanL-20210218-U1.pdf; Mark Walsh, *The Supreme Court's 'Shadow Docket' Is Drawing Increasing Scrutiny*, A.B.A. J. (Aug. 20, 2020, 9:20 AM), https://www.abajournal.com/web/article/scotus-shadow-docket-draws-increasing-scrutiny. Although emergency orders—the focus of this section—have received the most attention in recent debates, commentators also continue to raise concerns about the Court's use of summary reversals. *See, e.g.,* Richard C. Chen, *Summary Dispositions as Precedent*, 61 WM. & MARY L. REV. 691 (2020); Edward A. Hartnett, *Summary Reversals in the Roberts Court*, 38 CARDOZO L. REV. 591 (2016); *see also* Barry Friedman & Maria Ponomarenko, *To Rein in Abuse by the Police, Lawmakers Must Do What the Supreme Court Will Not*, N.Y. Times (Oct. 27, 2021) (critiquing recent summary reversals and arguing that the decisions escaped media attention "because the court handled them on its shadow docket").

[9] On September 30, 2021, Justice Alito gave a public address on "The Emergency Docket" at Notre Dame Law School in which he responded to many of the critiques of the Court's recent orders. The address was livestreamed, but a recording is not publicly available. *See* https://events.nd.edu/events/2021/09/30/justice-samuel-alito-the-emergency-docket/. *See also, e.g.,* Whole Woman's Health v. Jackson, 141 S. Ct. 2494, 2500 (2021) (Kagan, J., dissenting) (contending that the ruling "illustrates just how far the Court's 'shadow docket' decisions may depart from the usual principles of appellate process," and "is emblematic of too much of this Court's shadow-docket decisionmaking—which every day becomes more unreasoned, inconsistent, and impossible to defend"); Adam Liptak, *Justice Breyer on Retirement and the Role of Politics at the Supreme Court*, N.Y. TIMES (Aug. 27, 2021), https://www.nytimes.com/2021/08/27/us/politics/justice-breyer-supreme-court-retirement.html (quoting Justice Breyer in an interview: "I can't say never decide a shadow-docket thing," he said. "Not never. But be careful. And I've said that in print. I'll probably say it more.").

[10] This section is not meant to exhaustively engage every criticism or defense advanced about the Court's procedures in its issuance of emergency orders. We have focused on especially salient critiques—and responses to those critiques—that have been developed by scholars and practitioners, and more recently the Justices themselves, over the past few years.

[11] 141 S. Ct. 2494 (2021).

[12] *E.g.*, Biden v. Texas, No. 21A21, slip op. at 1 (U.S. Aug. 24, 2021) (mem.); Dep't of Homeland Sec. v. New York, 140 S. Ct. 599 (2020) (mem.).

[13] *E.g.*, West Virginia v. EPA, 136 S. Ct. 1000 (2016) (mem.).

[14] Alabama Ass'n of Realtors v. Dep't of Health & Human Servs., No. 21A23, slip op. at 1 (U.S. Aug. 26, 2021) (per curiam); Alabama Ass'n of Realtors v. Dep't of Health & Human Servs., No. 20A169, slip op. at 1 (U.S. June 29, 2021) (mem.); Chrysafis v. Marks, No. 21A8, slip op. at 1 (U.S. Aug. 12, 2021) (mem.).

[15] 141 S. Ct. 2494 (2021).

[16] *See* Ross v. Nat'l Urban League, 141 S. Ct. 18 (2020) (mem.).

[17] *See* Merrill v. People First of Ala., 141 S. Ct. 190 (2020) (mem.); Andino v. Middleton, 141 S. Ct. 9 (2020) (mem.); Republican Nat'l Comm. v. Democratic Nat'l Comm., 140 S. Ct. 1205 (2020) (mem.).

[18] *See* Barnes v. Ahlman, 140 S. Ct. 2620 (2020) (mem.).

[19] *See, e.g.*, Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63 (2020) (per curiam); Tandon v. Newsom, 141 S. Ct. 1294 (2021) (per curiam).

[20] *Presidential Commission on the Supreme Court of the United States* 13 (July 20, 2021) (written testimony of Sharon McGowan, Lambda Legal), https://www.whitehouse.gov/wp-content/uploads/2021/07/McGowan-Testimony.pdf (describing how although the Court later denied cert in a Virginia school board's effort to reverse a lower-court injunction allowing a transgender student to use the boys' bathroom, the Supreme Court's initial stay in the case, Gloucester Cty. Sch. Bd. v. G.G. *ex rel.* Grimm, 136 S. Ct. 2442 (2016) (mem.), had the effect of barring Gavin Grimm from "using the boys' restroom along with all the other boys throughout his last year of high school").

[21] Vladeck Testimony*, supra* note 7, at 7.

[22] Steve Vladeck (@steve_vladeck), TWITTER (Sept. 5, 2021 1:27 PM), https://mobile.twitter.com/steve_vladeck/status/1434568812045742086.

[23] In the 2020 Term, the Court decided fewer than 70 merits cases, below its average over the past 15 years. *See* Kalvis Golde, *In Barrett's First Term, Conservative Majority Is Dominant but Divided*, SCOTUSBLOG (July 2, 2021, 6:37 PM), https://www.scotusblog.com/2021/07/in-barretts-first-term-conservative-majority-is-dominant-but-divided; SCOTUSBLOG, STAT PACK FOR THE SUPREME COURT'S 2020-21 TERM 18 (2021), https://www.scotusblog.com/wp-content/uploads/2021/07/Final-Stat-Pack-07.02.2021.pdf. The merits docket for the 2019 Term contained the lowest number of cases since the Civil War. Adam Feldman, *Empirical SCOTUS: Something We Haven't Seen in the Supreme Court Since the Civil War*, SCOTUSBLOG (Apr. 16, 2020, 5:22 PM), https://www.scotusblog.com/2020/04/empirical-scotus-something-we-havent-seen-in-the-supreme-court-since-the-civil-war; *see* SCOTUSBLOG, FINAL STAT PACK FOR OCTOBER TERM 2019, at 1 (2020), https://www.scotusblog.com/wp-content/uploads/2020/07/Final-Statpack-7.20.2020.pdf.

[24] Vladeck Testimony*, supra* note 7, at 7-8.

[25] Bray Testimony, *supra* note 6, at 5-7 (discussing such injunctions and their relationship to the shadow docket).

[26] [To add citation to Justice Alito's Notre Dame address when transcript is available.]

[27] As an example of the latter point, Professor Vladeck argues that a majority of the Justices believe that state and federal governments are irreparably harmed when their actions are enjoined by a lower court and suggests that this is a relatively new development. Vladeck Testimony, *supra* note 7, at 14.

[28] In *Whole Woman's Health*, for example, abortion providers and other groups challenging the Texas law applied to the Court for emergency relief after a federal appeals court issued an administrative stay halting proceedings in the district court. Challengers asked the Court to issue injunctive relief or, in the alternative, to lift the appellate court's stay. Given that the law was set to go into effect the following day, the Court faced great pressure to act quickly—and its decision could hardly have failed to be important and controversial.

[29] [To add citation to Justice Alito's Notre Dame address when transcript is available.] *See* Mark Rienzi, *The Supreme Court's "Shadow" Docket—A Response to Professor Vladeck*, NAT'L REV. (Mar. 16, 2021, 1:30 PM), https://www.nationalreview.com/bench-memos/the-supreme-courts-shadow-docket-a-response-to-professor-vladeck.

[30] *See, e.g.,* Vladeck Testimony, *supra* note 7, at 4-6 (focusing on evidence of an increase in "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"); *id.* at 14-15 (critiquing the Court's apparent readiness to intervene on the ground 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," as well as the Court's apparent willingness to grant emergency relief to protect "newly minted rights").

[31] *Id.* at 6 (describing the rise of "cases in which the Justices are using the shadow docket to change the status quo" and arguing that "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)").

[32] *See, e.g.,* Rienzi, *supra* note 29. For a response, see *Texas's Unconstitutional Abortion Ban and the Role of the Shadow Docket, Hearing Before the Senate Committee on the Judiciary* 20-21 (Sept. 29, 2021) (written testimony of Stephen I. Vladeck, University of Texas School of Law), https://www.judiciary.senate.gov/imo/media/doc/Vladeck%20testimony1.pdf [*hereinafter* Vladeck Senate Testimony]. *See also* Charlie Savage, *Texas Abortion Case Highlights Concern Over Supreme Court's 'Shadow Docket,'* N.Y. Times (Sept. 2, 2021) ("'I think the real concern [of critics] is that the court has been reaching out aggressively in some of the immigration and Covid cases, and [in *Whole Woman's Health*] it is not. . . . And why is it when it's a Covid restriction in church service, the court rushes in, in the middle of the night, to stop the government, but when it's an anti-abortion law, the court lets it go?'" (quoting Professor Will Baude)).

[33] Bray Testimony, *supra* note 6, at 9.

[34] *Compare Presidential Commission on the Supreme Court of the United States* 5:19:47 (June 30, 2021) (oral testimony of Samuel L. Bray) [hereinafter Bray Oral Testimony], https://www.whitehouse.gov/pcscotus/public-meetings/june-30-2021 (defining "status quo" as used in the testimony of Samuel L. Bray) *with id.* at 50:20:12 (defining "status quo" as used in the testimony of Stephen I. Vladeck).

[35] Bray Testimony, *supra* note 6, at 9 ("I recognize that these judgments inevitably have a normative tinge. I know that it is a choice to see the national injunction as the disruptive force, not the executive policy or rule that prompted the national injunction. I know it is a choice to see the state public health measures as the disruptive force, not the worship services that ran up against the public health measures.").

[36] *See, e.g.*, Vladeck Testimony, *supra* note 7, at 4 (describing "orders that . . . change the status quo" as those that "stay[] a lower-court decision and/or mandate pending appeal," "vacat[e] a stay . . . imposed by a lower court," "grant[] an emergency writ of injunction pending appeal," or "vacat[e] a lower-court's grant of an emergency injunction").

[37] *See, e.g.*, Tandon v. Newsom, 141 S. Ct. 1294 (2021) (per curiam) (issuing a writ of injunction against enforcement of California's pandemic-based limits on in-home gatherings); Merrill v. People First of Ala., 141 S. Ct. 190 (2020) (staying a lower-court order lifting a ban on Alabama counties from offering curbside voting in light of the COVID-19 pandemic); Barnes v. Ahlman, 140 S. Ct. 2620 (2020) (mem.) (staying a lower-court preliminary injunction requiring implementation of safety measures to protect inmates during the COVID–19 pandemic).

[38] *See, e.g.,* Alabama Ass'n of Realtors v. Dep't of Health & Human Servs., No. 21A23, slip op. at 8 (U.S. Aug. 26, 2021) (Breyer, J., dissenting) ("We should not set aside the CDC's eviction moratorium in this summary

proceeding."); Bray Oral Testimony, *supra* note 34 (defining status quo as "the last peaceable moment" that existed prior to a disruption, and explaining that in a case in which a lower court enters an injunction blocking a new executive policy, "the disruption is coming from the lower courts usually").

[39] Whole Woman's Health v. Jackson, 141 S. Ct. 2494, 2496 (Roberts, C.J., dissenting) (emphasis added).

[40] For example, Justice Barrett recently denied a request for emergency relief concerning Indiana University's vaccine requirement. The denial is noted on the Court's docket without any accompanying explanation. *See* Klaassen v. Trustees of Indiana University, No. 21A15, https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/21a15.html; Amy Howe, *Barrett leaves Indiana University's vaccine mandate in place*, SCOTUSblog (Aug. 12, 2021, 9:40 PM), https://www.scotusblog.com/2021/08/barrett-leaves-indiana-universitys-vaccine-mandate-in-place/.

[41] As an example, commentators cite the Court's decisions in a series of cases concerning the rights of people facing execution to have a religious advisor of their chosen spiritual denomination present in the execution chamber at the time of their death. *See* Dunn v. Smith, 141 S. Ct. 725 (2021) (mem.); Gutierrez v. Saenz*,* 141 S. Ct. 127 (2020) (mem.); Murphy v. Collier*,* 139 S. Ct. 1475 (2019) (mem.); Dunn v. Ray, 139 S. Ct. 661 (2019) (mem.). To some observers, the Court's rulings suggest that some of the Justices' understanding of the governing legal principles may have shifted across the four cases, but in the absence of majority opinions speaking for "the Court" and information about how each Justice voted in each case, the answer is not clear. *See* Vladeck Testimony, *supra* note [7], at 8 - 9 & 18 (discussing the lack of written explanation for the Court, as well as the lack of disclosure of certain Justices' votes, in the emergency orders in the religious-adviser capital cases).

[42] *See* Vladeck, *The Solicitor General and the Shadow Docket*, *supra* note 8, at 131; Vladeck Testimony, *supra* note 7, at 14 (citing the Court's decision in *South Bay United Pentecostal Church v. Newsom (South Bay II)*, 141 S. Ct. 716 (2021) (mem), and emphasizing that none of the four separate opinions issued by Justices who supported the order "purported to apply the four-factor test the Court traditionally follows when considering whether to grant an injunction"). For some of the recent articulations of the standard, which may vary by context, including procedural posture, see, e.g., *Whole Woman's Health v. Jackson*, 141 S. Ct. 2494, 2495 (2021) ("To prevail in an application for a stay or an injunction, an applicant must carry the burden of making a strong showing that it is likely to succeed on the merits, that it will be irreparably injured absent a stay, that the balance of equities favors it, and that a stay is consistent with the public interest." (internal quotation marks omitted)); *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam) ("To obtain a stay pending the filing and disposition of a petition for a writ of certiorari, an applicant must show (1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay. In close cases the Circuit Justice or the Court will balance the equities and weigh the relative harms to the applicant and to the respondent."); *Nken v. Holder*, 556 U.S. 418, 434 (2009) (citing the factors as "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3)whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies"). *Cf.* John Does 1-3 v. Mills, No. 21A90, slip op. at 1 (U.S. Oct. 29, 2021) (Barrett, J., concurring) ("When this Court is asked to grant extraordinary relief, it considers, among other things, whether the applicant is 'likely to succeed on the merits'. . . I understand this factor to encompass not only an assessment of the underlying merits but also a discretionary judgment about whether the Court should grant review in the case . . . Were the standard otherwise, applicants could use the emergency docket to force the Court to give a merits preview in cases that it would be unlikely to take—and to do so on a short fuse without the benefit of full briefing and argument.").

[43] *See, e.g.,* Steve Vladeck, *The Supreme Court Doesn't Just Abuse Its Shadow Docket. It Does So Inconsistently.,* WASH. POST (Sept. 3, 2021, 10:43 AM), available at https://www.washingtonpost.com/outlook/2021/09/03/shadow-docket-elena-kagan-abortion (contrasting the Court's refusal to issue relief in *Whole Woman's Health,* the Texas abortion case, on grounds of legal uncertainty, with cases in which the Court "showed no compunction about [making new law] where alleged infringements on religion were at issue"); Lee Kovarsky, *Abortion, the Death Penalty, and the Shadow Docket,* SCOTUSBLOG (Sept. 6, 2021, 12:03 PM), https://www.scotusblog.com/2021/09/abortion-the-death-penalty-and-the-shadow-docket (contrasting *Whole Woman's Health* with cases involving federal executions); *see also* Alabama Ass'n of Realtors v. Dep't of Health & Human Servs., No. 21A23, slip op. at 1-2 (U.S. Aug. 26, 2021) (Breyer, J., dissenting) (criticizing the majority for

vacating a stay entered by a lower court when the agency order was not "demonstrably wrong" (citation omitted)); Wheaton College v. Burwell, 573 U.S. 958, 965-68 (2014) (Sotomayor, J., dissenting) (objecting to the majority's decision to issue an emergency injunction where the legal rights at issue were not "indisputably clear," as required by precedent interpreting the All Writs Act, 28 U.S.C. § 1651 (citing Turner Broad. Sys., Inc. v. FCC, 507 U.S. 1301, 1303 (1993))).

[44] As one Commission witness put it, "[i]t is common in our legal system for preliminary orders, rather than merits decisions, to have different norms of justification and attribution." Bray Testimony, *supra* note 6, at 13. [To add citation to Justice Alito's Notre Dame address when transcript is available.]

[45] As Professor Michael Morley argued in congressional testimony, "it may often be much easier for Justices to agree on an ultimate outcome than to craft an opinion with detailed reasoning . . . ." *The Supreme Court's Shadow Docket: Hearing Before the Subcomm. on the Courts, Intellectual Prop. & the Internet of the H. Comm. on the Judiciary,* 117th Cong. 3 (2021) (statement of Michael T. Morley, Florida State University College of Law) [*hereinafter* Morley House Testimony], https://docs.house.gov/meetings/JU/JU03/20210218/111204/HHRG-117-JU03-Wstate-MorleyM-20210218-U1.pdf.

[46] *See, e.g., Presidential Commission on the Supreme Court of the United States* 18 (July 16, 2021) (written testimony of Kenneth Geller, Mayer Brown LLP, & Maureen Mahoney, Latham & Watkins, LLP) [*hereinafter* Geller & Mahoney Testimony], https://www.whitehouse.gov/wp-content/uploads/2021/07/Geller-Mahoney-Testimony.pdf (arguing that "requiring the Court to announce legal conclusions may appear to commit the Justices to particular views before merits briefing—which itself is a criticism of some emergency orders"); Bray Testimony, *supra* note 6, at 14 (discussing potential psychological precommitment effect).

[47] *See, e.g.,* Richard C. Chen, *Summary Dispositions as Precedent*, 61 WM. & MARY L. REV. 691, 702 (2020); Trevor N. McFadden & Vetan Kapoor, *The Precedential Effects of the Supreme Court's Emergency Stays*, 44 HARV. J.L. & PUB. POL'Y 827, 830 (2021).

[48] [To add citation to Justice Alito's Notre Dame address when transcript is available.]

[49] There are other examples. One witness testified that the U.S. Court of Appeals for the Fourth Circuit grappled with the same problem in *CASA de Md., Inc. v. Trump*, 971 F.3d 220 (4th Cir. 2020). *See* Vladeck Testimony*, supra* note 7, at 10 n.30; *see also* Baude, *supra* note 6, at 13 (describing the Seventh Circuit's effort in *Frank v. Walker,* 769 F.3d 494 (7th Cir. 2014), to discern the meaning of the Supreme Court's stays in the earlier marriage equality cases). *Cf.* Alabama Ass'n of Realtors v. Dep't of Health & Human Servs., No. 21A23, slip op. at 4 (U.S. Aug. 26, 2021) (per curiam) (explaining, in the second of two eviction moratorium cases, that the district court concluded that "the Government was unlikely to succeed on the merits, given the four votes to vacate the stay in this Court and Justice Kavanaugh's concurring opinion" in the first case); *id.* at 5 (Breyer, J., dissenting) ("Certainly this Court did not resolve the question by denying applicants' last emergency motion, whatever one Justice might have said in a concurrence.").

[50] 141 S. Ct. 1460, 1460 (2021).

[51] Vladeck Testimony*, supra* note 7, at 14.

[52] *See, e.g.,* Bray Testimony, *supra* note 6, at 7-9, 18 (analogizing emergency rulings to preliminary injunctions and arguing that "[i]f the shadow docket works (and fails to work) in the same way as the preliminary injunction, then we want to tamp down the precedential effects, not ramp them up").

[53] *See, e.g.*, Vladeck Testimony, *supra* note 7, at 22-26.

[54] *Id.*

[55] One defender of the Court's use of emergency orders explained that "there does not appear to be a need for either vote tallies, or the identities of the Justices who voted to grant or deny a petition, to be withheld from the public." Morley House Testimony*, supra* note 45, at 3.

[56] *See* Vladeck Senate Testimony, *supra* note 32, at 27 (critiquing the Court's order in *Whole Woman's Health v. Jackson*, 141 S. Ct. 2494 (2021), which articulated the standard four-part test for relief and concluded that the applicants failed to "me[e]t their burden," but did not explain how the Court weighed the four factors (or whether it

deemed some factors irrelevant in the absence of a sufficient showing on the merits)). For a response, see *Jurisdiction and the Supreme Court's Orders Docket, U.S. Senate Committee on the Judiciary* (Sept. 29, 2021) (written testimony of Jennifer L. Mascott).

[57] *See* Whole Woman's Health v. Jackson, 141 S. Ct. 2494, 2500 (2021) (Kagan, J., dissenting) (faulting the majority for "barely bother[ing] to explain its conclusion—that a challenge to an obviously unconstitutional abortion regulation backed by a wholly unprecedented enforcement scheme is unlikely to prevail").

[58] Alabama Ass'n of Realtors v. Dep't of Health & Human Servs., No. 21A23, slip op. (U.S. Aug. 26, 2021) (per curiam).

[59] United States v. Texas, No. 21A85, slip op. (U.S. Oct. 22, 2021), https://www.supremecourt.gov/opinions/21pdf/21a85_5h25.pdf (treating application for emergency relief as a petition for a writ of certiorari before judgment and granting the petition with an expedited schedule for briefing and oral argument); Whole Woman's Health v. Jackson, No. 21-463, 2021 U.S. LEXIS 5326 (Oct. 22, 2021), https://www.supremecourt.gov/orders/courtorders/102221zr_986b.pdf (granting petition for certiorari before judgment with an expedited schedule for briefing and oral argument).

[60] Ramirez v. Collier, No. 21-5592 (21A33), 2021 U.S. LEXIS 3681 (Sept. 8, 2021), https://www.supremecourt.gov/orders/courtorders/090821zr_n7ip.pdf.

[61] *Whole Woman's Health,* 141 S. Ct., at 2495. Disavowing a decision on the merits, while potentially deflecting mistaken treatment of an emergency ruling as precedent, might not dull its practical effects. *See United States v. Texas*, slip op. at 2 (Sotomayor, J., concurring in part and dissenting in part) ("The promise of future adjudication offers cold comfort, however, for Texas women seeking abortion care, who are entitled to relief now. These women will suffer personal harm from delaying their medical care, and as their pregnancies progress, they may even be unable to obtain abortion care altogether.").

[62] *Whole Woman's Health*, 141 S. Ct., at 2496 (Roberts, C.J., dissenting).

[63] Bray Testimony, *supra* note 6, at 18.

[64] The Commission has focused primarily on the issue of emergency orders as "vertical precedents" that are binding on lower courts. Significant complications are raised by the questions of whether, when, and how emergency orders should operate as "horizontal precedents" that bind the Court itself in later cases. The Court might, for example, treat its statements about the standards for review in emergency rulings as carrying some precedential weight in later cases even if it does not treat the more substantive elements of its emergency rulings, such as predictions about likelihood of success on the merits, as precedential. One's views on these matters might inform the questions of whether and on what issues the Court should be "consistent" across the run of its emergency rulings, and vice versa.

[65] Geller & Mahoney Testimony, *supra* note 46, at 18-19 (detailing such existing principles but noting that "the Court may not always garner universal acclaim—even among the Justices themselves—for its adherence to these settled standards").

[66] *Id.* at 19 (citing *Glossip v. Gross*, 576 U.S. 863, 882 (2015) as stating that Supreme Court does not review "concurrent findings of fact by two courts below in the absence of a very obvious sand exceptional showing of error").

[67] *Id.* at 19. The testimony points to *Doe v. Gonzales*, 546 U.S. 1301, 1303 (2005) (Ginsburg, J., in chambers), as an endorsement of the expedited-schedule norm. *Id.*

[68] Professor Vladeck, for example, has proposed that "[i]n any 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." Vladeck Testimony, *supra* note 7, at 24. Although Professor Vladeck is suggesting this as a reform for Congress to enact, similar acceleration may be accomplished to some degree by the courts themselves.

[69] Bray Testimony, *supra* note 6, at 18 (endorsing the Injunctive Authority Clarification Act of 2021, H.R. 43, 117th Cong. (2021)); *see also* Morley House Testimony*, supra* note 45, at 7 (arguing that if nationwide injunctions were

"curtailed—whether through a clear Supreme Court precedent directly on point, a federal statute, or an amendment to the Federal Rules of Civil Procedure—at least one of the contributing factors to the recent growth of the shadow docket w[ould] be removed").

[70] In the specific context of "nationwide" injunctions, as relevant to emergency orders, one limitation is that such restrictions would address only a subset of the orders that have been of concern. *See* Vladeck Testimony, *supra* note 7, at 11-12 (reporting that cases involving the federal government—and, thus, the potential for a nationwide injunction—account for "only one modest slice of the shadow docket," and that "even within the DOJ slice, less than half of the Trump administration's applications for emergency relief involved nationwide injunctions" (emphasis omitted)).

[71] *Id.* at 24.

[72] There is a debate over the extent to which litigation commenced as execution dates approach is an example of strategic gamesmanship, versus a more benign outgrowth of the nature of death penalty law and litigation itself. Several Justices clearly view it as the former. *See, e.g.,* Murphy v. Collier, 139 S. Ct. 1475, 1482 (2019) (mem.) (Alito, J., dissenting) ("This Court receives an application to stay virtually every execution; these applications are almost all filed on or shortly before the scheduled execution date; and in the great majority of cases, no good reason for the late filing is apparent."); Price v. Dunn, 139 S. Ct. 1533, 1538 (2019) (mem.) (Thomas, J., concurring) ("A stay [when] the petitioner inexcusably filed additional evidence hours before his scheduled execution after delaying bringing his challenge in the first place — only encourages the proliferation of dilatory litigation strategies that we have recently and repeatedly sought to discourage."). On the other hand, Professor Lee Kovarsky observes that litigation in the lead up to an execution is a natural consequence of two other factors. First, the Court's own doctrine creates a set of "intrinsically delayed claims," such as challenges to a person's competency to be executed or to the method of execution, for which "the nature of the constitutional challenge itself thwarts early-phase litigation" because the claims are unripe for adjudication until an execution date is imminent. Lee Kovarsky, *Delay in the Shadow of Death,* 95 N.Y.U. L. REV. 1319, 1322-23 (2020) (citing, *inter alia,* Panetti v. Quarterman, 551 U.S. 930, 946 (2007)); *cf. Glossip v. Gross,* 576 U.S. 863, 923-24 (2015) (Breyer, J., dissenting) ("[D]elay is in part a problem that the Constitution's own demands create."). Second, Kovarsky observes that a lack of resources available to capital defendants forces a small number of lawyers to triage their representation, such that litigation is often "undertaken after the state sets an execution date—because that is the first time that many capital prisoners have the legal representation necessary to enforce certain rights." Kovarsky, *supra*, at 1321. *See generally id.* at 1356-85.

[73] *See* Adam Liptak, *To Beat the Execution Clock, the Justices Prepare Early*, N.Y. TIMES, Sept. 4, 2012, at A19.

[74] The clerk who handles all emergency applications at the Court is sometimes referred to as the "death clerk" due to the salience of this category of cases. *Id.* This category is also procedurally distinctive in that many cases involve habeas corpus, "a thorny and evolving area of the law governed by intricate rules, multi-faceted statutes, and a complex (and still developing) jurisprudence." *Presidential Commission on the Supreme Court of the United States* (July 26, 2021) (written testimony of Federal Capital Habeas Project) [hereinafter Federal Capital Habeas Project Testimony], https://www.whitehouse.gov/wp-content/uploads/2021/08/Federal-Capital-Habeas-Project.pdf.

[75] *See, e.g.,* Geller & Mahoney testimony, *supra* note 65, at 28 ("On balance, based on the Supreme Court's recognition that capital cases are different and on the potential beneficial effects of a heightened standard of review on the process for consideration of applications to vacate a stay of execution, a majority of the Committee [of experienced Supreme Court practitioners] believes that proposals for heightened standards of review for such applications warrant serious consideration."); Gregg v. Georgia, 428 U.S. 153, 188 (1976) ("[T]he penalty of death is different in kind from any other punishment imposed under our system of criminal justice"); Reid v. Covert, 354 U.S. 1, 45-46 (1957) (on rehearing) (Frankfurter, J., concurring) ("The taking of life is irrevocable. It is in capital cases especially that the balance of conflicting interests must be weighed most heavily in favor of the procedural safeguards of the Bill of Rights.").

[76] *Cf. Glossip,* 576 U.S. at 937 (Breyer, J., dissenting) ("[R]eview by courts at every level helps to ensure reliability; if this Court had not ordered that Anthony Ray Hinton receive further hearings in state court he may well have been executed rather than exonerated." (citing *Hinton v. Alabama,* 571 U.S. 263 (2014))).

[77] *See Presidential Commission on the Supreme Court of the United States* 2 (June 25, 2021) (written testimony of Christina Swarns, Innocence Project) [hereinafter Swarns Testimony], https://www.whitehouse.gov/wp-content/uploads/2021/06/Swarns-Presidential-Commission-on-SCOTUS-Testimony.pdf. Given these statistics, "the risk of convicting and executing an innocent person is real and," the witness argued, "constitutionally unacceptable." *Id. See also Glossip v. Gross,* 567 U.S. 863, 927 (2015) (Breyer, J., dissenting) ("Several inmates have come within hours or days of execution before later being exonerated.") (citing multiple examples); Dahlia Lithwick, *Cruel but not Unusual*, SLATE (Apr. 1, 2011, 7:43 PM), https://slate.com/news-and-politics/2011/04/connick-v-thompson-clarence-thomas-writes-one-of-the-cruelest-supreme-court-decisions-ever.html (noting that John Thompson had seven death warrants signed, each setting an imminent date for his execution, before he was exonerated).

[78] One Commission witness drew a sharp distinction between challenges to a condemned person's conviction and arguments that the execution itself would violate the condemned person's constitutional or statutory rights. *Presidential Commission on the Supreme Court of the United States* 2 (Sept. 15, 2021) (written testimony of Hashim M. Mooppan) [hereinafter Mooppan Testimony], https://www.whitehouse.gov/wp-content/uploads/2021/09/Hashim-Mooppan.pdf.

[79] *See, e.g., Glossip*, 576 U.S. at 876-77 (2015) (describing the standard for an Eighth Amendment method-of-execution claim).

[80] *See* Ford v. Wainwright, 477 U.S. 399 (1986).

[81] *See supra* note 41 (discussing religious advisor cases).

[82] *See, e.g.,* Swarns Testimony, *supra* note 77, at 1 (arguing that there "is no area of the law in which reliability, accuracy, and fairness are more critical than capital punishment").

[83] Price v. Dunn, 139 S. Ct. 1533, 1540 (2019) (mem.) (Thomas, J., concurring in denial of certiorari) (quoting Ivana Hrynkiw, *Execution Called Off for Christopher Price; SCOTUS Decision Allowing It Came Too Late*, ALABAMA.COM (Apr. 12, 2019, 7:03 AM), https://www.al.com/news/birmingham/2019/04/christopher-price-set-to-be-executed-thursday-evening-for-1991-slaying-of-minister.html). Most death sentences are never carried out. *See Glossip,* 576 U.S. at 931 (Breyer, J., dissenting) ("Of the 8,466 inmates under a death sentence at some point between 1973 and 2013, 16% were executed, 42% had their convictions or sentences overturned or commuted, and 6% died by other causes; the remainder (35%) are still on death row."). Those that are take a very long time: for those put to death in 2014, an average of 18 years had elapsed between the imposition and the execution of sentence. *See id.* at 924-25. Most of that delay is attributable to the ordinary course of judicial review (as opposed to emergency stay applications) or to factors independent of the judicial process. *See, e.g., Jones v. Chappell,* 31 F. Supp. 3d 1050, 1055-60 (C.D. Cal. 2014) (concluding after reviewing multiple reports on death penalty delay in California "that delay is evident at each stage of the post-conviction review process, including from the time the death sentence is issued").

[84] Mooppan Testimony, *supra* note 78, at 3 ("Especially given the lengthy delay before an execution is scheduled at all, further delaying an execution even for a limited time in these circumstances essentially undermines for that period the judgment of Congress, the Executive Branch, and the sentencing judge and jury that continued imprisonment is inadequate and only death is sufficient punishment for the most heinous of murders.").

[85] A further consequence, also noted by Justice Thomas, is that surviving relatives of the victims sometimes travel to witness the execution and may be "forced to leave without closure" after years of waiting if the execution is postponed at the last minute. *Dunn v. Price,* 139 S. Ct. 1533, 1540 (2019) (mem.).

[86] *See* Federal Bureau of Prisons, *Historical Information: Capital Punishment*, at https://www.bop.gov/about/history/federal_executions.jsp (last accessed Oct. 3, 2021); *see also* Lee Kovarsky, *The Trump Executions* 10 (July 27, 2021) (U. Tex. L. Sch., Pub. L. Res. Paper), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3891784.

[87] *See* Death Penalty Information Center, *Execution Database*, https://deathpenaltyinfo.org/executions/execution-database (last accessed Oct. 3, 2021). Against this backdrop, several witnesses who shared assessments and recommendations with the Commission regarding the Court's emergency capital orders grounded their analyses at least in part on cases from the states, including a series of recent cases from Alabama and Texas about the presence

of a religious adviser at the execution. *See* Swarns Testimony, *supra* note 77; Bray Testimony, *supra* note 6; *cf.* Mooppan Testimony, *supra* note 78, at 22 n.10.

[88] Federal Capital Habeas Project Testimony, *supra* note 74; Vladeck Testimony, *supra* note 7, *see also* Kovarsky, *The Trump Executions, supra* note 86. The Commission also solicited and received testimony from one witness who defended the Court's approach to the federal execution cases. *See* Mooppan Testimony, *supra* note 78.

[89] For detailed (and divergent) accounts of the cases and litigation described in this section, see Kovarsky, *The Trump Executions, supra* note 86; Federal Capital Habeas Project Testimony, *supra* note 88; Mooppan Testimony, *supra* note 78.

[90] Federal Capital Habeas Project Testimony, *supra* note 74, at 5-6 (listing legal challenges raised by federal prisoners that were unanswered by the Supreme Court); Kovarsky, *The Trump Executions*, *supra* note 86, at 27-28 (noting Eighth Amendment claims). Notably, these executions were conducted pursuant to a recently adopted execution protocol that was being implemented for the first time in the midst of a pandemic, and they implicated a set of statutes that had not previously been examined closely by the courts.

[91] Federal Capital Habeas Project Testimony, *supra* note 74, at 3 & n.14.

[92] Professor Kovarsky summarized these requests as follows: the Court "entertained some twenty-four requests for emergency relief, touching on all of the executions"; and while it "granted no emergency relief to prisoners," it issued "shadow-docket orders granting emergency relief to the U.S. Solicitor General" multiple times. Kovarsky, *supra* note 86, at 43 & n.322 (citing United States v. Higgs, 141 S. Ct. 645 (2021); Rosen v. Montgomery, 141 S. Ct. 1232 (2021); United States v. Montgomery, 141 S. Ct. 1233 (2021); Barr v. Hall, 141 S. Ct. 869 (2020); Barr v. Purkey, 141 S. Ct. 196 (2020); Barr v. Lee, 140 S. Ct. 2590 (2020)). *See also* Federal Capital Habeas Project Testimony, *supra* note 74, n.14 ("In eight of these cases, the government filed emergency applications to vacate the stays, which the Court uniformly granted—and in seven of those eight, the Court provided no explanation at all for its orders.")

[93] *See, e.g.*, United States v. Higgs, 141 S. Ct. 645 (2021) (granting certiorari before judgment and vacating two lower-court decisions preventing execution); Barr v. Purkey, 141 S. Ct. 196 (2020) (vacating the lower court's preliminary injunction without reasoning). As one commentator observes, in the rare instance where the Court did issue a brief per curiam opinion, it appeared to change the underlying Eighth Amendment doctrine. Prior precedent issued in 2019 (via the merits docket) had held that a person challenging a method of execution under the Eighth Amendment must demonstrate that the challenged method would "superadd" pain above and beyond a "feasible and readily implemented alternative method of execution." Buckley v. Precythe, 139 S. Ct. 1112, 1125 (2019). In contrast to that comparative analysis, the Court's per curiam opinion in the federal execution case of *Barr v. Lee*, 140 S. Ct. 2590 (2020), "appeared to ground its vacatur [of the lower court's stay] in the idea that pentobarbital-only executions [a]re *unconditionally* consistent with the Eighth Amendment," even when compared to a proposed less painful alternative that had not previously been analyzed by the Court. Kovarsky, *supra* note 86, at 24 (emphasis added).

[94] Ten of the orders, out of 25, were issued over dissents. Mooppan Testimony, *supra* note 78, at 11. Also, in several cases, the Court vacated lower court stays even though the courts of appeals had set expedited briefing schedules to resolve the cases promptly. *See*, *e.g.*, Rosen v. Montgomery, 141 S. Ct. 1232 (2021) (mem.) (vacating D.C. Circuit's stay of execution pending highly expedited en banc consideration of FDPA statutory question); Barr v. Lee, 140 S. Ct. 2590 (2020) (per curiam) (vacating similarly expedited D.C. Circuit consideration of Eighth Amendment challenge to federal execution protocol).

[95] *See generally* Mooppan Testimony, *supra* note 78, at 1-16; *see also id.* at 12 (defending "the orders where the criticism of the Court would seem to be most relevant, because a divided Court used emergency rulings to" summarily vacate lower court says, on the ground that "the dissenting Justices did not assert that the inmate's claim was likely to succeed").

[96] *See* Vladeck Testimony, *supra* note 7; Federal Capital Habeas Project Testimony, *supra* note 74; *Presidential Commission on the Supreme Court of the United States* 16 (Sept. 1, 2021) (written testimony of Janai S. Nelson, NAACP Legal Defense Fund), https://www.whitehouse.gov/wp-content/uploads/2021/09/NAACP-LDF.pdf ("In eight orders supported by little to no reasoning, the Court lifted lower court stays of federal executions, denying the inmates a fair opportunity to present evidence for their claims.").

[97] In *United States v. Higgs,* the final case to reach the Court during the Trump administration, Justice Sotomayor argued in dissent that:

> This unprecedented rush of federal executions has predictably given rise to many difficult legal disputes. . . . Throughout this expedited spree of executions, this Court has consistently rejected inmates' credible claims for relief. The Court has even intervened to lift stays of execution that lower courts put in place, thereby ensuring those prisoners' challenges would never receive a meaningful airing. The Court made these weighty decisions in response to emergency applications, with little opportunity for proper briefing and consideration, often in just a few short days or even hours. Very few of these decisions offered any public explanation for their rationale. This is not justice.

*Higgs*, 141 S. Ct. at 647 (Sotomayor, J., dissenting). Justice Breyer was similarly critical: "None of these legal questions is frivolous. What are courts to do when faced with legal questions of this kind? Are they simply to ignore them? Or are they, as in this case, to 'hurry up, hurry up'? That is no solution." *Id.* at 646 (Breyer, J., dissenting).

[98] *Id.* at 647 (Sotomayor, J., dissenting).

[99] *See, e.g.,* Bray Testimony, *supra* note 6, at 16. Professor Bray's point echoed others, most notably Mr. Amir Ali, who told Congress earlier this year that "When it comes to ending someone's life, there is no do-over. And when the matter before the Court is one of life or death, the public's interest in transparency and the need to ensure public confidence in our legal system are at their apex." *The Supreme Court's Shadow Docket: Hearing Before the Subcomm. on the Courts, Intellectual Prop. & the Internet of the H. Comm. on the Judiciary,* 117th Cong. 1 (2021) (statement of Amir H. Ali, Roderick & Solange MacArthur Justice Center) [hereinafter Ali House Testimony], https://docs.house.gov/meetings/JU/JU03/20210218/111204/HHRG-117-JU03-Wstate-AliA-20210218-U2.pdf; *see also* Swarns Testimony, *supra* note 77; *cf.* Eric M. Freedman, *No Execution If Four Justices Object,* 43 HOFSTRA L. REV. 639, 652-54 (2015) (arguing that executions should be stayed whenever necessary to afford the Justices "time to think" about whether to grant certiorari in a case).

[100] *See* Bray Testimony, *supra* note 6, at 16-17; Swarns Testimony, *supra* note 77, at 5-6; *see also* Ali House Testimony, *supra* note 99, at 5-6.

[101] *See* Swarns Testimony, *supra* note 77, at 5-6. *See also* Geller & Mahoney testimony, supra note 65, at 28 (noting that among a committee of experienced Supreme Court practitioners, "a majority of the Committee believes that proposals for heightened standards of review for such applications warrant serious consideration," although a "significant number of members of the Committee oppose the proposal").

[102] See *Presidential Commission on the Supreme Court of the United States* 5:42:00 (June 30, 2021) (oral testimony of Stephen Vladeck, University of Texas Law School) [hereinafter Vladeck Oral Testimony], https://www.whitehouse.gov/pcscotus/public-meetings/june-30-2021 (describing an asymmetrical, statutorily imposed standard of review as "clearly constitutional"); *see also* Ali House Testimony, *supra* note 7, at 5-6 (proposing a statutory approach).

[103] Swarns Testimony *supra* note 77, at 6. See also id. at 7 ("While it may be unlikely for an execution to proceed while a first-time habeas petition pends, the assurance of an automatic stay is nevertheless called for given the gravity of what is at stake."). Ms. Swarns agreed with Justice Stevens that "granting an automatic stay of execution pending the completion of a full round of federal habeas review is consistent with the goals of the Antiterrorism and Effective Death Penalty Act and would improve the balance between finality and justice in the Court's review of capital cases." *Id. See also* AD HOC COMMITTEE ON FEDERAL HABEAS CORPUS IN CAPITAL CASES, *Report on Habeas Corpus in Capital Cases*, reprinted in 45 CRIM. L. REP. 3239 (1989); Emmett v. Kelly, 552 U.S. 942, 943 (2007) (statement of Stevens, J., joined by Ginsburg J. respecting denial of certiorari).

[104] See Vladeck Oral Testimony, *supra* note 102, at 5:44:22 (proposing a statutory bar on carrying out an execution during the course of such a legal challenge to the method of execution, as well as arguing for mandatory review at the Supreme Court of such a challenge). *But see* Mooppan Testimony, *supra* note 78, at 23 (noting practical problems with automatically allowing a full round of litigation on administration-of-execution challenges, including potential incentives for capital inmates to raise weak claims).

[105] *See, e.g.,* Mooppan Testimony, *supra* note 78, at 3 ("[W]hen a claim is not likely to succeed—especially when it does not even challenge the lawfulness of the sentence or the risk of material harm in how the sentence will be carried out—the execution should not be postponed until the claim is finally rejected due merely to the existence of doubts and questions held by some judges. Postponement for that reason alone would fail to give sufficient weight to the compelling interest of the government and the public in timely executions.").

[106] See *Presidential Commission on the Supreme Court of the United States* 5:46:40 (June 30, 2021) (oral testimony of Michael Dreeben, O'Melveny & Myers LLP) [hereinafter Dreeben Oral Testimony], https://www.whitehouse.gov/pcscotus/public-meetings/june-30-2021 ("I think a much better approach would be that if four Justices vote to hear a case, that there either be a courtesy fifth or just a policy that four in that instance trumps five and that the Court hear the case on the merits. I think that would be more consistent with the traditional rule of four and the underlying purposes that it serves.").

[107] *See* Freedman, *supra* note 109, at 650 n.45 (describing proposals separately advanced over the years, most explicitly by Justices Brennan and Marshall).

[108] Adam Liptak, *A Fitful Commitment to Halting Executions,* N.Y. TIMES, Dec. 13, 2016, at A13.

[109] *See, e.g.,* Darden v. Wainwright, 473 U.S. 928, 928–29 (1985) (mem.) (Powell, J., concurring in the granting of the application for a stay) ("I find no merit whatever in any of the claims advanced in the petition for certiorari . . . . But in view of the unusual situation in which four Justices have voted to grant certiorari . . . and in view of the fact that this is a capital case with petitioner's life at stake . . . I feel obligated to join in granting the application for a stay."). In practice, however, this norm has been difficult to discern and has not always been applied consistently. *See* Freedman, *supra* note 99; Liptak, *supra* note 108 (describing the courtesy-fifth practice as operating "in fits and starts" and as being "inconsistent"). The Court also often denies stays of execution or vacates lower-court stays over four dissents. *See, e.g.*, Dunn v. Ray, 139 S. Ct. 661 (2019) (mem.) (Kagan, J., joined by Ginsburg, Breyer, and Sotomayor, JJ., dissenting); *see also* Freedman, *supra* note 99, at 651 n.50 (recounting "dozens of cases . . . denying stays over four dissents"). Some observers contend that these votes might be consistent with the courtesy-fifth norm if the norm requires the four dissenting Justices to actually vote to grant certiorari, and not merely to vote for a stay to permit more time to consider granting certiorari. *See* Tom Goldstein, *Death Penalty Stays*, SCOTUSBLOG (Oct. 13, 2007, 12:06 PM), http://www.scotusblog.com/wp/2007/10/death-penalty-stays.

[110] As one commentator notes, "the Court has chosen to reveal neither whether it is governed by a rule nor what the contents of that rule might be," while any potential pattern one might attempt to glean from the Court's public actions are consistent with "ad hoc negotiations by the Justices on a case-by-case basis." Freedman, *supra* note 99, at 651.

[111] Medellin v. Texas, 554 U.S. 759, 765-66 (2008) (Breyer, J., dissenting).

[112] 139 S. Ct. 1312 (2019) (mem.). In *Dunn,* Justice Breyer's request to consider the state's application the following morning would have carried the execution past its warrant date. As it turns out, the Court's majority did not vacate the lower court's stay until after the warrant expired, which resulted in the execution being postponed. *See* Adam Liptak, *Dissent As Court Splits Over Execution*¸ N.Y. TIMES, Apr. 13, 2019, at A1.

[113] *Id.* at 1313-14 (Breyer, J., dissenting). *But cf.* Price v. Dunn, 139 S. Ct. 1533, 1539 (2019) (mem.) (Thomas, J., concurring in denial of certiorari) ("Insofar as Justice Breyer was serious in suggesting that the Court simply 'take no action' on the State's emergency motion to vacate until the following day, it should be obvious that *emergency* applications ordinarily cannot be scheduled for discussion at weekly (or sometimes more infrequent) Conferences.").

[114] As Chief Justice Roberts noted in voting for a stay as a "courtesy" when four other Justices had voted for a stay (before deciding on certiorari): "I do not believe that this application meets our ordinary criteria for a stay. This case does not merit the Court's review: the claims set out in the application are purely fact-specific, dependent on contested interpretations of state law, insulated from our review by alternative holdings below, or some combination of the three. Four Justices have, however, voted to grant a stay. To afford them the opportunity to more fully consider the suitability of this case for review, including these circumstances, I vote to grant the stay as a courtesy." Arthur v. Dunn, 137 S. Ct. 14 (2016) (mem.) (statement of Roberts, C.J., respecting the grant of the application for stay).

[115] Mooppan Testimony, *supra* note 78, at 5 ("If the Supreme Court is to take such consequential action, it should be done only if a majority of the Justices vested with the judicial power of the Court actually agrees with that action.").

[116] Freedman, *supra* note 99, at 652 n.55 (quoting Memorandum from Justice William H. Rehnquist, Supreme Court of the U.S., on Darden v. Wainwright to the Conference 2 (Sept. 9, 1985)). At various points over the past few decades, more than four Justices (albeit not all serving at the same time) have expressed their opposition to the death penalty. Some but not all made a regular practice of voting in favor of every capital defendant seeking relief at the Court. *See, e.g.,* Callins v. Collins, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting from denial of certiorari); *see also* Green v. Zant, 469 U.S. 1143, 1143 (1985) (mem.) (Brennan, J., joined by Marshall, J., dissenting) ("Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, I would grant the application for a stay of execution.") (citation omitted); Baze v. Rees, 553 U.S. 35, 86 (2008) (Stevens, J., concurring) ("[T]he imposition of the death penalty represents the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes.") (quotation omitted); Glossip v. Gross, 576 U.S. 863, 909 (2015) (Breyer, J., joined by Ginsburg, J., dissenting) ("[M]y own 20 years of experience on this Court, that lead me to believe that the death penalty, in and of itself, now likely constitutes a legally prohibited cruel and unusual punishment."); *see generally* CAROL S. STEIKER & JORDAN M. STEIKER, COURTING DEATH: THE SUPREME COURT AND CAPITAL PUNISHMENT ch. 2 (2016).

[117] Freedman, *supra* note 99, at 652 n.55.

[118] Swarns Testimony, *supra* note 77, at 5.

[119] 2011 YEAR-END REPORT ON THE FEDERAL JUDICIARY 4 (2011) [hereinafter 2011 YEAR-END REPORT], https://www.supremecourt.gov/publicinfo/year-end/2011year-endreport.pdf.

[120] *Hearings Before a Subcomm. of the H. Comm. on Appropriations*, 116th Cong. (2019) (statements of Hons. Samuel Alito & Elena Kagan, Associate Justices, U.S. Supreme Court), https://www.govinfo.gov/content/pkg/CHRG-116hhrg38124/html/CHRG-116hhrg38124.htm.

[121] In the past decade, observers have argued that Justices transgressed provisions of the Code by participating in fundraising dinners for outside organizations or by overtly criticizing political candidates, to take two prominent examples. *See e.g.*, Andrew Rosenthal, *Step Right Up. Buy Dinner with a Justice*, N.Y. TIMES (Nov. 10, 2011, 4:30 PM), https://takingnote.blogs.nytimes.com/2011/11/10/step-right-up-buy-dinner-with-a-justice; Editorial Board, *Justice Ginsburg's Inappropriate Comments on Donald Trump*, WASH. POST (July 12, 2016), https://www.washingtonpost.com/opinions/justice-ginsburgs-inappropriate-comments-on-donald-trump/2016/07/12/981df404-4862-11e6-bdb9-701687974517_story.html. Justice Ginsburg later apologized for her comments and acknowledged that "[j]udges should avoid commenting on a candidate for public office." Meg Anderson, *LISTEN: Justice Ginsburg Expands on Decision to Apologize for Trump Remarks*, NPR (July 14, 2016), https://www.npr.org/2016/07/14/486080234/listen-justice-ginsburg-expands-on-decision-to-apologize-for-trump-remarks.

[122] *See, e.g.*, *Ethics Handbook for On and Off-Duty Conduct,* DEP'T OF JUSTICE (Jan. 2017), https://www.justice.gov/jmd/ethics-handbook; *Code of Business Conduct and Ethics*, AMAZON, https://ir.aboutamazon.com/corporate-governance/documents-and-charters/code-of-business-conduct-and-ethics/default.aspx (last accessed Oct. 25, 2021); *Code of Ethics*, EXXONMOBIL, https://corporate.exxonmobil.com/About-us/Who-we-are/Corporate-governance/Code-of-ethics#Overview (last accessed Oct. 25, 2021).

[123] 28 U.S.C. § 351(a).

[124] *Id.* § 351(d).

[125] *See, e.g.*, Patrick M. Erwin, *Corporate Codes of Conduct: The Effects of Code Content and Quality on Ethical Performance*, 99 J. BUS. ETHICS 535 (2011) (finding that quality codes of conduct can positively affect culture in the corporate context); Alan Doig & John Wilson, *The Effectiveness Of Codes Of Conduct*, 7 BUS. ETHICS, THE ENV'T, AND RESPONSIBILITY 140 (1998) (finding that codes of conduct can positively affect ethical practices when paired with practices that inculcate and reinforce values).

[126] 1991 SUPREME COURT INTERNAL ETHICS RESOLUTION 1 (1991), https://www.documentcloud.org/documents/296686-1991-supreme-court-internal-ethics-resolution.html.

[127] Although, as noted below, there might be reason to be cautious when considering the current Code's provisions on recusal because recused Justices cannot be replaced. Although the current statutory standards of recusal apply equally to the Justices. 28 U.S.C. §455(a).

[128] *Hearings Before a Subcomm. of the H. Comm. on Appropriations*, *supra* note 120.

[129] *Id.*

[130] Although the statutory standards for recusal are fixed, courts have developed doctrines that assist in their application. For example, many circuits require timely filing of recusal motions so that waste of judicial resources may be avoided. *See, e.g.*, Preston v. United States, 923 F.2d 731, 733 (9th Cir. 1991) ("We require recusal motions to be lodged in a timely fashion because the absence of such a requirement would result in increased instances of wasted judicial time and resources."); Travelers Ins. Co. v. Liljeberg Enterprises, Inc., 38 F.3d 1404, 1410 (5th Cir. 1994) ("[I]t is well-settled that—for obvious reasons—one seeking disqualification must do so at the earliest moment after knowledge of the facts demonstrating the basis for such disqualification."). The Supreme Court might similarly tailor the application of the statute to fit its institutional concerns.

[131] There has been an internal debate in the federal judiciary over to what extent judges should be limited in their attendance at events and memberships in organizations. In 2020, the Code of Conduct Committee of the Judicial Conference released a draft opinion concluding that the Code prohibits membership in the Federalist Society and American Constitution Society. COMM. ON CODES OF CONDUCT, ADVISORY OPINION NO. 117 (EXPOSURE DRAFT): JUDGES' INVOLVEMENT WITH THE AMERICAN CONSTITUTION SOCIETY, THE FEDERALIST SOCIETY, AND THE AMERICAN BAR ASSOCIATION (2020). But the opinion was rescinded after widespread opposition from many members of the judiciary.

[132] *See, e.g.*, Supreme Court Ethics Act of 2015, S. 1072, 114th Cong. (2015); Supreme Court Ethics Act, H.R. 1057, 116th Cong. (2019).

[133] 2011 YEAR-END REPORT, *supra* note 119, at 4.

[134] Amanda Frost, *Judicial Ethics and Supreme Court Exceptionalism*, 26 GEO. J. LEGAL ETHICS 443, 460-61 (2013).

[135] 28 U.S.C. § 453.

[136] Several observers have argued that Congress is limited in its capacity to regulate the ethical practices of the Supreme Court when such regulation might intrude on the Court's inherent constitutional powers. *See* Louis J. Virelli III, *Congress, the Constitution, and Supreme Court Recusal*, 69 WASH. & LEE L. REV. 1535, 1562-75 (2012); Suzanne Levy, *Your Honor, Please Explain: Why Congress Can, and Should, Require Justices to Publish Reasons for Their Recusal Decisions*, 16 U. PA. J. CONST. L. 1161, 1181-84 (2014); *but see* Amanda Frost, *supra note* 134, at 463–75 (arguing against various constitutional objections to proposed ethics legislation governing the Supreme Court, in part because ethics legislation might encroach on the Court's decisionmaking function).

[137] *See* 28 U.S.C. § 2072 (Rules Enabling Act).

[138] Circuit judicial councils are composed of a circuit's chief judge sitting as chair and an equal number of other circuit and district court judges. Circuit judicial councils perform various administrative roles within their circuits. *See Governance & the Judicial Conference*, U.S. COURTS, https://www.uscourts.gov/about-federal-courts/governance-judicial-conference (last accessed Sept. 18, 2021).

[139] The constitutionality of the Judicial Conduct and Disability Act has been challenged at least once in the past, in a case brought by a United States District Judge; there, the Act's constitutionality was upheld. *See* McBryde v. Comm. to Rev. Cir. Council Conduct and Disability Orders of Jud. Conf. of U.S., 264 F.3d 52, 64–70 (D.C. Cir. 2001) (upholding the constitutionality of the Judicial Conduct and Disability Act against arguments based on Article III and the impeachment clause).

[140] Anthony J. Scirica, Senior Circuit Judge, U.S. Court of Appeals for the Third Circuit, *Judicial Governance and Judicial Independence*, Madison Lecture, *in* 90 N.Y.U. L. REV. 779, 788 (2015).

[141] *Presidential Commission on the Supreme Court of the United States* 8 (June 30, 2021) (written testimony of Russell Wheeler), https://www.whitehouse.gov/wp-content/uploads/2021/07/R.-Wheeler-statement-6.30-rev.7.12-on-SCOTUS_.pdf (noting that a "small bureaucracy" would be required to sift through the high number of potential complaints against Supreme Court justices).

[142] *See* 28 U.S.C. § 354(a)(2).

[143] Such a sanction might also be unconstitutional as a de facto impeachment or impairment of the Court's ability to discharge its constitutionally mandated duties. *See* Lynn A. Baker, *Unnecessary and Improper: The Judicial Councils Reform and Judicial Conduct and Disability Act of 1980*, 94 YALE L.J. 1117, 1133 (1985) ("By authorizing the judicial councils and the Judicial Conference to order that no new cases be assigned [to] a judge, the Act contravenes th[e] explicit decision of the Framers not to permit so much as the temporary removal of an official, even if already impeached, until convicted by the Senate."); *but see* McBryde v. Comm. to Rev. Cir. Council Conduct and Disability Orders of Jud. Conf. of U.S., 264 F.3d 52, 64–70 (D.C. Cir. 2001) (upholding the facial constitutionality of the Judicial Conduct and Disability Act on the theory that principles of judicial independence established by the Constitution were designed to protect judges from interference by the *other branches*, and not to prevent intrabranch organization and discipline).

[144] A conduct oversight option frequently proposed by some members of Congress is the creation of an Inspector General for the Federal Courts. Some variations of the proposal give the Inspector General the power to investigate misconduct on the Supreme Court. This proposal has been around for decades and has been heavily discussed. *See, e.g.*, Diane M. Hartmus, *Inspection and Oversight in the Federal Courts: Creating an Office of Inspector General*, 35 CAL. W. L. REV. 243 (1999); Ronald D. Rotunda, *Judicial Transparency, Judicial Ethics, and a Judicial Solution: An Inspector General for the Courts*, 41 LOY. U. CHI. L.J. 301 (2010). Members of the federal judiciary have criticized the proposal and noted the dangers such an office could pose to judicial independence. *See* Scirica, *supra* note 140, at 789-97 (2015). Since 2018, the Judicial Conference has provided for a "Judicial Integrity Officer" who oversees workplace conduct in the federal judiciary. The responsibilities of the Judicial Integrity Office include "answering individuals' questions, providing guidance on conflict resolution, mediation, and formal complaint options." *Judicial Integrity Officer Named for Federal Judiciary*, U.S. COURTS (Dec. 3, 2018), https://www.uscourts.gov/news/2018/12/03/judicial-integrity-officer-named-federal-judiciary.

[145] *Cf.* W. Bradley Wendel, *Nonlegal Regulation of the Legal Profession: Social Norms in Professional Communities*, 54 VAND. L. REV. 1955 (2001) (arguing that where lawyers are given clear rules to follow, informal social pressures from other members of the profession can serve the role of formal sanctions).

[146] 28 U.S.C. § 455(a).

[147] *Id.* § 455(1)-(4).

[148] *See* Tuan Samahon, *Rehnquist's Recusals*, 10 GREEN BAG 2D 205, 207 (2007); Memorandum of Justice Scalia, Cheney v. U.S. Dist. Court for D.C., 541 U.S. 913 (2004), available at https://www.supremecourt.gov/opinions/03pdf/03-475scalia.pdf.

[149] *See Recent Times in Which a Justice Failed to Recuse Despite a Conflict of Interests*, FIX THE COURT (June 13, 2021), https://fixthecourt.com/2021/06/recent-times-justice-failed-recuse-despite-clear-conflict-interest.

[150] This data was compiled with the help of Fix the Court's regular reports on Supreme Court recusal. *See, e.g.*, *The Supreme Court's Unexplained OT17 Cert.-Stage Recusals Explained*, FIX THE COURT, https://fixthecourt.com/wp-content/uploads/2018/05/OT17-cert.-stage-recusals-chart.pdf (last accessed Sept. 18, 2021).

[151] Even some who are skeptical of congressional regulation of the Court's recusal practices have argued that requiring statements explaining recusal decisions would be a permissible procedural reform. *See* Virelli, *supra* note 136, at 1591-92.

[152] In a 2015 appropriations hearing, Justice Kennedy voiced a concern that presenting reasons for recusal might resemble lobbying. Justice Kennedy said: "In the rare cases when I recuse, I never tell my colleagues, oh, I'm

recusing because my son works for this company and it's a very important case for my son. Why should I say that? That's almost like lobbying. So, in my view, the reason for recusal should never be discussed." Rich Gardella, *Why Don't Supreme Court Justices Have an Ethics Code*, NBC NEWS (Apr. 11, 2017, 2:26 PM) (quoting Justice Kennedy), https://www.nbcnews.com/news/us-news/why-don-t-supreme-court-justices-have-ethics-code-n745236.

[153] Under 28 U.S.C. § 455, all federal judges decide certain recusal motions in the first instance. However, for lower-court judges, the decision not to recuse may be appealed. Under 28 U.S.C. § 144, an affidavit alleging personal bias or prejudice by a United States District Judge must be heard by another judge if the affidavit is timely and sufficient.

[154] SUP. CT. R. 22(4).

[155] Justice Black and Justice Jackson feuded over Black's refusal to recuse himself in a case where the plaintiff's counsel was Black's former law partner and personal lawyer. Jackson wrote a concurrence to an order denying rehearing of the case that has been interpreted as critical of Black. *See* Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers of America, 325 U.S. 897 (1945) (Jackson, J., concurring); *see also* Dennis J. Hutchinson, *The Black-Jackson Feud*, 1988 SUP. CT. REV. 203 (covering the Black-Jackson feud in detail).

[156] *See* RUSSELL WHEELER & MALIA REDDICK, JUDICIAL RECUSAL PROCEDURES: A REPORT ON THE IAALS CONVENING 19-21 (2017) (listing state statutes and codes that allow or require a judge's recusal decision to be referred to another judge or the entire court, including some statutes and codes that create such a referral process for the state's highest court).

[157] James M. Anderson, Eric Helland & Merritt McAlister, *Measuring How Stock Ownership Affects Which Judges and Justices Hear Cases*, 103 GEO. L.J. 1163, 1178 (2015).

[158] *See* 26 U.S.C. § 1043.

[159] For example, the divestment statute only allows for divestiture when doing so is "reasonably necessary" to avoid a conflict. 26 U.S.C. § 1043(b)(2). Perhaps the Justices interpret this language as not permitting preemptive divestments to avoid conflicts.

[160] *See* Anderson, Helland & McAlister, *supra* note 157, at 1207-08 (proposing divestment requirements for judges or Justices).

[161] *See, e.g.*, Anderson et al., *supra* note 157 at 1207–08 (suggesting that Congress should require divestment of stock ownership as a condition for confirmation, or require divestment when conflicts arise); Adam Liptak, *The Hazards Justices Face by Owning Individual Stocks*, NEW YORK TIMES (Jan. 9, 2017), https://www.nytimes.com/2017/01/09/us/politics/the-hazards-justices-face-by-owning-individual-stocks.html; Richard W. Painter, *Stocks owned by Supreme Court justices tilt the scales of justice*, MSNBC (Oct. 6, 2021, 1:39 PM), https://www.msnbc.com/opinion/stocks-owned-supreme-court-justices-tilt-scales-justice-n1280712.

[162] From our review, the Second, Third, Seventh, and Ninth Circuits have all allowed video recording of at least some oral arguments in the past few years. The Ninth Circuit has been especially prolific in this regard; it posts video recordings of most, if not all, of its oral arguments. *See Audio and Video*, U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT, https://www.ca9.uscourts.gov/media/ (last accessed Oct. 31, 2021). According to a 2019 report by the Congressional Research Service, all 50 state supreme courts allow video recording of proceedings "under certain conditions." CONGRESSIONAL RESEARCH SERVICE, VIDEO BROADCASTING FROM THE FEDERAL COURTS: ISSUES FOR CONGRESS (2019). Judges on lower federal courts and state courts have written articles reflecting on the positive and negative effects of cameras in their courtrooms. *See* Diarmuid F. O'Scannlain, *Some Reflections on Cameras in the Appellate Courtroom*, 9 J. APP. PRAC. & PROCESS 323 (2007); Robert L. Brown, *Just a Matter of Time? Video Cameras at the United States Supreme Court and the State Supreme Courts*, 9 J. APP. PRAC. & PROCESS 1 (2007). *See also* Nancy S. Marder, *The Conundrum of Cameras in the Courtroom*, 44 ARIZ. ST. L.J. 1489 (2012) (collecting many of the competing arguments for and against cameras).

[163] *Visitor's Guide to Oral Argument*, SUPREME COURT OF THE UNITED STATES, https://www.supremecourt.gov/visiting/visitorsguidetooralargument.aspx (last accessed Sept. 18, 2021).

[164] At the start of the 2015 Term, the Court announced: "Only Bar members who actually intend to attend argument will be allowed in the line for the Bar section; 'line standers' will not be permitted." Robert Barnes, *Supreme Court Tells Lawyers: Stand in Line Yourselves. You Can't Pay Others to Hold a Spot*, WASH. POST (Oct. 6, 2015), https://www.washingtonpost.com/politics/courts_law/supreme-court-bar-bans-line-standing-for-hearings/2015/10/06/a309e0e6-6c15-11e5-aa5b-f78a98956699_story.html; *see Presidential Commission on the Supreme Court of the United States* 3 (June 30, 2021) (testimony of Amy Howe), https://www.whitehouse.gov/wp-content/uploads/2021/06/Testimony-of-Amy-Howe.pdf; Katie Bart, *Courtroom Access: Line-standing Businesses Save Spots in the Public Line*, SCOTUSBLOG (Apr. 15, 2020, 4:48 PM), https://www.scotusblog.com/2020/04/courtroom-access-line-standing-businesses-save-spots-in-the-public-line. For data on the number of people waiting in the public line for seats at each argument session during the 2019 Term (until the courtroom closed due to the pandemic), the share of people in line who were eventually seated, and when one would have needed to arrive in order to secure a seat, *see* Amy Howe, *Courtroom Access: Let's Talk Data—The Public Line*, SCOTUSBLOG (May 4, 2020, 6:47 PM), https://www.scotusblog.com/category/special-features/courtroom-access-2020/.