Statement of Amir H. Ali

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Roderick & Solange MacArthur Justice Center

Hearing Before the

Subcommittee on Courts, Intellectual Property, and the Internet
Committee on the Judiciary
United States House of Representatives

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Chairman Johnson, Ranking Member Issa, and Members of the Subcommittee:

Thank you for the opportunity to appear before you to address an important topic, the U.S. Supreme Court's "Shadow Docket." The very name used to describe this part of the Supreme Court's work—the "Shadow Docket"—reveals it is a topic unaccustomed to open hearing and transparency. I applaud the Subcommittee for taking the time to examine and consider this part of the Supreme Court's work in a public forum like this.

I want to begin by making clear that the disputes and issues that are resolved on the Shadow Docket are no less important than the other cases the Supreme Court decides—those in which the Court ensures that the parties have the opportunity to be heard, including full briefing and oral argument, and issues reasoned legal analysis through an opinion, usually after months of deliberations. In fact, one of the most frequently recurring issues on the Shadow Docket concerns the most solemn act that our legal system sanctions: The execution of a human being by the State. 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. Presently, however, the Supreme Court's decisions regarding executions are being made in the middle of the night, without anything even approaching full process. It has become routine for the Supreme Court to set aside lower court decisions detailing serious problems with an impending execution without itself giving *any* legal analysis of why the questioned execution should go forward. I propose a narrow first step to reducing the pressure on the Supreme Court to conduct its decisionmaking in this dangerous way.

I. What Execution Litigation is and How it Arrives at the Supreme Court.

In order to understand the particular risks that Shadow Docket execution cases pose to public confidence in our legal system, it is critical to first understand what this litigation is about and how it reaches the Supreme Court in the first place.

When a state or the federal government decides to execute a person on its death row, it generally issues an execution warrant announcing the person's execution date. The amount of notice given is often weeks, not months, and this often triggers a need to resolve several critical legal issues before the State's chosen execution date. For example, the person under the execution warrant may have had ongoing litigation pending in state or federal lower courts for months, if not years. The outstanding issues may concern the person's very eligibility for the death penalty—for instance, litigation about whether the person is intellectually disabled and therefore constitutionally protected from execution under the Supreme Court's landmark decision in *Atkins v. Virginia*. The State's issuance of an execution warrant when there are still outstanding issues creates an urgency in sorting them out.

The imminence of an execution also triggers new issues that *could not have been* litigated before the execution date was set. In *Ford v. Wainwright*, the Supreme Court held that the Constitution prohibits execution of people who are found to be insane, therefore requiring an evaluation of the defendant's competency to be executed. Because the relevant question is competency at the time of execution, this issue cannot be litigated until the State declares when the execution will occur. Several other legal issues often cannot be raised until close to the execution date, such as certain issues concerning the State's chosen method and protocol for execution. There are also challenges that arise from the execution chamber itself. This can include the State's last-minute changes to the execution protocol, mishandled executions which lead to prolonged agony, or even religious freedom issues, like the State's exclusion of the defendant's chosen spiritual advisor from the death chamber (discussed further below).

Litigation of these issues travels up the court system like any other. The person under the execution warrant must bring his or her claims in a state or federal trial court. The trial court, which has the responsibility to review the evidence and make findings of fact, generally has the longest opportunity to consider the case. Given its fact-finding responsibility, the trial court may consider the issue for weeks or months. After the trial court reviews the evidence and legal arguments, it issues an opinion on whether the defendant has presented a serious constitutional claim and, taking into account the equities between the parties, decides whether the execution should be stayed to allow further consideration of the problems that have been identified. The matter then works its way up on appeal, first to intermediate appellate courts (which generally have more time with the case still than the U.S. Supreme Court), and ultimately to the Supreme Court itself.

II. The Shadow Docket and Executions.

When an execution is imminent, the principal issue the lower courts consider is whether more time is needed to resolve the legality of the impending execution—*i.e.*, whether to "stay" the execution because the defendant has raised issues that are sufficiently weighty to believe that the execution, as currently planned, will violate the Constitution or laws of our country. Given the short time to hear evidence and review the legal issues, trial courts frequently are not able to provide their analysis until just days before, and sometimes even the day of, the execution. That decision, whether to stay the execution for further consideration of the problems, then hurriedly works its way up the appeal system to the U.S. Supreme Court.

As a result, the legal issues pertaining to an execution often arrive at the Supreme Court just hours before the scheduled execution. And, presently, the Supreme Court's final word on whether the defendant will be executed, or whether his claims will receive full consideration, is often delivered in the middle of the night, while the public is asleep. As a result of the pressure the Supreme Court faces, it has at times taken extraordinary liberties with the ordinary litigation process. For instance, sometimes the Supreme Court issues its decision before the parties have even had the opportunity to file their briefs. In a recent case involving the execution of Orlando Hall, the Supreme Court acted without even waiting for one of the lower courts, the D.C. Circuit, to weigh in, pretermitting a whole stage in the appellate process. Far more often than not, the Supreme Court's final word on whether the person will live or die comes without any explanation or articulation of the law or reasoning supporting its decision.

The most disturbing instance of these unexplained and unsigned orders comes in cases where a lower court has reviewed the record and, sometimes after holding a hearing where the court considered the testimony of witnesses and evidence, determined that the planned execution is likely to violate the Constitution. Several times this has occurred and, within a matter of hours or even minutes from receiving the relevant briefing, the Supreme Court reverses the lower court order without explanation.

It is important to pause to consider the implications for public confidence in our legal system. The question in these cases is whether the State's imminent plan to execute someone lives up to the guarantees of the Constitution and federal law. In the circumstance I have just described, a court—and perhaps the only court to go through the full process of hearing the evidence and then applying the law in a reasoned decision—has made findings on the record and concluded that there is a substantial likelihood the execution is unlawful. When the Supreme Court vacates the lower court's order, it means that a person may be executed even though the only reasoned judicial decision on the books tells us there was a serious likelihood the execution violates the laws of our country. The public, and the historical record, is left with little or no indication of what made it lawful for this person to be executed.

III. Recent Examples of the Lack of Transparency and Risks to Public Confidence.

In order to appreciate the serious risk to public confidence posed by current Shadow Docket practice, I ask you to consider the following examples:

First, consider the case of Dustin Higgs, who was executed last month. Mr. Higgs was infected with COVID-19, and introduced expert testimony that the Government's planned method of lethal injection would be tantamount to torture given the damage COVID-19 had done to his organs. A federal district court held a hearing, including testimony from expert witnesses, and made factual findings that, in light of the significant damage to Mr. Higgs' lungs, the Government's chosen method of execution would "subject [him] to a sensation of drowning akin to waterboarding." The court therefore stayed the execution temporarily until Mr. Higgs recovered from COVID-19. A second district court also stayed Mr. Higgs' execution based on a serious question as to the Government's authority to execute Mr. Higgs. When the Government appealed the latter order, the U.S. Court of Appeals for the Fourth Circuit noted that Mr. Higgs' execution raised "novel" legal issues. It scheduled expedited oral argument, asking for just 12 additional days to consider whether it would be lawful to execute Mr. Higgs.

Around 11:00 p.m. on the night of the execution, the Supreme Court issued an order that would be virtually unheard of in any other part of its docket. It granted the extraordinary relief of "certiorari before judgment," which meant that it would not let the Fourth Circuit take time to hear and decide the legality of Mr. Higgs' execution. The Supreme Court then directly set aside the district court's order without *any* legal analysis or explanation as to why the district court's analysis was incorrect.

Mr. Higgs was promptly executed, at 1:23 a.m. This was so despite the fact that the only court to hear expert evidence and make factual findings on the public record found that the execution would be "akin to waterboarding" and violate the Constitution. And this was so even though the only court to issue a reasoned opinion on the issue concluded that the Government lacked the authority to execute Mr. Higgs.

The second example I ask you to consider involves a trilogy of cases concerning access to a religious or spiritual advisor to guide people through the final moments of their life. In these cases, people subject to execution warrants have asked that the spiritual advisor provided to them in the execution chamber be a member of their own faith, not another faith prescribed by the State. In these cases, the defendants were told that either that they could have a Christian spiritual advisor or that they could not have any spiritual advisor at all by their side. The disparate outcomes of these cases demonstrate the arbitrariness of present Shadow Docket practice in terms of who dies without this basic dignity.

The first of these men, Domineque Hakim Marcelle Ray, was a devout Muslim. Days before his execution, the State informed him that he would not be permitted to have an Imam in the execution chamber and could only have a state-employed Christian chaplain. Mr. Ray raised a challenge to this discriminatory practice under the Establishment Clause, asking for the right to have a spiritual advisor associated with his own religion present during his final moments. A lower court panel of three judges reviewed Mr. Ray's arguments, and concluded that he had raised "a powerful Establishment Clause claim." It found that Mr. Ray had acted diligently to bring his claim as quickly as he possibly could have, given the State's late notice that it would not allow his spiritual advisor. The three judges held that a stay was necessary to consider Mr. Ray's claims in an expedited appeal.

The Supreme Court issued an unsigned opinion vacating the lower court's stay. The Supreme Court did not provide any reasoning, except for a single citation, suggesting that Mr. Ray's claim could be denied solely on the basis that it reached the Court in the context of a "last minute" application. The Supreme Court did not address the lower court's conclusion that Mr. Ray had brought his claim at his soonest possible opportunity and did not question that allowing only Christian chaplains violated Mr. Ray's constitutional rights. Mr. Ray was executed that night without a spiritual advisor, as would have been available to any Christian person in his shoes.

One month later, the Supreme Court considered a virtually identical claim by Patrick Henry Murphy, a Buddhist prisoner who had been informed by the State of Texas that he could die with a chaplain next to him, but not a Buddhist priest. This time, the Supreme Court reached the opposite conclusion. After lower courts denied Mr. Murphy relief, relying on the Supreme Court's decision in Mr. Ray's case, the Supreme Court held that a stay should be granted for Mr. Murphy. In an unsigned, two-sentence order, the Court stated that Mr. Murphy could

not be executed "unless the State permits Murphy's Buddhist spiritual advisor or another Buddhist reverend of the State' choosing to accompany Murphy in the execution chamber during the execution." An opinion by one Justice suggested an alternative: the State could either allow Mr. Murphy to have a Buddhist priest, or it could respond to Mr. Murphy's request by denying spiritual advisors to all prisoners. Believing this to represent the view of the Supreme Court, Texas changed its policy to exclude all clergy from the execution chamber.

Just last week, the Supreme Court considered a similar claim by Willie B. Smith, a Christian prisoner who wanted to have his pastor present in the execution chamber during the final moments of his life. Like Texas, the State of Alabama had modified its policies to exclude any spiritual advisor from the execution chamber. Once again, the Supreme Court shifted course. In an unsigned order with no legal analysis, the Supreme Court allowed a stay of Mr. Smith's execution unless he was provided a Christian pastor.

The arbitrariness demonstrated by this trilogy of cases is disturbing. To this day, the Court has never meaningfully explained why the lower court in Mr. Ray's case was wrong to conclude that his claims were timely and never questioned that Mr. Ray was executed in a manner that violated his constitutional rights. Furthermore, because of the Court's failure to provide any explanation for its decisions in these cases, the public is left with a potentially devastating impression of the justice system, in which three people of different religions are treated in a disparate fashion: The Muslim prisoner is allowed to die without an advisor; the Buddhist prisoner is told that his advisor cannot be selectively excluded like the Muslim person, but may be denied across the board; and the Christian prisoner is told that his execution may not go forward without a Christian pastor in the execution chamber. The Supreme Court would not have viewed these cases in such terms. But this historical record, enabled by the lack of standards governing the Shadow Docket in execution cases, should be troubling to anyone concerned with the legitimacy of, and confidence in, our justice system.

IV. A Solution to Avoid Catastrophic and Irreparable Errors.

When it comes to the death penalty, the importance of getting things right is at its zenith: there is no do-over. At the same time, precisely because the State is wielding its most consequential power, mishaps and lack of transparency pose greater risks to public confidence in our legal system than in any other context. A system in which a lower court's decision to hear claims is swept away by an unreasoned and unsigned order in the middle of the night is intolerable and needs to be fixed.

An immediate step Congress can take to increase accuracy, transparency, and confidence is to do what it has done in numerous other contexts: provide reviewing courts, including the Supreme Court, with clear guidance on the standard that must be applied to overrule the decisions of a lower court that has granted a stay for further consideration of an execution issue. As set forth above, the nature of execution litigation means that lower courts have substantially more time to review the evidence and arguments presented in these cases. The Supreme Court, on the other hand, considers its responsibility to be to review those decisions in a matter of hours or minutes, before the scheduled execution. When a lower court has identified a serious issue and granted a stay, the Supreme Court is left with little guidance from Congress on how to conduct its analysis in those final moments.

In ordinary appellate litigation, review of lower court decisions is dealt with through the concept of a "standard of review"—the threshold for when factual or legal determinations can be overturned by a higher court. In other contexts where Congress has identified institutional concerns, it has given guidance to courts, including the U.S. Supreme Court, by adopting deferential standards of review. In Title 28 of the U.S. Code, Section 2254(d), for instance, Congress provided that certain state court decisions concerning prisoners cannot be overturned unless it is apparent the decision was "contrary to, or involved an unreasonable application of, clearly established Federal law" or "based on an unreasonable determination of the facts in light of the evidence presented." This standard applies to the Supreme Court itself, and the Supreme Court itself has developed precedent to govern its application.

Congress should specify a similar standard of review here, in the particular instance where a lower court has reviewed the record and determined that an execution is likely to violate the law. Given the gravity and utter permanence of executions, and particularly given the abridged nature of the Supreme Court's review in these cases, a lower court's request for additional time to consider the lawfulness of an execution should be disturbed only if it is apparent to the Supreme Court that the lower court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law" or rested on "an unreasonable determination of the facts in light of the evidence presented." In order to prevent the untenable circumstance in which a person is executed, but the only reasoned decision in the public tells us execution would be unlawful, Congress should also specify that the Supreme Court state its reasons for concluding that the lower court's decision satisfied this standard.

This is a narrow fix that Congress can and should adopt immediately to safeguard public confidence in one of the most disturbing aspects of the Shadow Docket.

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Thank you again for the invitation to share my views on this important topic. I look forward to addressing any questions that you have.