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INTERNET**

Hearing on “The Supreme Court’s Shadow Docket”

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INTRODUCTION AND BACKGROUND

Chairman Johnson, Ranking Member Issa, Members of the Committee, thank you for the opportunity to testify at today’s hearing. This hearing is about the U.S. Supreme Court’s “Shadow Docket.” It is a phrase that sounds mysterious, foreboding, suspicious. Professor William Baude of the University of Chicago Law School coined the term a few years ago to refer to the Court’s “orders and summary decisions.”² As Professor Barry Friedman of NYU Law School points out, however, another name for the shadow docket is the Supreme Court’s “orders list”—a far less ominous topic of discussion that sounds bureaucratically dull.³ Far from lingering in shadows, all of the documents, briefs, and orders comprising the so-called shadow docket are readily available on the Supreme Court’s website.⁴

Orders on the shadow docket differ from the Court’s merits decisions—which result in the Court’s customary written opinions—in several respects. Although the Court’s orders are based on petitions and briefing from the parties, they are typically issued without oral argument and the involvement of *amici*.⁵ Additionally, the orders are often issued without accompanying opinions explaining the Court’s rationale, though either the majority or individual Justices are free to issue such opinions setting forth their reasoning.⁶ The absence of opinions can make it hard for litigants and the public to tell the standards the Court applied in granting or denying relief.⁷ This, in turn, makes it harder for lower courts to conform their rulings to the Court’s directives.

The lack of explanation can also sometimes contribute to a perception that the Court has treated similar cases differently. Indeed, the absence of reasoned elaboration may even make it more difficult for the Justices to ensure they actually *are* according equal treatment to similarly situated litigants. Moreover, when the Court’s orders are unsigned, it can be unclear which—or exactly how many—Justices voted to support or oppose the

¹ Institutional affiliation is provided for identification purposes only. This testimony is presented solely in my individual capacity.

² William Baude, *Foreword: The Supreme Court’s Shadow Docket*, 9 NYU J. L. & LIB. 1, 1, 3 (2015).

³ Barry Friedman, *Letter to Supreme Court (Erwin Chemerinsky is Mad. Why You Should Care)*, 69 VAND. L. REV. 995, 1011 (2016).

⁴ See Supreme Court of the United States, *Docket Search* (last referenced Feb. 17, 2021), <https://www.supremecourt.gov/docket/docket.aspx>.

⁵ Baude, *supra* note 2, at 6.

⁶ See, e.g., *Trump v. Sierra Club*, 140 S. Ct. 1 (2019) (mem.) (Breyer, J., concurring in part and dissenting in part from grant of stay).

⁷ Baude, *supra* note 2, at 15 (citing *Wheaton College v. Burwell*, 134 S. Ct. 2806 (2014)).

relief.⁸ Again, however, Justices are free to publicly note their concurrence or dissent. Finally, unlike merits opinions, which are announced in open court, “[t]he orders list issues without ceremony” a half hour before the start of the Court’s regular session.⁹ Based on these aspects of the shadow docket, scholars such as Professor Baude have expressed concern that the Court may “deviate from its otherwise high standards of transparency and legal craft” in such matters.¹⁰

It is important to recognize that the orders list and the procedures governing it reflect how the Supreme Court conducts most of its business. The most commonly issued order is the denial of certiorari, which the court issues when declining to review a case on the merits. Each year, the Supreme Court summarily denies between seven and eight thousand petitions for certiorari.¹¹ Virtually all of these rulings are terse, unsigned orders unaccompanied by any explanation. The Court generally affords the full panoply of procedural restrictions and transparency to its opinions that establish binding law as a matter of *stare decisis* for the entire nation, and greater procedural flexibility to petitions for largely discretionary relief, such as certiorari denials and stays, where it is not seeking to establish binding law, but rather focusing primarily on the adjudication or resolution of a particular case.¹² The disparity between the Court’s procedures appears to correlate to whether the Court is performing a primarily law-declaration function or dispute-resolution function.¹³ Because the Court’s role is not primarily error correction, it appears to exhibit greater procedural flexibility in the limited number of cases when it grants extraordinary relief to perform that function.

CRITIQUES OF THE SHADOW DOCKET

Professor Baude has raised two main critiques against the shadow docket. First, he points out that, apart from summary reversals, “many of the orders lack the transparency that we have come to expect in [the Court’s] merits cases.”¹⁴ There can be potentially valid reasons for the lack of written opinions, however. Given the emergency nature of many of these petitions, time constraints can make it difficult or impossible to prepare contemporaneous opinions.¹⁵ “[I]n many of those cases, there is a need for swift rulings and virtually no time to prepare even a short explanatory opinion (though the Court could release one later).”¹⁶ Moreover,

⁸ *Id.* at 4, 18.

⁹ *Id.* at 6.

¹⁰ *Id.* at 56.

¹¹ See FED. JUD. CTR., JUDICIAL BUSINESS OF THE UNITED STATES COURTS, *Supreme Court of the United States—Cases on Docket, Disposed of, and Remaining on Docket at Conclusion of October Terms, 2014 Through 2018*, tbl. A-1 (Sept. 30, 2019), https://www.uscourts.gov/sites/default/files/data_tables/supcourt_a1_0930.2019.pdf.

¹² Richard H. Fallon, Jr., *A Theory of Judicial Candor*, 117 COLUM. L. REV. 2265, 2274 (2017); Erin F. Delaney, *Analyzing Avoidance: Judicial Strategy in Comparative Perspective*, 66 DUKE L.J. 1, 18-19 (2016); see also Benjamin Johnson, *The Supreme Court’s Political Docket: How Ideology and the Chief Justice Control the Court’s Agenda and Shape Law*, 50 CONN. L. REV. 581, 585 (2018).

¹³ See Michael T. Morley, *De Facto Class Actions? Plaintiff- and Defendant-Oriented Injunctions in Voting Rights, Election Law, and Other Constitutional Cases*, 39 HARV. J.L. & PUB. POL’Y 487, 518-20 (2016) (contrasting the law-declaration and dispute-resolution functions of federal courts).

¹⁴ Baude, *supra* note 2, at 1.

¹⁵ *Id.* at 20-22.

¹⁶ Joshua A. Douglas & Michael E. Solimine, *Precedent, Three-Judge District Courts, and the Law of Democracy*, 107 GEO. L.J. 413, 429 n.111 (2019).

it may often be much easier for Justices to agree on an ultimate outcome than to craft an opinion with detailed reasoning on which they can all agree. And when Justices “agree on the outcome, but on different grounds . . . [d]eciding the case by summary order allows them to strike an incompletely theorized agreement—they achieve the right outcome, but without saying why.”¹⁷ The Court may be especially reluctant to issue a hurried opinion that, regardless of any disclaimers the Court may append, is likely to be treated as precedent—or at least a powerful signal—by lower courts and cited by litigants.¹⁸ Moreover, because many of these orders “respond to unusual or unexpected developments,” it may be hard to “have a fully prescribed set of procedures” for addressing them.¹⁹ At a minimum, however, 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. Publicly disclosing Justices’ votes can help incentivize consistency, bolster “individual accountability,” and enhance the perceived legitimacy of the Court’s actions.²⁰

Second, Professor Baude contends that the criteria the Court uses to decide whether to summarily reverse a case are unclear.²¹ Summary reversals have been the subject of academic critique for decades.²² Unlike many other types of orders on the shadow docket, however, the modern Court typically “provides reasoned explanations” for its summary reversals.²³ And the “sheer practice of summarily reversing a handful of cases every year creates a tradition that makes the practice not unexpected.”²⁴ Baude suggests that the Court appears to have largely coalesced around the view that “summary reversals are warranted in areas of law where there is an unusual epidemic of lower-court judges willfully refusing to apply the Supreme Court’s interpretations of the law.”²⁵ To the extent that is accurate, it is highly unlikely the Court would expressly articulate such a standard in either its Rules or opinions. Expressly recognizing the possibility that lower courts may attempt to undermine, circumvent, or ignore Supreme Court opinions—particularly recent opinions—with which they disagree would contribute to a heavily politicized, legal realist view of the federal judiciary that the Court has a strong institutional interest in opposing and refuting.²⁶

¹⁷ Andrew Keane Woods, *The Transparency Tax*, 71 VAND. L. REV. 1, 6 (2018); see also Greg Goelzhauser, *Silent Concurrences*, CONST. COMMENT. 351, 379 (2016).

¹⁸ See *Zubik v. Burwell*, 136 S. Ct. 1557, 1561 (2016) (Sotomayor, J., concurring) (noting that “some lower courts have ignored [the Court’s] instructions” that certain opinions accompanying orders should not be construed as “signals of where this Court stands”); cf. Richard M. Re, *Narrowing Supreme Court Precedent from Below*, 104 GEO. L.J. 921, 943 (2016) (explaining that some have viewed the shadow docket as a way for the Court to send “signals” to lower courts that “have precedential force but are subordinate to conventional precedent”).

¹⁹ Baude, *supra* note 1, at 21.

²⁰ See *id.* at 23-24.

²¹ *Id.* at 2, 25, 30.

²² See, e.g., Ernest J. Brown, *Foreword: Process of Law*, 72 HARV. L. REV. 77 (1957); see also Albert M. Sacks, *Foreword*, 68 HARV. L. REV. 96, 103 (1954).

²³ Baude, *supra* note 1, at 25; see also *id.* at 28.

²⁴ *Id.* at 28.

²⁵ Baude, *supra* note 1, at 36; see also *id.* at 42-43.

²⁶ Cf. Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 828 (1994) (arguing that “the Constitution does compel adherence to Supreme Court precedents”); Adam Liptak, *Chief Justice Defends Judicial*

More recently, Professor Steve Vladeck of the University of Texas School of Law has voiced a third concern: in recent years, the Solicitor General has become more willing to request, and the Court has concomitantly become more willing in grant, certain forms of extraordinary relief to the government through the shadow docket.²⁷ As of January 2017, “the Solicitor General has sought stays from the Supreme Court on at least twenty-one different occasions; has asked for certiorari before judgment nine times; and has expressly requested mandamus relief directly against a district court in at least three different cases.”²⁸ Professor Vladeck argues that the Court’s tolerance of such requests and willingness to grant them has given the federal government an unfair litigation advantage.²⁹ He is particularly concerned the Court may be showing favoritism “for a specific political party when it’s in control of the federal government.”³⁰

Based on these statistics, the two main types of extraordinary “shadow docket” relief that the Court has afforded the government in recent years are stays of lower courts’ orders and certiorari before judgment. It is difficult to make categorical claims about these orders, since they arise from such a diverse array of different cases. And particular orders may certainly raise valid causes for concern. In assessing the propriety of the Court’s actions more broadly, however, it is helpful to bear in mind two overarching considerations.

A. *Stays Pending Appeal, Certiorari Before Judgment, and Nationwide Injunctions*

A substantial fraction—though by no means all³¹—of the Court’s stays of lower court orders arose in the context of so-called “nationwide injunctions.” As Professor Vladeck explains:

By volume, the most common ground the Trump Administration has invoked for needing emergency or extraordinarily relief has been a response to nationwide injunctions issued by district courts against executive branch policies. Of the twenty-one stay applications, twelve sought to allow a policy that had been subjected to a nationwide injunction to remain in place, and six of the nine petitions for certiorari before judgment invoked the unique harm caused by nationwide relief as the reason the Court should bypass the courts of appeals.³²

As an initial matter, the unfortunately ubiquitous phrase “nationwide injunction” is misleading. Many types of injunctions can have a “nationwide” effect.³³ The real contrast is between a “plaintiff-oriented injunction,” which is appropriately tailored to enforcing the rights of the plaintiffs before the court, and a “defendant-oriented injunction,” which unnecessarily goes beyond that scope to enforce the rights of third-

Independence After Trump Attacks “Obama Judge,” N.Y. TIMES (Nov. 21, 2018) (quoting Chief Justice John Roberts as saying, “We do not have Obama judges or Trump judges. . . . What we have is an extraordinary group of dedicated judges doing their level best to do equal right to those appearing before them.”), <https://www.nytimes.com/2018/11/21/us/politics/trump-chief-justice-roberts-rebuke.html>.

²⁷ Stephen I. Vladeck, *The Solicitor General and the Shadow Docket*, 133 HARV. L. REV. 123, 124 (2019).

²⁸ *Id.* at 134; *see also id.* at 124-25.

²⁹ *Id.* at 126-27; *see also id.* at 159-60.

³⁰ *Id.* at 126-27.

³¹ Professor Vladeck emphasizes, “[A] nonfrivolous percentage of the government’s applications for emergency or extraordinary relief have had nothing to do with nationwide injunctions Thus, even if nationwide injunctions are behind much of this development, they cannot be behind all of it.” Vladeck, *supra* note 27, at 153.

³² Vladeck, *supra* note 27, at 134.

³³ *See* Michael T. Morley, *Disaggregating Nationwide Injunctions*, 71 ALA. L. REV. 1 (2019).

party non-litigants, including rightholders outside the scope of the court’s geographic jurisdiction whose claims would otherwise be subject to the law of other circuits.³⁴ A nationwide defendant-oriented injunction completely bars a governmental defendant from enforcing a challenged legal provision against anyone, anywhere in the nation (or potentially even world). Such orders may impact the rights of millions of people, significantly interfere with the operations of federal agencies on a national scale, and prevent implementation of programs or restrictions that the government believes to further important interests. They can turn what would otherwise be ordinary constitutional litigation—including litigation where fundamental rights are at stake—into an even more pressing matter in which the stakes have been exponentially increased, demanding more immediate attention from higher courts. The willingness of lower courts to issue nationwide defendant-oriented injunctions is one important contributing factor to the growth of the shadow docket.

Federal courts likely lack Article III jurisdiction to grant nationwide defendant-oriented injunctions.³⁵ Such orders are likewise inconsistent with the traditional equitable principles that federal courts are bound to apply when granting equitable relief.³⁶ Two Justices have recently issued opinions endorsing these notions.³⁷ Nationwide defendant-oriented injunctions also raise serious questions under Rule 23(b)(2), which already provides a mechanism to allow plaintiffs to easily bring other rightholders before the court to have their claims adjudicated.³⁸ These orders also give rise to unfairly asymmetric preclusive effects. If the Government prevails in a challenge to the validity of a legal provision, the court’s ruling has no *res judicata* effect for any rightholders other than the plaintiff in that case.³⁹ And district court rulings generally lack any *stare decisis* effect; they do not even bind other judges within the same district.⁴⁰ Yet if a single rightholder anywhere in the country prevails,

³⁴ Morley, *supra* note 13, at 489-90; Morley, *supra* note 33, at 9-10.

³⁵ See *Salazar v. Buono*, 559 U.S. 700, 734 (2010) (Scalia, J., concurring) (stating that Article III forbids federal courts from issuing orders that “cover additional actions that produce no concrete harm to the original plaintiff”); *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979) (“[I]njunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs.”); *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931 (1975) (“[N]either declaratory nor injunctive relief can directly interfere with enforcement of contested statutes or ordinances except with respect to the particular federal plaintiffs”); see also *Gill v. Whitford*, 138 S. Ct. 1916, 1934 (2018) (“Standing is not dispensed in gross: A plaintiff’s remedy must be tailored to redress the particular injury.”); *Baxter v. Palmigiano*, 425 U.S. 308, 310 n.1 (1976) (holding that, if a district court did not certify a class, “the action is not properly a class action” and cannot be treated as such); see, e.g., *U.S. Dep’t of Def. v. Meinhold*, 510 U.S. 939, 939 (1993) (mem.) (staying a lower court injunction insofar as it prohibited the military from applying the challenged regulation to anyone other than the individual plaintiff); *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 123 (1940) (declaring that the D.C. Circuit’s nationwide defendant-oriented injunction against the Secretary of Labor “goes beyond any controversy that might have existed between the complaining companies and the Government officials”); Morley, *supra* note 13, at 523-27; Morley, *supra* note 33, at 28-29.

³⁶ See *Grupo Mexicano de Desarrollo v. Alliance Bond Fund*, 527 U.S. 308, 318-19 (1999) (quoting 11A C. Wright, et al., *Federal Practice and Procedure* § 2491, at 31 (2d ed. 1995)); see especially Samuel Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417, 471-72 (2017).

³⁷ See *Dep’t of Homeland Sec. v. New York*, 140 S. Ct. 599, 600 (2020) (Gorsuch, J., concurring in stay) (“Injunctions like these thus raise serious questions about the scope of courts’ equitable powers under Article III.”); see also *Trump v. Hawaii*, 138 S. Ct. 2392, 2429 (2018) (Thomas, J., concurring) (“[U]niversal injunctions are legally and historically dubious.”).

³⁸ See Fed. R. Civ. P. 23(b)(2); see also Michael T. Morley, *Nationwide Injunctions, Rule 23(b)(2), and the Remedial Powers of the Lower Courts*, 97 B.U. L. REV. 615, 634-37 (2017).

³⁹ See *Taylor v. Sturgell*, 553 U.S. 880, 901 (2008).

a nationwide defendant-oriented injunction would allow the court to enjoin that provision against everyone, everywhere (potentially even including the unsuccessful litigants in prior cases).⁴¹ In other words, the Government could successfully defend a challenged provision four times but, if it then loses the fifth case, the provision could be enjoined throughout the nation.⁴²

Additionally, defendant-oriented injunctions are inconsistent with the hierarchical, decentralized structure of the federal judiciary.⁴³ By enacting the Evarts Act of 1891, Congress deliberately crafted a federal judiciary in which the lower courts exercised limited geographic jurisdictions.⁴⁴ Each circuit is free to develop its own body of law; the rulings of courts in one district or circuit lack binding *stare decisis* effect in other circuits.⁴⁵ Nationwide defendant-oriented injunctions, in contrast, allow a district or circuit court to impose its view of the law on third-party non-litigants throughout the nation, including rightholders whose claims would otherwise be adjudicated based on the law of other circuits. Such sweeping authority is in tension with the limited geographic jurisdiction of lower courts.

Nationwide defendant-oriented injunctions are similarly inconsistent with the Supreme Court's ruling in *United States v. Mendoza*.⁴⁶ In *Mendoza*, the Court held that the Government is not subject to offense non-mutual collateral estoppel.⁴⁷ In other words, if a litigant prevails on an issue against the Government, the Government remains free to re-litigate the same issue against other litigants. The Government is not bound as a matter of *res judicata* or collateral estoppel by adverse judicial rulings. The Court offered many explanations for this doctrine. The Government is much more likely than other entities to be involved in repeat litigation concerning the same issues. Moreover, allowing the first adverse district court ruling to bind the government on a national basis "would substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue."⁴⁸ It would be difficult for legal issues to percolate through the lower courts and circuit splits to arise; the Court would be precluded from comparing the practical consequences of different possible legal conclusions in different jurisdictions.⁴⁹

In addition, if the government could be collaterally estopped from relitigating adverse rulings, it would be forced to "appeal every adverse decision to avoid foreclosing further review."⁵⁰ The Solicitor General's ability to effectively exercise discretion over the Government's litigation docket before the Supreme Court

⁴⁰ See *Camreta v. Greene*, 563 U.S. 692 (2011) ("A decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case." (quoting 18 J. MOORE, ET AL., MOORE'S FEDERAL PRACTICE, § 134.02[1][d])).

⁴¹ Morley, *supra* note 13, at 531-34; Morley, *supra* note 33, at 29.

⁴² Bray, *supra* note 36, at 460.

⁴³ Morley, *supra* note 13, at 535-38; Morley, *supra* note 33, at 29-30; Morley, *supra* note 38, at 639-53.

⁴⁴ Ch. 517, § 2, 26 Stat. 826.

⁴⁵ *Mast, Foss & Co. v. Stover Mfg. Co.*, 177 U.S. 485, 488 (1900).

⁴⁶ 464 U.S. 154 (1984); see Morley, *supra* note 38, at 627-33.

⁴⁷ *Mendoza*, 464 U.S. at 158.

⁴⁸ *Id.* at 160.

⁴⁹ *Id.*

⁵⁰ *Id.* at 161.

would be greatly curtailed. And a refusal to appeal a particular adverse ruling would make it much easier for one presidential administration to bind successor administrations to a particular view of the law or Constitution without the Supreme Court having addressed the issue.⁵¹ Much of the reasoning that led the *Mendoza* Court to promote relitigation of public law issues by exempting the Government from the traditional rules of *res judicata* equally suggest that district courts should not be able to hinder or prevent relitigation of such issues through nationwide defendant-oriented injunctions.

Finally, from a pragmatic perspective, allowing courts to issue such injunctions greatly enhances the incentives for, and consequences of, forum shopping.⁵² Plaintiffs can seek out the most ideologically advantageous judge in the nation, and that person can enforce their view of constitutional law on all rightholders throughout the nation, at least as an initial matter. “This means that controversial constitutional and other challenges will tend to be adjudicated by ideological outliers toward the extremes of the political spectrum, depending on the nature of the case, rather than a more representative cross section of the federal judiciary. Lower court adjudications will disproportionately reflect such ideologically skewed judicial views, rather than those of the median judge.”⁵³ And, based on the luck of the draw in the composition of the appellate panel, such rulings are often affirmed.

In short, nationwide defendant-oriented injunctions raise a wide range of serious concerns. If they are 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 will be removed.

B. *Certiorari Before Judgment and Congressional Intent*

Certiorari before judgment is one of the main forms of extraordinary relief that the Court has increasingly granted to the Government in recent years through the shadow docket.⁵⁴ Such an order allows the Court to review a district court’s final judgment before the Court of Appeals has ruled on the case.⁵⁵ Although the Court grants this relief very rarely, Congress’ intent in adopting the Court’s current jurisdictional provisions was that the Court would exercise this authority to hear important constitutional cases directly from the district courts, bypassing the intermediate appellate court.⁵⁶

Throughout much of the Twentieth Century, any litigant could appeal directly as of right to the Supreme Court when a federal district court struck down a federal law.⁵⁷ In 1988, however, Congress adopted the Supreme Court Case Selection Improvement Act (“Improvement Act”) to reduce the Court’s caseload.⁵⁸

⁵¹ *Id.* at 161-62.

⁵² Bray, *supra* note 36, at 460.

⁵³ Morley, *supra* note 33, at 32.

⁵⁴ Vladeck, *supra* note 27, at 134.

⁵⁵ See 28 U.S.C. § 1254(1) (allowing the Supreme Court to review “cases in the court of appeals . . . [b]y writ of certiorari . . . before or after rendition of judgment or decree”).

⁵⁶ Michael T. Morley, *Congressional Intent and the Shadow Docket*, HARV. L. REV. BLOG (Jan. 24, 2020), <https://blog.harvardlawreview.org/congressional-intent-and-the-shadow-docket/>.

⁵⁷ See Michael T. Morley, *Vertical Stare Decisis and Three-Judge District Courts*, 108 GEO. L.J. 699, 734-39 (2020).

⁵⁸ Pub. L. No. 100-352, 102 Stat. 662 (1988).

This act eliminated the Supreme Court’s mandatory appellate jurisdiction over such constitutional cases, and instead required them to be appealed through ordinary appellate channels—that is, to the Courts of Appeals—like most other cases. To assuage concerns about eliminating mandatory, immediate Supreme Court review, however, the House Judiciary Committee report accompanying the Act explained that the measure “should not create an obstacle to the expeditious review of cases of great importance,” since certiorari before judgment remained available.⁵⁹

The Committee recognized that “[p]rompt correction or confirmation of lower court decisions invalidating acts of Congress is generally desirable for reasons of separation of powers, avoiding unwarranted interference with the government’s administration of the laws and protection of the public interest.”⁶⁰ The Improvement Act “increase[d] the importance” of certiorari before judgment “as a means of securing an expeditious and definitive resolution of questions of statutory unconstitutionality by the Supreme Court.”⁶¹ The report concluded that the Committee “contemplates that the Court will give appropriate weight to the elimination of direct review” when deciding whether to grant certiorari before final judgment in cases where a lower court has invalidated a federal law.⁶²

The Department of Justice, in advocating the Improvement Act, likewise emphasized that it “need not [prevent] expeditious” Supreme Court review “in cases of exceptional importance.”⁶³ The Department explained that, when “expedited consideration by the Supreme Court is required,” the Court could grant certiorari before judgment, as it had recently done in two cases.⁶⁴ It observed that such relief is appropriate because, “[o]rdinarily, lower federal court decisions invalidating acts of Congress present issues of great public importance warranting Supreme Court review.”⁶⁵ Other witnesses similarly pointed to the availability of certiorari before judgment as a substitute for direct appeal as of right.⁶⁶ Thus, the use of certiorari before judgment “when district courts hold federal legal provisions unconstitutional is not an unanticipated abuse of power, but rather fully consistent with Congress’ intent when it curtailed the Court’s mandatory appellate jurisdiction in constitutional cases.”⁶⁷

⁵⁹ H. REP. NO. 100-660, at 11 (May 26, 1988).

⁶⁰ *Id.* at 11 n.14.

⁶¹ *Id.*

⁶² *Id.*

⁶³ Letter from Asst. Att’y Gen. Robert A. McConnell to Hon. Peter W. Rodino, Chair, House Comm. on the Judiciary (Dec. 4, 1981), in *Hearing on Mandatory Appellate Jurisdiction of the Supreme Court—Abolition of Civil Priorities—Jurors Rights Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 97th Cong., 1st Sess. 269 (June 22, 1982).

⁶⁴ *Id.*

⁶⁵ *Id.*; accord *Hearing on Court Reform Legislation Before the Subcomm. on Courts of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 129 (Nov. 16, 1981) (statement of Asst. Att’y Gen. Johnathan Rose).

⁶⁶ See, e.g., *Hearing on the Supreme Court Jurisdiction Act of 1978 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. of the Judiciary*, 95th Cong., 2d Sess. 31 n.7 (June 20, 1978) (statement of Prof. Arthur D. Hellman).

⁶⁷ Morley, *supra* note 56.